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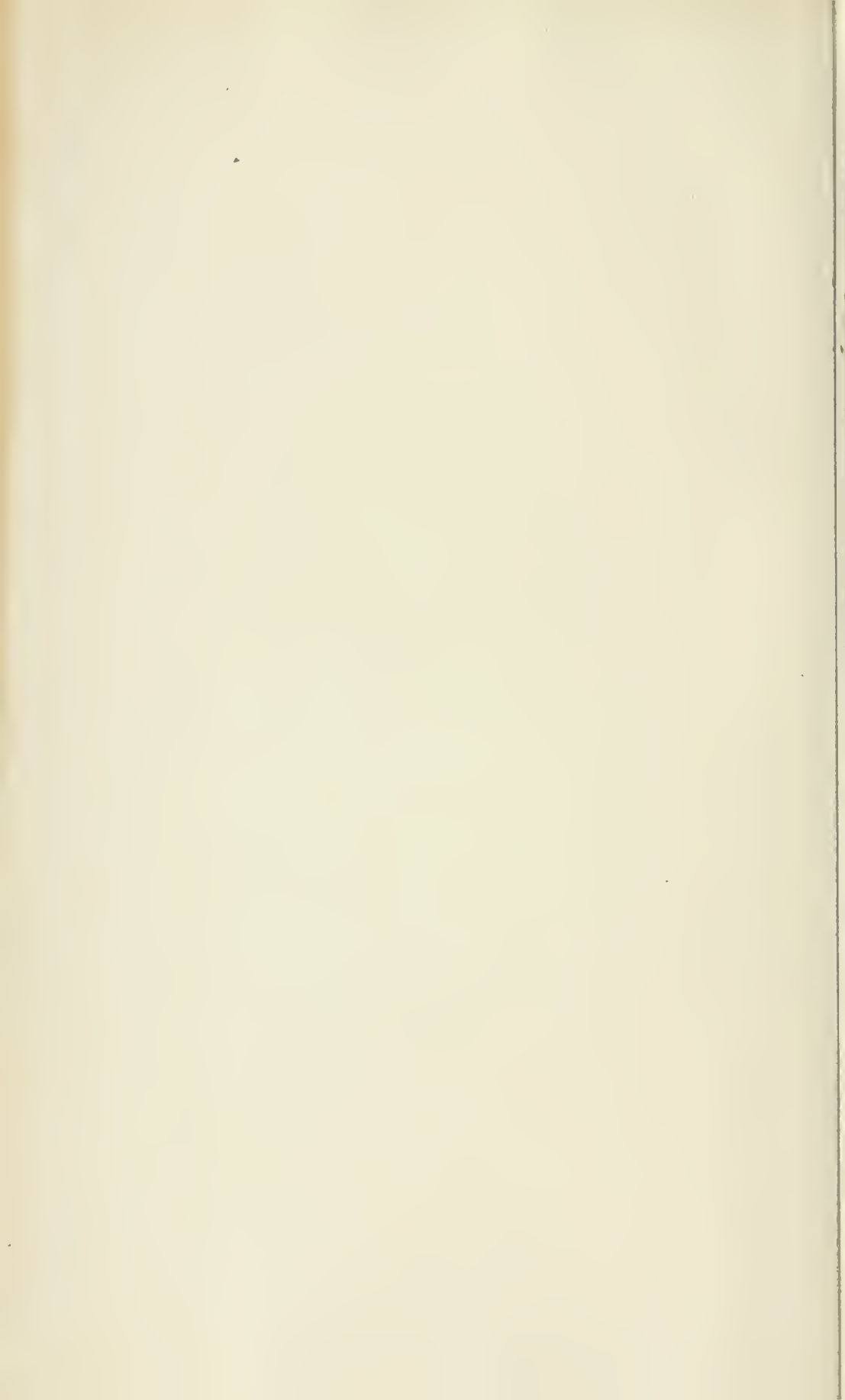


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THE ENGLISH REPORTS

VICE-CHANCELLOR'S COURT

CONSULTATIVE COMMITTEE

THE RIGHT HONOURABLE THE EARL OF HALSBURY,
LORD HIGH CHANCELLOR OF GREAT BRITAIN

THE RIGHT HONOURABLE LORD ALVERSTONE,
LORD CHIEF JUSTICE OF ENGLAND

THE RIGHT HONOURABLE SIR RICHARD HENN COLLINS,
MASTER OF THE ROLLS

SIR R. B. FINLAY, K.C.,
ATTORNEY-GENERAL

EDITORS

MAX. A. ROBERTSON AND GEOFFREY ELLIS, ESQRS.,
BARRISTERS-AT-LAW

THE
ENGLISH REPORTS

VOLUME LIX

VICE-CHANCELLOR'S COURT

IV

CONTAINING

SIMONS, VOLUMES 8 TO 12

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PREFATORY NOTE

In 9 Simons, p. 324 is blank in the original. There is a gap in the pagination from p. 494 to p. 497.

In 10 Simons, a memorandum on p. 166 has been transposed to the case to which it refers.

In 11 Simons, pp. 326 and 490 are blank in the original.

LIST OF LORD CHANCELLORS, MASTERS OF THE
ROLLS, VICE-CHANCELLORS, AND LAW OFFICERS,
DURING THE PERIOD COVERED BY THE PRESENT
VOLUME—1836-1844.

LORD CHANCELLORS.

1836. LORD COTTENHAM.
1841. LORD LYNDHURST.

MASTER OF THE ROLLS.

1836. LORD LANGDALE.

VICE-CHANCELLORS.

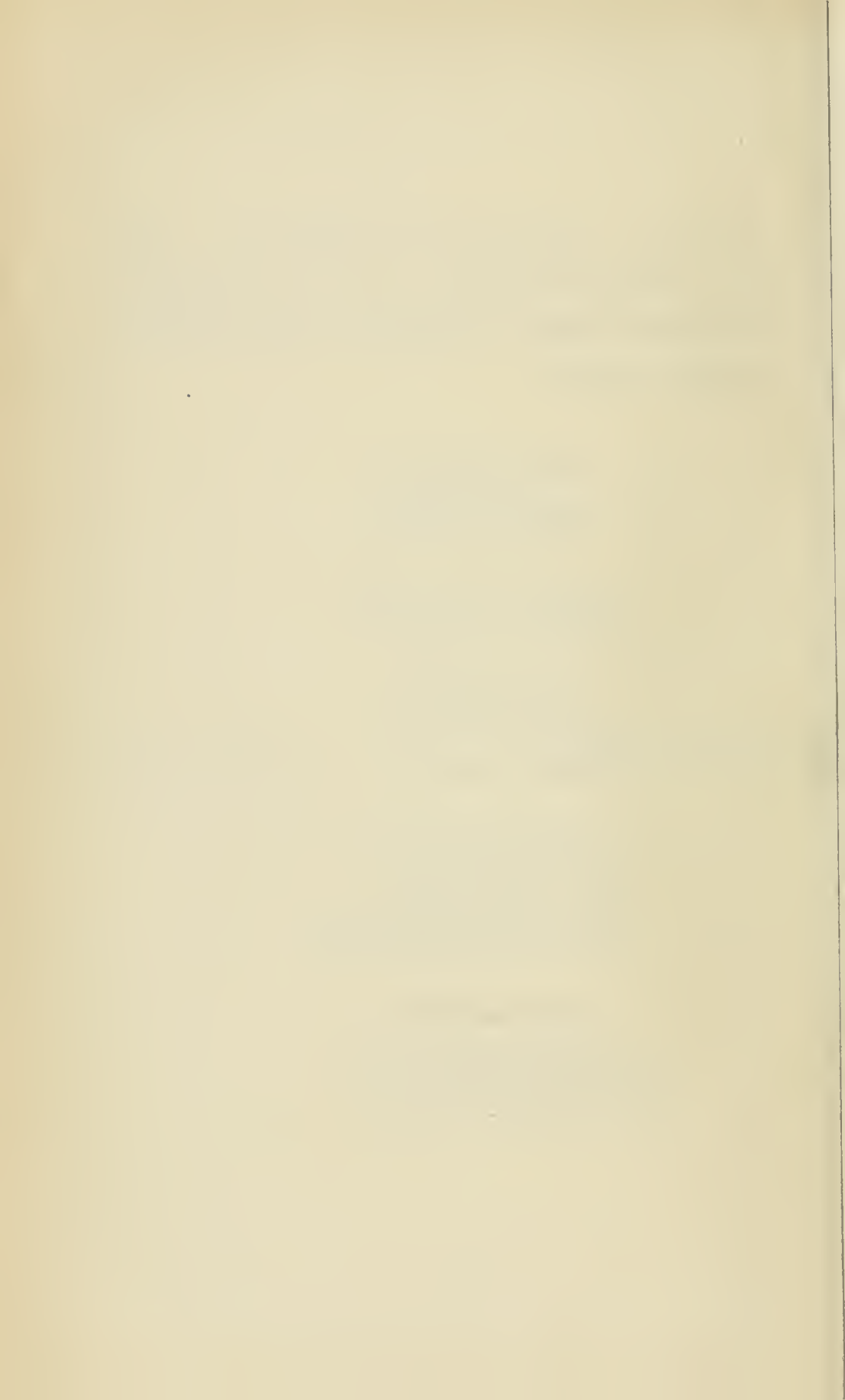
1830. Sir LANCELOT SHADWELL.		
1841.	Sir JAMES L. KNIGHT BRUCE.	Sir JAMES WIGRAM.

ATTORNEYS-GENERAL.

1835. Sir JOHN CAMPBELL.
1841. Sir THOMAS WILDE.
1841. Sir FREDERICK POLLOCK.
1844. Sir WILLIAM WEBB FOLLETT.

SOLICITORS-GENERAL.

1835. Sir ROBERT MONSEY ROLFE.
1839. Sir THOMAS WILDE.
1841. Sir WILLIAM WEBB FOLLETT.
1844. Sir FREDERICK THESIGER.



Reports of CASES DECIDED in the HIGH COURT
OF CHANCERY by the Right Honorable Sir
LANCELOT SHADWELL, Vice-Chancellor of
England. Containing cases in 1836 and 1837, with
a few in 1838 and 1839. By NICHOLAS SIMONS,
of Lincoln's Inn, Esqr., Barrister-at-Law. Vol. VIII.
1839.

[1] BARRYMORE v. ELLIS. Feb. 27, 29, March 1, 2, 1836.

[See *Brown v. Bamford*, 1842, 46, 11 Sim. 131 ; 1 Ph. 626 ; 41 E. R. 771.]

Construction. Feme Coverte. Separate Use.

An annuity was assigned to trustees, in trust to pay the same to such persons as Lady Barrymore should, by any writing signed by her, notwithstanding her coverture, appoint, but so as not to deprive herself of the benefit thereof by sale or other anticipation ; and, for want of such appointment, in trust to pay the same to Lady Barrymore for her separate use. Held, that Lady Barrymore has not only a limited power of appointment, but also, under the latter part of the clause, the general uncontrolled dominion over the annuity.

Under an indenture of the 28th of February 1794, the Plaintiff Lady Barrymore (who was then the widow of Richard, Earl of Barrymore) was entitled to an annuity of £300 for her life. She afterwards married the Defendant J. M. Williams ; and, by an indenture, dated the 29th of May 1795, after reciting that, upon the treaty for the marriage, it had been agreed that the annuity should be assigned to trustees for the separate use of Lady Barrymore in manner after mentioned ; Williams and Lady Barrymore assigned the annuity to trustees, in trust during their joint lives, to pay the annuity, as the same should become due and payable, to such person or persons, and for such intents and purposes as Lady Barrymore should, *by any writing signed with her name, in her own handwriting, notwithstanding her said coverture, direct or appoint, but so as not to deprive herself of the benefit* [2] *thereof by sale or other anticipation ; and, for want of such direction or appointment, to pay the same to Lady Barrymore for her own sole, separate and peculiar use and benefit ;* it being thereby agreed and declared, between and by all the parties thereto, that the annuity should not be subject to the debts, control, interference or engagements of J. M. Williams, and that the receipt or receipts of Lady Barrymore, or of any person or persons so to be by her appointed to receive the same as thereinbefore was mentioned, should, notwithstanding her marriage with J. M. Williams, be a sufficient discharge, or sufficient discharges, to the person or persons paying the same or any part thereof.

By an indenture, dated the 7th of November 1812, after reciting the deed of the 28th of February 1794, and that, since the execution of the deed, Lady Barrymore had intermarried with Williams, and that by virtue thereof, Williams was entitled to

receive the annuity in as full and ample a manner as Lady Barrymore, before her marriage with him, could receive the same under the deed of the 28th of February 1794; Lady Barrymore and Williams, in consideration of £2275 paid to them by Harriet Atkins, assigned the annuity to her. The object of the bill was to have that assignment declared fraudulent and void and delivered up to be cancelled.

Miss Atkins, in her answer, denied that she had any knowledge or notice of the deed of May 1795; and added that she totally disbelieved, for the reasons which she stated, that any such deed was executed prior to the execution of the deed of November 1812.

[3] Mr. Knight, Mr. Wakefield, Mr. Jacob and Mr. Girdlestone, jun., for the Plaintiff.

Mr. Spence, Mr. Barber, Mr. Wigram, Mr. Turner, Mr. Bethell, Mr. Heathfield, Mr. Maclean, Mr. Coleridge and Mr. Walford, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell], in the the course of his judgment, observed that the Plaintiff's evidence did not shew that the deed of May 1795 was in existence prior to the execution of the deed of November 1812, and then proceeded thus :—

Supposing, however, that the deed of 1795 was executed at the time it bears date, it appears to me to admit of this construction, namely, that, in the first instance, it is a grant to such person or persons as Lady Barrymore should, in a given manner, appoint, and subject thereto to her sole use generally; and, if that be so, then [it was competent to her to dispose of the annuity without executing the power in the manner before referred to. The deed does not say, "do and shall pay the same into her own hands," &c., but simply, "to her for her own sole use." Then is this different from a limitation to such uses as A. shall, in a certain manner, appoint, and subject thereto to A. generally? In my opinion this is within the spirit of *Cox v. Chamberlain* (4 Ves. 631); which has been supported at law by *Roach v. Wadham* (6 East, 289) and *Wilde v. Fort*.(1) For Lady Barrymore had both a limited power of appoint-[4]-ment and the general uncontrolled dominion over the property; and, therefore, if we find her conveying the property by the deed of 1812, the grantee will take, notwithstanding the restrictions imposed on the power of disposition.

His Honor then commented upon the other parts of the case, and concluded by stating that his opinion, both on the law and the facts, was that no case was made against the Defendants, and, consequently, that the bill must be dismissed with costs.

[4] MACHELL v. WEEDING.(2) March 16, 1836.

[S. C. 5 L. J. Ch. (N. S.) 182.]

Will. Construction.

Testator devised lands to his son Joseph for life; but if Joseph should die without issue, not leaving any children, then he directed that the lands should be sold and the proceeds divided amongst his three other sons; and if any of them should die before Joseph, then that their shares should be divided amongst their children. Held, that Joseph took an estate tail.

A testator devised certain freehold and copyhold estates and personal property to his wife for life; and then proceeded as follows :—"And at her decease I give and bequeath to my son, Joseph Machell, all my copyhold estates, lands, messuages and tenements situate within the parish of Malden aforesaid, with all the growing crops and live and dead stock thereon, the same to be enjoyed by him during his natural life; but if my son Joseph shall die without issue, not leaving any children, then my

(1) 4 Taunt. 334. See Sir E. Sugden's observations on the cases above referred to, in his *Treatise on Powers*, vol. i. p. 451, *et seq.*, and vol. ii. p. 35, note 2.

(2) *Ex relatione*.

will and meaning is that the said copyhold estates, lands, messuages and tenements shall be [5] sold, and the money arising from such sale thereof equally divided amongst my three other sons, viz., William Machell, James Machell and John Machell, share and share alike : and if any or either of my three sons last named shall happen to die before my said son Joseph, the respective share or shares of money arising from the sale of the above-named copyhold estates shall be divided among their respective children, share and share alike."

Joseph Machell, assuming himself to be tenant in tail of the copyhold estates, joined with his mother in suffering a recovery of them ; and afterwards agreed to sell them to the Defendant.

The purchaser having objected to complete his purchase on the ground that Joseph took an estate for life only, the bill was filed to compel a specific performance of the agreement : and the Master having reported in favour of the title, the Defendant excepted to the report.

Mr. Wigram and Mr. Garratt, in support of the exception. The estate given to Joseph Machell is not given indefinitely, but expressly for his life. There is no case in which an express estate for life without a gift to the issue has been extended to an estate tail on account, merely, of the gift over. The words "not leaving any children" are merely explanatory of the preceding words "die without issue." The estates are directed to be sold immediately upon Joseph's death, and the money is to be divided amongst the testator's other sons. [THE VICE-CHANCELLOR. Suppose Joseph were [6] to have one child only, and that child were to die in the lifetime of Joseph, leaving issue, would the gift over take effect ?] In that case the issue would be disinherited ; but that is the fault of the testator, and not of the Court. *Wylde v. Lewis* (1 Atk. 432), *Robinson v. Robinson* (2 Vez. 225), *Doe v. Webber* (1 Barn. & Ald. 713), *Doe v. Frost* (3 Barn. & Ald. 546), *Roe v. Jeffery* (7 T. R. 589), *Pells v. Brown* (Cro. Jac. 590), *Doe v. Davies* (4 Barn. & Adol. 43), *Mellish v. Mellish* (2 Barn. & Cress. 520), *Doe v. Wetton* (2 Bos. & Pull. 324).

At all events the question is a doubtful one ; and, therefore, the purchaser ought not to be compelled to take the title.

Mr. Knight and Mr. Rogers appeared for the Plaintiff,

But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said : The words "die without issue, not leaving any children," may be taken either as marking out one event or two. Suppose they are to be taken as referring to two events : then they must be read thus "die without issue *and* not leaving any children," and then it is perfectly manifest that the testator did not mean that the estate should go over as long as any issue of the first taker should be in existence. But if the words are to be considered as referring to one event only, they must, in that case, be taken to refer to the greater event, that is, the dying without issue. The not leaving any child is only a certain mode of dying without leaving issue. [7] Joseph might die without leaving children, but not without leaving issue ; as, for instance, if he were to have an only child, and that child were to die in his lifetime leaving issue.

I cannot but think that these words must be taken as descriptive of dying without issue : and I consider it to be a settled point that, whether an estate be given in fee or for life, or, generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail.

Exception overruled.

[7] LLOYD v. LLOYD. March 18, 19, 1836.

[S. C. affirmed, 2 My. & Cr. 192 ; 40 E. R. 613 (with note).]

Construction. Marriage Articles. Covenants.

Covenants in marriage articles entered into by the fathers of the intended husband and wife, though expressed to be dependent, held, on behalf of the issue of the marriage, to be independent of each other.

By articles of agreement, dated the 22d of October 1777, made between Evan Lloyd of the first part, Evan Lloyd, son of the said Evan Lloyd, of the second part, James Stephens and Mary, his wife, of the third part, and George Harries and Sylvanus Lloyd of the fourth part : after reciting that a marriage was intended to be solemnized between Evan Lloyd the younger and Esther Stephens, second daughter of James Stephens, who was then an infant, and for securing a competent maintenance and provision for Esther Stephens in case the marriage should take effect and she should survive Evan Lloyd the elder and Evan Lloyd the younger, and for the better preferment in the world of Evan Lloyd the younger, Evan Lloyd the elder had agreed, in case the marriage should take effect, to pay £200 to Evan Lloyd the younger, upon the solemnization of the marriage, and also to [8] convey and settle the several messuages, tenements and lands thereafter described, in the manner, to the uses and upon the trusts thereafter mentioned : and that James Stephens and Mary, his wife, in consideration of the intended marriage and for the better provision in the world of their daughter, had agreed to convey the moiety of the messuage, tenement and lands thereafter described in the manner at the time to the uses and upon the trusts thereafter mentioned, and also to pay £100 to Evan Lloyd the younger upon the solemnization of the marriage : it was agreed between the parties thereto, and Evan Lloyd the elder for himself, his heirs, executors, administrators and assigns, covenanted with Evan Lloyd the younger, his heirs and assigns, on behalf of himself and Esther Stephens, his intended wife, and the issue of the marriage, that in case the marriage should take effect and James Stephens and Mary, his wife, or the survivor of them should, as soon as Esther Stephens should attain her age of 21 years, at the costs and charges and upon the reasonable request of Evan Lloyd the younger, or Esther Stephens, convey and assure the moiety of the messuage, tenement and lands thereafter described, to the uses thereafter expressed concerning the same, that then Evan Lloyd the elder, his heirs and assigns, would, at the costs and charges, and upon the reasonable request of Evan Lloyd the younger, or Esther, his intended wife, or their heirs, convey and assure unto George Harries and Sylvanus Lloyd and their heirs, the messuage, tenement and lands called Tynypwly in the county of Carmarthen, and also the messuage, tenement and lands called Brynmawr in the same county, to hold to George Harries and Sylvanus Lloyd, their heirs and assigns, to the use of Evan Lloyd the elder, his heirs and assigns, [9] until the marriage, and after the solemnization thereof, to the use of Evan Lloyd the elder and his assigns for his life, and after the determination of that estate to the use of George Harries and Sylvanus Lloyd and their heirs for the life of Evan Lloyd the elder, in trust to preserve, &c., and, after his decease, then as to the tenement and lands called Tynypwly to the use of Evan Lloyd the younger, and his assigns for his life and, after his decease, then to the use of Esther Stephens, in case she should survive Evan Lloyd the younger, and her assigns for her life if she should so long continue a widow, in lieu of all dower which she might otherwise claim out of all or any other real estates of Evan Lloyd, her intended husband ; and, after the decease of Esther Stephens and Evan Lloyd the younger, or the second marriage of Esther Stephens, in case she should survive Evan Lloyd the younger, to the use of the first and other sons, successively, of the body of Evan Lloyd the younger, on the body of Esther Stephens to be begotten, and the heirs of their bodies, and, for default of such issue, to the use of the daughters of the body of Evan Lloyd the younger, on the body of Esther Stephens to be begotten, and of the heirs of the bodies of such daughters lawfully issuing, to take as tenants in common, and, for default of such issue, to the use of the right heirs of Evan Lloyd the elder ; and as for the other messuage, tenement and lands called Brynmawr, to the use of Evan Lloyd the elder and Ann, his wife, for their lives and the life of the survivor of them, and, after the decease of the survivor of them, to and upon the same uses and trusts as were thereinbefore declared concerning the messuage, tenement and lands called Tynypwly, charged or not charged with any sum or sums of money to any younger child or children of the intended marriage.

[10] And, in consideration of the intended marriage and of the covenant thereinbefore made on the part of Evan Lloyd the elder, and in pursuance of the agreement on the part of James Stephens and Mary, his wife, it was agreed between the parties, and Stephens for himself and for Mary, his wife, their heirs, executors and adminis-

trators, covenanted with Evan Lloyd the younger, his heirs and assigns, on behalf of himself and the issue of the marriage, that in case the marriage should take effect, and Evan Lloyd the elder and his heirs and assigns should perform the covenant thereinbefore contained on his, her and their parts, then James Stephens and Mary, his wife, and Esther Stephens, their daughter, or the survivor or survivors of them and all other necessary parties would, at the costs and charges and upon the reasonable request of Evan Lloyd the younger, or the issue of the marriage, convey and assure the undivided moiety of the messuage, tenement and lands called Glandead in the county of Pembroke, to hold to George Harries and Sylvanus Lloyd, their heirs and assigns, to the use of James Stephens and Mary, his wife, for their lives and the life of the survivor of them, and, after their decease and the decease of the survivor of them, then to the use of Evan Lloyd the younger and Esther, his intended wife, for their lives and the life of the survivor and longest liver of them, if Evan Lloyd the younger should continue unmarried after the decease of Esther, his intended wife, and, after their several deceases and the decease of the survivor of them or the second marriage of Evan Lloyd the younger, then to the use of the first and other sons of the body of Evan Lloyd the younger, on the body of Esther Stephens lawfully to be begotten, successively, and the heirs of their bodies, and, in default of such issue, then to the use of all the daughters of the body [11] of Evan Lloyd the younger on the body of Esther Stephens lawfully to be begotten and the heirs of their bodies, such daughters and the heirs of their bodies lawfully issuing to take as tenants in common, and for want of such issue, to the use of the right heirs of Esther Stephens for ever.

And Evan Lloyd the elder, for himself, his heirs, &c., and James Stephens, for himself and Mary, his wife, his and her heirs, &c., &c., severally covenanted with George Harries and Sylvanus Lloyd, their heirs and assigns, that all the premises thereinbefore mentioned should, at all times thereafter, be peaceably and quietly held and enjoyed according to the several uses thereof declared and in manner thereinbefore covenanted to be granted and conveyed, without the lawful let, suit, &c. of Evan Lloyd the elder and Ann, his wife, James Stephens and Mary, his wife, their heirs, assigns, or any other person whatsoever: and that Evan Lloyd the elder, his heirs and assigns, and James Stephens and Mary, his wife, their heirs and assigns would, at all times thereafter, at the costs and upon the request of Evan Lloyd the younger, or Esther Stephens, their heirs or assigns, do such other acts for the further conveying and assuring the hereditaments thereinbefore covenanted to be conveyed to and for the several uses and trusts thereinbefore declared thereof, as by Evan Lloyd the younger, or Esther Stephens, their heirs or assigns should be reasonably required. And Evan Lloyd the elder covenanted with Evan Lloyd the younger to pay £200 to Evan Lloyd the younger upon the solemnization of the marriage. And Stephens covenanted with Evan Lloyd the younger, that in case the marriage should take effect and his wife should survive him, then she should pay to Evan Lloyd the younger and to Esther, his wife, in case she [12] should survive her intended husband, an annuity of £8 during the life of her, Mary Stephens, out of the rents of Glandead.

Esther Lloyd attained 21 in March 1778. There was issue of the marriage four sons and one daughter.

Evan Lloyd the elder and his wife died in the lifetime of Evan Lloyd the younger. Evan Lloyd the elder never made any conveyance either of Tynypwly or Brynmawr pursuant to his covenant in the articles; and on his death those estates descended to Evan Lloyd the younger. In 1813 Evan Lloyd the younger died intestate, and thereupon Tynypwly and Brynmawr descended to his eldest son John William Lloyd. In 1825 John William Lloyd died, having devised Tynypwly and Brynmawr to his wife Rebecca Lloyd in fee. In 1829 Esther Lloyd died. In 1830 David, the second son of Evan Lloyd the younger and Esther his wife, suffered a recovery of Tynypwly and Brynmawr to the use of himself in fee.

At the date of the articles the estate called Glandead was subject to a mortgage in fee; and the equity of redemption was settled on James and Mary Stephens for their lives, with remainder to their daughter Esther in tail. Some years afterwards the mortgage was foreclosed, and, thereby, Stephens's covenant in the articles became incapable of being performed. Stephens survived Evan Lloyd the elder several years, and died in January 1794. Mrs. Stephens died in December 1799.

The bill was filed by David Lloyd against Rebecca Lloyd, the widow and devisee of John William Lloyd, charging that it was the general purpose and intent of the articles to secure, by means of the covenants, [13] a competent maintenance and provision for Esther Stephens in case she should survive Evan Lloyd the younger, and that, regard being had to such general purpose and intent, the covenants ought not to be construed as dependent upon each other: and praying that it might be declared that the covenant by Evan Lloyd the elder for the settlement of Tynypwly and Brynmawr ought to be performed, and that the Plaintiff, as the eldest surviving son and heir in tail of Evan Lloyd the younger, might be declared to have become entitled, under that covenant and the recovery, to Tynypwly and Brynmawr in fee, and that Rebecca Lloyd might be decreed to convey those estates to him accordingly.

Rebecca Lloyd, in her answer, submitted whether the covenants in the articles ought to be construed as dependent covenants, and whether the performance of one of them ought to be enforced separately from the other.

Mr. Knight, Mr. Wilbraham and Mr. Girdlestone, jun., for the Plaintiff. It is plain that the articles in question were prepared by an unskilful person. According to the recitals, the agreement to settle the estates was unqualified; and the covenants for quiet enjoyment and further assurance are unconditional also. It is clear, therefore, taking the whole of the instrument together, that the parties meant the covenants in the operative part of it to be independent of each other.

Besides, marriage articles are construed differently from all other agreements. The marriage is the principal consideration: and though the covenants are [14] expressed to be made in consideration of each other, they are considered, so far at least as the issue are concerned, as independent covenants; and the Court will, at the suit of the issue, compel one of the parties to perform his covenant, notwithstanding the other party may have failed in the performance of his covenant. *Harvey v. Ashley* (3 Atk. 607; see 610 and 611), *Perkins v. Thornton* (Amb. 502), *Crofton v. Ormsby* (2 Scho. & Lef. 602), *North v. Ansell* (2 P. W. 618). Stephens and wife had life interests only in the estate which they agreed to settle, and consequently their covenant could be of no avail: it would be absurd, therefore, to suppose that Lloyd's covenant was intended to be conditional on the performance of Stephens's covenant, which never could be performed.

Mr. Jacob and Mr. Blake, for the Defendant. The meaning of the parties was to make the performance of Lloyd's covenant dependent upon the performance of Stephens's covenant: for at the date of the articles Glandead was subject to a mortgage, and it was extremely doubtful whether Stephens would be able to settle it according to his covenant. None of the cases that have been cited decide that, if the husband's father agreed to make a settlement provided the wife's father made one, the children of the marriage could enforce the covenant whether it was performed on the part of the wife's father or not. All that those cases decide is that, where unconditional covenants are entered into by the relations of the husband and wife, the Court will, at the suit of the children, enforce the covenant on one side, notwithstanding the covenant on the other side may not have been performed. In this [15] case, before Lloyd's covenant can be enforced, it must be shewn that the event in which it was to operate has arisen. That event, however, has not nor ever can happen. *Sumner v. Powell* (2 Mer. 30), *Alexander v. Crosbie* (Lloyd & Gould, 145), *Morton v. Lamb* (7 T. R. 125), *Glazebrook v. Woodrow* (8 T. R. 366).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The only question in this case is, what was the true meaning of the parties? I accede to what has been said, namely, that if it had been plainly put in the instrument that the covenant by Evan Lloyd should be executed only in case the covenant by Stephens should be executed, and *vice versâ*, then one covenant ought not to be decreed to be performed without the other. But the question is whether the parties have really said so. The fairest way to determine that question is to consider what is the literal meaning of the very words which they have used. Now, first of all, Lloyd covenants that, in case the intended marriage should take effect, and Stephens and wife should, as soon as their daughter Esther Stephens should attain 21, convey the moiety of the messuage, tenement and lands thereafter described, to the uses thereafter expressed concerning the same, then Evan Lloyd the elder would convey the messuage, tenement and lands called

Tynypwllly, and also the messuage, tenement and lands called Brynmawr, to the uses and upon the trusts thereafter expressed concerning the same; and then Stephens covenants, for himself and his wife, that, in case the marriage should take effect, and Evan Lloyd the elder should perform the covenant thereinbefore contained on his part, then Stephens and wife and their daughter would convey [16] the moiety of the messuage, tenement and lands called Glandead, to the uses and upon the trusts thereafter mentioned concerning the same. Therefore Stephens covenants to do an act, in the event of an act being previously done by Lloyd, the doing of which is to be preceded by the act that Stephens is to do. It is but fair to conclude that the parties could not have meant anything so absurd. Lloyd's covenant was to be performed upon the solemnization of the marriage; but Stephens's covenant was not, and, indeed, could not, be performed until some time afterwards, namely, until his daughter attained 21; and, if she had died under 21, leaving issue, that covenant could not have been performed at all. It would be absurd, however, to suppose that the parties meant that no provision should be made for the issue of the marriage in the event of Esther dying under age.

The instrument is informal from beginning to end. In the first place, it is not usual, in marriage articles, to omit, as a party, so important a person as the intended wife; Esther, however, is not made a party to the articles. In the next place, it is recited that Evan Lloyd the elder had agreed, in case the intended marriage should take effect, to pay the sum of £200, and also to convey the messuages, tenements and lands thereafter described, in the manner, to the uses and upon the trusts thereafter mentioned; and also that Stephens and wife had agreed to convey the moiety of the messuage, tenement and lands thereafter described, in the manner, at the time, to the uses and upon the trusts thereafter mentioned, and also to pay the sum of £100 to Evan Lloyd the younger, upon the solemnization of the marriage. Now, although there is a covenant by Evan Lloyd the elder to pay the £200, [17] there is no covenant on the part of Stephens to pay the £100; and, although there is no recital of any agreement for payment of the annuity of £8, there is a covenant, on the part of Stephens, to pay that annuity. Again, in default of issue male of the marriage, Lloyd's estate is limited to the use of the daughters, as tenants in common; but, when you come to the limitation of Stephens's estate in default of issue male, the daughters and the heirs of their bodies are made to take as tenants in common. It is evident that the person who prepared these articles did not use his understanding as he wrote; for, after having used language that was correct, he departs from it, in the subsequent part of the instrument, and uses language that is incorrect.

It seems to me, taking the whole of the instrument together, that the real intention of the parties was that Lloyd should settle his estate in a given manner, and that Stephens should settle his estate in a given manner; and that they did not intend that there should be no settlement at all, if either party capriciously refused.

The form of the covenants for title also tends to shew that it was not the intention of the parties that these covenants should be dependent covenants. For Lloyd and Stephens covenant that all the premises thereinbefore mentioned should, at all times thereafter, be quietly held, possessed and enjoyed according to the several uses thereof limited and declared and in manner thereinbefore covenanted to be granted and conveyed. That is an absolute covenant that the estates should stand limited to the uses before declared.

My opinion is that the true construction of these articles is that Lloyd should settle his estate in the [18] manner proposed, and that Stephens should settle his estate in the manner proposed; and, therefore, the estates of Tynypwllly and Brynmawr must be conveyed to the Plaintiff, according to the prayer of the bill.

[18] MARRIOTT v. TARPLEY. *March 21, 1836.**Practice. New Orders. Dismissal.*

By the 4th and 16th Orders, four months must elapse after the filing of the answer before the bill can be dismissed for want of prosecution ; but the intervals mentioned in the 19th Order must be reckoned, unless they occur in the first two months.

The answer of the Defendant Tarpley was filed on the 30th of May 1835. Mr. Koe, on his behalf, now moved to dismiss the bill for want of prosecution. The notice of motion was served on the 7th of January 1836.

Mr. Turner, for the Plaintiff, said that, under the 4th and 16th of the New Orders, a Defendant could not move to dismiss until after the expiration of two successive periods of two months each or 112 days from the time of filing his answer ; and that, by the 19th Order, the time between the last seal after Trinity term and the first seal before Michaelmas term, and between the last seal after Michaelmas term and the first seal before Hilary term, was not to be reckoned ; that the last seal day after Trinity term 1835 was the 24th of July ; and, there having been no seal day before Michaelmas term, the first excepted period extended to the 2d of November, the first day of that term ; that the last seal day after Michaelmas term was the 21st of December ; and there having been no seal day before Hilary term 1836, the second excepted period extended to the 11th of January, the first day of that term ; and, consequently, when the notice of motion was served, eight of the 112 days were unexpired. *The Attorney-General v. Jones* (ante, vol. 5, p. 246).

[19] THE VICE-CHANCELLOR [Sir L. Shadwell] said that the 19th Order applied only to the two months mentioned in the 4th Order, as was decided in *The Attorney-General v. Jones* ; and that, in computing the two months mentioned in the 16th Order, the Plaintiff was not entitled to the benefit of the 19th Order.

The Plaintiff then undertook to speed.

[19] DANIELL v. AUSTEN. *March 21, 1836.**Practice. Dismissal. New Orders.*

Under the 16th Amended Order, the Plaintiff need not serve a *subpœna* to rejoin within three weeks from the date of his undertaking to speed, unless he requires a commission to examine witnesses.

On the 16th of December 1835 the Defendant moved to dismiss the bill for want of prosecution. The Plaintiff appeared and gave the undertaking prescribed by the 16th Amended Order.(1) He did not, however, serve a *subpœna* to rejoin within three weeks from the date of his undertaking, nor, indeed, until after the Defendant had served him with notice of another motion to dismiss.

Mr. Bethell, in support of the second motion, contended that, under the 16th Order, the Plaintiff was bound to serve a *subpœna* to rejoin within three weeks from the date of his undertaking.

[20] Mr. Wakefield, for the Plaintiff, said that the three weeks applied only to the obtaining and serving the order for a commission, and not to the service of the *sub-*

(1) The order made on giving the undertaking is stated in Smith's Prac., 1st edit. 238, to be as follows : " It is ordered that the Plaintiff do file a replication, serve *subpœnas* to rejoin, and obtain and serve an order for a commission to examine witnesses, if he require such commission, within three weeks from this time, and give rules to produce witnesses and pass publication in term, and set the cause down for hearing and serve *subpœnas* to hear judgment in term, or, in default thereof, that the Plaintiff's bill do stand dismissed out of this Court with costs.

pœna to rejoin ; and that, where the Plaintiff did not require a commission (as was the case here) the limit of the three weeks was not imposed.

Mr. Bethell, in reply, said that the object of the 16th Order was to compel a Plaintiff, who had been served with notice of a motion to dismiss, to proceed, immediately, to put his cause at issue : that the order for a commission could not be obtained until the cause was at issue, that is, until after a *subpœna* to rejoin had been served ; and, therefore, the *subpœna* must, of necessity, be served within the three weeks : that, if the construction of the order which Mr. Wakefield contended for were the true one, it would be in the power of a Plaintiff who did not want a commission to postpone, indefinitely, the putting of his cause at issue.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as the Plaintiff did not require a commission, the limit of three weeks did not apply ; and, as the Plaintiff had served the *subpœna* to rejoin within the time required by the old practice, the motion must be refused.

[21] TAYLOR v. HARRISON. March 22, 1836.

New Orders. Insufficiency. Practice.

An order for referring an answer for insufficiency must be served as well as obtained before the expiration of the six days allowed by the 5th of Lord Lyndhurst's Orders.

On the 9th of January 1836 the Plaintiff delivered exceptions to the answer for insufficiency ; and, on the 18th, he obtained an order for referring the answer. On the 25th the order and exceptions were left in the Master's office and a warrant to proceed was obtained. On the following day a copy of the order and the warrant were served on the Defendant's Clerk in Court. On the 29th the Master allowed the exceptions.

Mr. Knight and Mr. Teed, for the Defendant, now moved to take the Master's report off the file for irregularity. They said that the Plaintiff had not *referred* the answer within the six days allowed by the 5th of Lord Lyndhurst's Orders, because he had not *served* the order of reference within that period ; and that *Peace v. Hodgson* (*ante*, vol. 7, p. 347) decided that there could be no reference without service of the order.

Mr. Wakefield and Mr. W. T. S. Daniel, for the Plaintiff. An order for referring an answer for insufficiency operates from the time when it is pronounced, and not from the time of its service. The form of the order shews that it need not be served. (See *Hand's Prac.* 80.) All that is required is to serve the warrant that is taken out on leaving the order in the Master's office. By the 12th Order the Plaintiff is bound to obtain the Master's report within a fortnight from the *date*, not from the [22] *service* of the order. In orders that require to be served it is expressly directed that notice of them shall be given. (See *Hand's Prac.* 81.) This is further illustrated by the 16th and 17th Amended Orders, in which service is expressly provided for.

THE VICE-CHANCELLOR said that the question was decided by *Peace v. Hodgson*, and granted the motion. (Affirmed by the Lord Chancellor, 1 *Myl. & Craig*, 274.)

[22] SIMMONS v. SIMMONS. March 24, 1836.

[S. C. 5 L. J. Ch. (N. S.) 198.]

Will. Construction.

Testator gave all his real and personal property to his daughter for her separate use for life : "at her decease she shall be at liberty to will the same to her issue ; but in case of her dying without issue, I wish the property to go to my brother and sister for their lives. In the event of my brother's death prior to the death of my daughter, then to the children of my brother." Held, that the daughter took an estate tail in the realty, and an absolute interest in the personalty.

William Simmons made his will, dated the 24th of May 1833, in the following words:—"I devise all my real estates, freehold land, or freehold premises, goods, chattels or property of any kind soever which I may die seised or possessed of, unto and to the use of my brother, Gwin Simmons (whom I hereby nominate my executor) upon trust to carry into effect the trusts as follows (that is to say), that he shall dispose of all or any of my property as he shall deem best for the benefit of my dearly beloved daughter Elizabeth Simmons, to whom I leave all, during her life, for her separate use, upon her own receipts, and free from the debts, control, and interference of any husband in case she marries; at her decease she will be at liberty to will the same to her issue as she may think fit; but, in case of her dying without issue, I wish the property [23] to go to my dear brother and sister, Gwin Simmons and Ann Simmons, for their natural lives, share and share alike. In the event of my brother Gwin's death prior to the death of my daughter, then to the children of the said Gwin Simmons, share and share alike."

The question was what interest the testator's daughter Elizabeth took in her father's property under the will.

Mr. Knight and Mr. Koe, for the Plaintiff Elizabeth Simmons, contended that she took an estate tail in the real property; and, as the real and personal property were both of them disposed of in the same clause, that she took an absolute interest in the personalty. *Genery v. Fitzgerald* (Jac. 468).

Sir Wm. Horne and Mr. Piggott, for the Defendant Gwin Simmons, said that the testator intended that his daughter should have a life interest only, with a testamentary power of disposition in favour of certain defined and limited objects, namely, her issue; and that the words: "in case of her dying without issue," meant, in case of her having no issue to whom she could will the property: that Gwin Simmons was to take the property in the event of his being alive at the death of Elizabeth Simmons; but, if he should be then dead, his issue were substituted for him; so that the testator looked at the time of his daughter's death as the period at which the interests of the parties in remainder were to be determined; and, therefore, he must have intended to give her a life interest only. *Roe v. Jeffery* (7 T. R. 589), *Target v. Gaunt* (1 P. W. 432).

[24] Mr. Wigram and Mr. Shadwell, for the children of Gwin Simmons. The limitations over are to take effect if the daughter shall die without issue living at her death: it is not an indefinite failure of issue which is contemplated. If this construction be given to the will, then every person for whom the testator intended to provide will be provided for. If the other construction prevails, the interests will be precarious: for, if Gwin Simmons do not die in the lifetime of the Plaintiff, no interest is given to his children. The circumstance that life interests only are given upon failure of the Plaintiff's issue is strongly in favour of the construction that we contend for. *Roe v. Jeffery*. So is the circumstance that *children* are substituted for the parent to whom a life-estate only is given: so also is the circumstance that the other construction would give an absolute interest in the personal estate. Although the words "dying without issue," may be construed differently as to real and personal estate, the construction is, *prima facie*, the same as to both. *Pinbury v. Elkin* (1 P. W. 563); *Bell v. Phyn* (7 Ves. 453).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he thought the words "in case she marries" belonged to the preceeding part of the sentence: and that he had no doubt that Elizabeth Simmons took an estate tail in the lands of inheritance, and an absolute interest in the personalty which was disposed of in the same clause as the lands.

[25] BAKER v. MARTIN. March 25, 1836.

[S. C. 5 L. J. Ch. (N. S.) 205. See *In re Muffett*, 1887, 56 L. J. Ch. 602.
Cf. *Hull v. Christian*, 1874, L. R. 17 Eq. 546.]

Executor.

Testator directed that £100 should be annually paid to one of his executors, for his trouble in superintending his concerns, until a final settlement of his affairs should

take place. The executor proved and acted. Some time after the testator's death a suit was instituted for the administration of his estate; but no receiver was appointed; and some of the assets were still outstanding. Held, that the annuity did not cease on account of the institution of the suit.

The testator in the cause, by his will, appointed his son, James Baker, one of his executors: and by a codicil, after reciting that he had done so, and that it would be a duty which would occupy much of his son's time and attention, he directed that £100 should be annually paid to his son, for his trouble in superintending his concerns and keeping accounts, until a final settlement of his affairs should take place, and which he directed to be a remuneration in the nature of salary, and over and above any legacy he had given to his son by his will.

James Baker proved the will, and acted in the execution of it.

Some time after the testator's death a suit was instituted for the administration of his estate. The Master, in taking the accounts under the decree, disallowed all the payments of the annuity from the first day of payment after the bill was filed; and on that account James Baker excepted to the report.

Some of the assets still remained outstanding; and no receiver had been appointed.

THE VICE-CHANCELLOR [Sir L. Shadwell] allowed the exception, saying that, unless it was shewn that the trouble of the executorship had ceased, he could not hold that the annuity had ceased.

[26] Sir W. Horne, Mr. Knight, Mr. Wakefield, Mr. Koe, Mr. Turner and Mr. Coleridge appeared for the different parties.

[26] HOOD v. BEAUCHAMP. *April 18, 1836.*

Evidence. Pedigree.

The Plaintiffs, in order to prove that the person under whom they claimed was descended from H. J., produced an old religious book containing the following entry: "E. J., her book, 15th June 1680, the gift of H. J. her father." It did not appear by whom the entry was made; but the book contained, in other parts of it, entries of the births of other members of the family which were proved to be in their father's handwriting; and moreover the book had been preserved by the family. Held, that the first-mentioned entry was admissible in evidence.

The object of the Plaintiffs was to prove that William Jennens, deceased, the person under whom they claimed, was descended from Humphrey Jennens; and for that purpose they produced a book intituled "Evidences of Christianity, by Parker, Bishop of Ely," which was published in 1666 and contained, on the inside of the cover, the following entry: "Elizabeth Jennens, her book, 15th June 1680, the gift of Humphrey Jennens, her father."

Thomas Collins, the owner of the book, deposed that his grandmother, who died in 1796, gave him the book about a year before her death, and his grandfather took care of it for him and delivered it to him after his grandmother's death: that his grandmother used to tell him that her father, Jeremiah Smith, married Elizabeth Jennens, and that Elizabeth Jennens was the daughter of Humphrey Jennens: *that he had never heard in whose handwriting the entry was*, nor when it was made; but he knew it was made prior to 1798 (in which year William Jennens died), because he saw it at the time when the book was given to him: that the book contained, on the back of the 163d page, entries of the births of the children of Elizabeth Jennens and her husband, in the handwriting of the witness's grandfather, [27] who, before he delivered the book to the witness, said: "Stop, I shall put the family in before I give it you," and then made the last-mentioned entries: that the book also contained, on the back of the 207th page, entries of the births of the children of the witness's grandfather and grandmother, which were made by the former, at the same time as the entries on the back of the 163d page.

At the hearing of the cause,

Sir Charles Wetherell, Sir William Horne, Mr. Wigram and Mr. Phillimore, for the Defendants, contended that the first-mentioned entry was not evidence, as it was not proved to have been made by Humphrey Jennens.

THE VICE-CHANCELLOR said that the book was a religious book, and therefore might be classed with a bible or a prayer-book; but that the admissibility of the entry did not alone depend upon the nature of the book in which it was made: that the book was held to be of value by the family, and had been preserved by them, not only because it was connected with their religious belief, but because it contained an important family memorial, and on that account the grandfather, before he delivered it to his grandson, thought it right to make the other entries in it. His Honor added that, as in *Slaney v. Wade* (*ante*, vol. 7, p. 595), he considered the copy of the mural inscription to be receivable in evidence, because it had been preserved by Moreton Aglionby Slaney as containing facts relating to his family; so, in this case, he was of opinion that the book was admissible for the purpose for which it was produced, as it had been pre-[28]-served by the family on account of its containing an important family memorial.

Mr. Knight, Mr. Wakefield and Mr. Elderton appeared for the Plaintiffs.

[28] KAYE v. FOSBROOKE. April 21, 1836.

Demurrer. Insolvent Debtor.

A bill was filed by an insolvent debtor, against A. (who was in possession of an estate claimed by him) and his assignees, alleging that the assignees had refused to sue for the estate, *because they were apprehensive of incurring personal expenses*, but that they were willing to concur in a sale of it for the benefit of the Plaintiff and his creditors, and that, if the estate were sold, the proceeds would be sufficient to pay the creditors and *to leave a considerable surplus*; and praying that A. might be declared to be a trustee of the estate for the Plaintiff and his creditors, and that it might be sold and the proceeds paid to the assignees, and that A. might be restrained from proceeding with an action which he had brought against the Plaintiff. A demurrer to the bill was allowed.

The case made by the bill was that the mortgagee of an estate belonging to the Plaintiff having advertised the estate to be sold under a power of sale contained in the mortgage deed, the Plaintiff instructed the Defendant Fosbrooke to attend at the sale, and, if £5000 should not be bid for the estate, to buy it in for him; that £3650 only having been bid, Fosbrooke bought in the estate for £3700, and had it conveyed to himself in fee; that, at and for some time before the sale, the Plaintiff was imprisoned for debt, and had since taken the benefit of the Insolvent Debtors Act; that the Plaintiff *and his assignees had requested Fosbrooke* to join in a sale of the estate for the benefit of the Plaintiff and his creditors; and that the Plaintiff had requested his assignees either to institute a suit or to allow the Plaintiff to sue in their names, for the same relief as was sought by the bill; but that the assignees, being apprehensive of incurring personal expenses, had refused so to do; that the estate, if sold, would not only produce sufficient to [29] pay the Plaintiff's debts, *but would leave a considerable surplus for the Plaintiff*. The bill prayed that Fosbrooke might be declared a trustee of the estate for the Plaintiff and his creditors, subject to a lien thereon for the £3700; that the estate might be sold and the proceeds applied in payment of that sum (the Plaintiff *and his assignees being willing to confirm any mortgage made by Fosbrooke on the estate to enable him to pay the £3700*), and that the residue of the proceeds might be paid to the assignees for the benefit of the Plaintiff and his creditors, and that Fosbrooke might be restrained from proceeding with an ejectment which he had brought against the Plaintiff in the Court of Common Pleas at Lancaster for the recovery of part of the estate.

Fosbrooke demurred for want of equity. The assignees also were Defendants, but did not demur.

Mr. Knight and Mr. Rogers, in support of the demurrer, said that an insolvent

debtor's title to property, whether legal or equitable, was wholly vested in his assignees, and that he had no right to sue unless there was fraud and collusion between the assignees and the person who was answerable to them: that in this case there was no charge of collusion; and, although it was alleged that there would be a surplus after payment of the creditors, that allegation was not sufficient to maintain the bill. *Benfield v. Solomons* (9 Ves. 77), *Spragg v. Binkes* (5 Ves. 583), *Tarleton v. Hornby* (1 You. & Col. 172), *Hammond v. Attwood* (3 Madd. 158), *Saxton v. Davis* (18 Ves. 72), *Bowser v. Hughes* (1 Anst. 101).

[30] Mr. Jacob and Mr. Geldart, in support of the bill. The Defendant is suing the Plaintiff, and, at the same time, insists that the Plaintiff has no right to sue him. Judgment is obtained very expeditiously in the Court of Common Pleas at Lancaster. Before the assignees can file a bill for an injunction, a meeting of the creditors must be convened, of which 14 days' notice, at the least, must be given; and then the consent of the Insolvent Debtors Court must be obtained: so that the action will be determined long before a bill for an injunction to restrain it can be filed.

The cases cited in support of the demurrer arose, either under the Bankrupt Act, or under some Insolvent Debtors Act prior to that now in force (7 Geo. 4, chap. 57), or there was no allegation that there would be a surplus after payment of the creditors. In this case there is not only that allegation, but also what is quite a sufficient charge of collusion. *Barton v. Tattersall* (1 Russ. & Myl. 237), *Gedge v. Traill* (*Ibid.* 281, note), *Lowndes v. Taylor* (1 Madd. 423), and *Randall v. Munford* (18 Ves. 424).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill cannot, I think, be sustained unless the Plaintiff can make out that this is not a case in which the Insolvent Debtors Court can interfere.

Generally speaking, the whole estate of a prisoner who takes the benefit of the Insolvent Debtors Act is vested in his assignees; and there it must remain unless [31] it can be shewn that, by reason of its being there, gross injustice would be done; for I observe that, by the 37th section of the Act, it is enacted: "That it shall be lawful for the said Court, or a Commissioner thereof on his Circuit, upon such inquiry so made as aforesaid, to ascertain the produce of the estate and effects of any such insolvent, to be divided among his or her creditors, and to direct the distribution thereof, and to take all such measures and make such orders as shall be necessary for the compelling of the proper disposition and distribution thereof according to this Act; and that if it shall at any time appear to the said Court or Commissioner that any dividend or dividends shall have remained in the hands of any such assignee or assignees for the space of 12 calendar months next following the declaring thereof by the said Court, or for the space of 12 calendar months next following any order of the said Court, made for the declaring or making thereof, it shall and may be lawful, to and for the said Court or Commissioner, to order and direct that such undivided dividend or dividends shall be immediately paid into the said Court, to the credit of the estate of such insolvent; and, in default of the payment of the same by the time which shall be limited by the said Court or Commissioner for that purpose, it shall and may be lawful, to and for the said Court or Commissioner, to make such summary remedy for that purpose by a distress and sale of the goods and chattels of such assignee or assignees, as to the said Court or Commissioner shall seem proper; and if sufficient distress can be found, then and in such case the said Court or Commissioner shall be at liberty to commit the offender to the prison of the King's Bench, or the common gaol of any county in which such offender shall be or shall usually reside, without bail or main-[32]-prize, there to remain until the said Court or Commissioner shall make order to the contrary." I infer, from this section, that, if it appeared to the Court or to the Commissioner that an individual was endeavouring to obtain possession of an estate belonging to the prisoner, and the assignees did not choose to interfere, the Court would take all necessary steps to make the estate available to the creditors.

This bill represents a case which one can scarcely understand. It charges that the estate is of the value of £5000 and upwards, and, if it were properly sold, there would be a considerable surplus after payment, in full, of all the Plaintiff's creditors; that the Plaintiff's assignees had applied to Fosbrooke to join in a sale of the estate, they being desirous to confirm any mortgage made by Fosbrooke for securing

part of the purchase-money. The bill then represents that, on the proceedings in the ejectment being commenced, the Plaintiff applied to his assignees and requested them to institute a suit for the purpose of obtaining such relief as was sought by the bill; but that the assignees, being apprehensive of incurring personal expenses, had refused either themselves to institute, or to allow the Plaintiff in their names to institute, such suit: and then it asks that the hereditaments may be sold, &c., the Plaintiff and his assignees being willing to confirm any mortgage that may have been made thereon by the Defendant, in respect of any monies that have been applied in payment of the purchase-money, and that the residue of such monies may be paid to the assignees, for the benefit of the Plaintiff and his creditors. It appears, therefore, that the assignees have refused to institute a suit, and yet the bill represents that they are willing to concur in a sale, and they are the persons to [33] whom it asks that the money may be paid. This is very unlike collusion: and, in my opinion, there is nothing on the face of the bill which can be fairly said to be collusion: and, as I understand the Act, there is no ground to suppose that any damage will accrue to the Plaintiff by the refusal of the assignees to interfere with the ejectment.

My opinion is that no case is made out by which this bill can be sustained; and, consequently, the demurrer must be allowed. (See *Barton v. Jayne*, ante, vol. 7, p. 24, and *Lautour v. Holcombe*, post, p. 76.)

[33] MORRIS v. SMITH. Dec. 14, 1837.

Practice. Process.

The serjeant-at-arms, after taking the Defendant, suffered him to escape; a second order for the serjeant-at-arms was made.

The serjeant-at-arms had taken the Defendant, and afterwards suffered him to escape. Mr. Purves, for the Plaintiff, now moved for a sequestration.

Mr. Wakefield, *amicus curiæ*, mentioned a case of *Andrews v. Walton*, in which the bill having been dismissed with costs, the Plaintiff was taken on an attachment for non-payment of the costs, and was afterwards discharged, with the Defendant's consent, by reason of some irregularity in the proceeding. The Defendant then took the Plaintiff on a second attachment, for the same cause, and Lord Brougham, C., refused to discharge him.

THE VICE-CHANCELLOR said that there must be a second order for a serjeant-at-arms.

[34] LORD MILLTOWN v. STUART. Dec. 1837.

[S. C. 1 Jur. 940. See *Seear v Webb*, 1883, 25 Ch. D. 84.]

Practice. Affidavit of Service.

An affidavit of service of notice of a motion or of a petition must be made, at the latest, before the rising of the Court on the day on which the application is made.

THE VICE-CHANCELLOR, on a motion in this cause made by Mr. Light Bruce, said that he had conferred with the Lord Chancellor, and that his Lords had decided that, where an application to the Court was made either by motion or by petition, and the opposite party did not appear, no order ought to be drawn, unless the affidavit of service of the notice of the motion or of the petition was filed, at the latest, before the rising of the Court on the day on which the application was made.

[34] In the Matter of DEAN CLARKE'S CHARITY. *April 27, 1836.*

[See *In re Norwich Town Close Estate Charity*, 1888, 40 Ch. D. 302.]

Jurisdiction. Charity. Petition.

The Court has no jurisdiction to decide upon a petition presented under 52 G. 3, c. 101, where the parties claim adversely to each other.

William Clarke, D.D., and formerly Dean of Winchester, made his will, dated the 22d of April 1679, and partly in the following words:—"I give the sum of £50 and all my wearing apparel to St. Paul's Cathedral, London, for and towards the rebuilding the same, if so good a work may proceed: Item, I devise and bequeath, assign and set over all that my lease for years taken of the Dean and Chapter of St. Paul's, London, of certain lands, tithes, &c., lying in the parish of Tillingham, in the county of Essex, and all my interest in the same, unto Sir John Bramston, Knight of the Bath, Thomas Raymond, serjeant-at-law, Mr. Robert Pocock, clerk, my cousin Thomas Hackett, Esq., and Mr. John Clarke, [35] clerk, and Sir Francis Gerrard, Bart., in trust for the uses and purposes hereafter named (that is to say), in the first place, to raise so much money, in the manner as is hereafter specified, as may be a sufficient fine from time to time for the renewing the said lease every seventh year or otherwise as occasion is offered, and as is usually observed and done by others the tenants of the said dean and chapter, and also effectually and duly to renew the same accordingly, that so the said lease by such constant renewing may be perpetuated to enable the said trustees to perform and pay the several farther trusts and payments hereafter named (that is to say) to the several sons and daughters of clergymen as followeth." [The testator then gave pecuniary legacies amounting to £2040.] "And, from and after the said several sums are raised and trusts performed as aforesaid, in further trust also, for and towards the augmenting of 10 small vicarages or other ecclesiastical benefices with cure, to pay unto the incumbents of each of them £30 per annum for ever, which said benefices are to be specified in a codicil unto this my will annexed: and, if it pleased God that I depart this life before I have specified, in the said codicil or otherwise, all the particular benefices so to be augmented, then my said trustees are to pay the said augmentations to such and so many as I shall have then named, and also such and so many more, making up in all the number of ten, as the Bishop of London for the time being, together with the Dean and Chapter of St. Paul's, London, my worthy landlords, shall nominate and appoint, to be perpetually vested and stated in such augmentations as absolutely as if they were of my own express nomination, which pious office I do, with all humility, request they would perform in case God prevents me that I do it not myself, declaring it further [36] my will that all the augmentations of such small benefices so to be named by them shall be in such parishes where the impropriations are in the hands of laymen, and no others, and, if it may be, likewise in market towns or populous parishes; and, to the end that these trusts may be easier to my trustees, I nominate and appoint my good cousin Mr. Abraham Preston to be their assistant or agent in all matters necessary to the performance of the said trust; and, for his care herein and for the affection I bear to him, I do give him, out of the profits of the said lease, £50 per annum, during his life, or so long as he shall continue agent upon the said estate; and, from and after his death or otherwise quitting the said employment, my trustees shall nominate and appoint, from time to time, some other expert and responsible person and agent to execute and perform all such orders of my trustees as were to be performed and executed by my cousin Abraham Preston as aforesaid, and shall allow the said person or agent, out of the profits, so much as they shall think convenient and answerable to his care and pains, always remembering that it is to be paid out of an estate wholly designed for charity; all which augmentations to ten small benefices, together with £50 per annum during my cousin Preston's life or agency upon the estate, amounts in all to £350 per annum. Note, that the whole estate willed for these pious uses, when I purchased the same, was £500 per annum clear, besides the church rent and

entertainment, wherefore the remaining £150 per annum above the said £350 per annum I allot partly for abatement of rents, and partly for taxes to the King, partly for incident charges of the trust, and the remainder, annually, to be set apart for and towards the raising a fine against the next renewing of the lease, which I hope, in every seven years, may be sufficient [37] to renew the same, without diminishing any part of the augmentations; yet, if such annual remainder will not be sufficient to make up a full fine, then I will that what is wanting of the fine should by my trustees be made up and defalked out of the augmentations, that so the lease and the augmentations may be secured to be continued for ever; and, if it happen there be no abatements of rents, or that there be improvements, then I will that my trustees, after incident charges, taxes, and fine as aforesaid be provided for, pay the overplus, as it shall arise, for and towards the rebuilding and repairing of the Cathedral Church of St. Paul's, London."

The testator made a codicil which commenced as follows:—"A catalogue of ten small vicarages or ecclesiastical benefices with cure of souls, which I mention in my will to be augmented, are as followeth in this codicil." The testator then named four benefices only, and died without having made any addition to them: and, thereupon, the Bishop of London and the Dean and Chapter of St. Paul's, in pursuance of the request contained in the will, executed a deed, dated the 27th of January 1698, whereby they nominated six other vicarages to receive, together with the four named in the codicil, the benefit of the augmentations provided by the will; and the benefices mentioned in the deed, together with the four named in the codicil, had ever since received the benefit of the endowment, and had been considered the objects of the testator's bounty.

New trustees were from time to time appointed of the will, and the lease was from time to time renewed by the trustees, the last renewal being for 21 years from Michaelmas 1829.

[38] For many years after the testator's death the clear income of the estate was not sufficient to pay £30 a year to each of the incumbents of the ten vicarages; but since 1780 it had been more than sufficient for that purpose; and in every year since 1780 the trustees had divided the whole net income of the estate equally between the incumbents of the ten benefices, under the impression that the incumbents were alone entitled thereto according to the true construction of the will.

In January 1834 an information was filed, in the Court of Chancery, by the Attorney-General, against the Dean and Chapter of St. Paul's and the trustees, insisting that such disposition of the net income of the estate was a breach of trust, and contrary to the will and intention of the testator, and praying that the charity might be established, and that it might be declared that the whole of the clear income of the estate, after providing for the fines on renewal and payment of the receiver's salary and the necessary expenses of the trustees, was applicable to the augmentation of the ten vicarages, and of so many other poor vicarages or ecclesiastical benefices with cure, being lay impropriations, as the income would suffice to augment by addition of £30 per annum to each of such vicarages or benefices, and that no part of such income was applicable to the rebuilding or repairing St. Paul's Cathedral, and that it might be referred to one of the Masters of the Court to settle a scheme for the due application of the surplus income of the estate.

The answer of the trustees submitted the questions raised by the information to the judgment of the Court. The answer of the dean and chapter, after stating that [39] no sufficient funds were provided, or in fact existed, for the maintenance and keeping in repair of St. Paul's Cathedral, insisted that, according to the will of the testator and according to the true construction of his will, £30 per annum to each of the vicarages before mentioned, and that the surplus income ought to be applied in repairing and keeping in repair St. Paul's Cathedral.

The information was heard before the Master of the Rolls on the 15th of September 1835, and was dismissed with costs.

In February 1836 the trustees presented a petition under 52d Geo. III. c. 36, which, after stating as above, alleged that, in consequence of the information that the proceedings taken in the suit, the Petitioners were, for the first time

dean and chapter claimed any interest (except as lessors) in the net surplus income arising from the charity estate; that the incumbents of the ten vicarages claimed to be entitled, in equal shares, to the whole of the net surplus income; that, in consequence of the aforesaid conflicting claims, the Petitioners were advised that they could not any longer act in the administration of the trust, with safety to themselves, without the direction of a Court of Equity. The petition prayed that the rights and interests of the incumbents of the ten vicarages and of the dean and chapter, in the net surplus income of the estate, might be ascertained and declared, and that proper directions might be given to the Petitioners for the administration of the estate, and that, if necessary, it might be referred to one of the Masters of the Court to settle a scheme [40] for the due application of the surplus income of the estate.

Mr. Jacob, for the Petitioners.

Mr. Knight, Mr. Stuart and Mr. Chandless, for the incumbents of the ten vicarages, said that the Dean and Chapter of St. Paul's having acquiesced, for a great number of years, in the whole net income of the charity estate being distributed amongst the vicars, had lost the right which they originally had under the will.

Mr. Wigram and Mr. Loftus Wigram, for the dean and chapter. This petition is presented under 52d Geo. 3, c. 101, and the Petitioners seek to compel the Dean and Chapter of St. Paul's and the vicars to interplead. The Court has no jurisdiction to do this under the statute. Under the will, the right of the dean and chapter is clear. The vicars (not disputing the original right) say that the dean and chapter have lost their original right and that it has become vested in themselves. The petition, therefore, raises a question of adverse right between the respondents; and such a question cannot be determined except in a suit between those parties. It is sometimes argued that the jurisdiction of the Court under the statute extends to all cases, and that it is matter of discretion only whether the Court will exercise its jurisdiction by petition or by information; but that is not so. It is impossible to imagine that the Legislature intended that the rights of adverse claimants under a trust should be decided on summarily, or in any other than the regular way. The preamble of the Act shews [41] that the jurisdiction thereby given is limited. Lord Redesdale is clear upon that point in his judgment in the case of *The Corporation of Ludlow v. Greenhouse* (1 Bli. N. S. 66). After stating that the Act applies only to cases of admitted trust as between trustees and *cestui que trusts*, he says: "Wherever the disposition in favour of a charity clearly points out in what manner the funds are to be disposed of"—which is the case here—"there is no authority or right to interfere; and the Court never does interfere, ordinarily, if it appears clearly how the funds of the charity are to be disposed of."

It is true that, in the *Upton Warren case* (1 Myl. & Keen, 410), Lord Chancellor Brougham thought that the adverse claims of different *cestui que trusts* might be determined upon petition under the statute, where the right depended simply upon the construction of a written instrument. As a matter of convenience merely, there may not, perhaps, in most cases, be any objection to determining such points upon petition. But such cases are within the principle laid down by Lord Redesdale; for an investigation of disputed facts may, and often does, arise as an incident to the interpretation of a written instrument. And the *Upton Warren case* is entitled to less weight than Lord Brougham's decisions usually are, from the circumstance to which he refers in his judgment, namely, that the objection to the jurisdiction was taken, for the first time, upon the appeal before him.

Mr. Jacob, in reply, said that under the Act of Parliament the Court had jurisdiction to decide, on petition, in cases where all parties claimed under the trust; that, in *The Corporation of Ludlow v. Greenhouse*, the [42] corporation were claiming adversely to the trust; but in this case there was no person who claimed adversely to the trust.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The objection which I understood Mr. Wigram to make was this: if the question is whether, on the face of the instrument, a trust was or was not created in favour of a given individual, that question cannot be decided on petition. This matter comes before me thus: the petition is presented, by the holders of the trust property, to have it determined whether A. or B. is entitled to that property; and *The Corporation of Ludlow v. Greenhouse* decides that, where two individuals are claiming the trust property adversely to each other, the right cannot be decided on petition.

There may be more in this matter than the mere question of construction; for I may have to determine the rights of the parties on grounds different from those on which I have had to decide, if the matter had come before me on the day after the death of the testator. I cannot but think that the intention of the Legislature was that the Act in question should apply only to plain cases of breach of trust; and, therefore, the proper course is for me not to decide on this petition, but to let an information be filed.

Petition dismissed.

[43] GRAVES v. GRAVES. May 4, 1836.

[S. C. 5 L. J. Ch. (N. S.) 270.]

Will. Construction. Debts charged on Real Estate.

Testator directed all his debts, legacies and funeral expenses to be paid as soon as conveniently might be after his decease. Afterwards he devoted a particular estate to the payment of his debts, legacies and funeral expenses in aid of his personal estate, and devised the rest of his estates to his children in strict settlement. Held, nevertheless, that all his real estates were charged with his debts.

R. M. Graves, by his will, dated the 28th of March 1814, directed that all his debts, legacies and funeral expenses should be paid as soon as conveniently might be after his decease. He then gave some pecuniary legacies, which he directed to be paid as soon as might be after his decease, without any deduction being made thereout for legacy duty or otherwise; all which legacy duties he desired might be paid out of his estate and effects. He then gave some specific legacies, and directed that the several personal articles and things thereinbefore by him given should in nowise be subject to the payment of his debts, legacies and funeral expenses. And, as to his estate called Ocle Court, in the county of Hereford, he devised the same to trustees, in trust to sell the same as soon as conveniently might be after his decease, and to apply the proceeds in, for and towards the payment and discharge of all and every his debts, legacies and funeral expenses, so far as his personal estate should not extend or be sufficient to pay and discharge the same, and in aid of his said personal estate, but exclusive, nevertheless, of the legacies of £1000, £2000 and £4000 thereafter directed to be raised and paid out of the residue of his real estates, by virtue of the trusts of the term of 1000 years thereafter created; it being his intent and meaning that those legacies, or any of them, or any part or parts thereof, should not in anywise be raised and paid out of his personal estate, or out of the monies to arise by the sale of his Ocle Court estate: [44] and, after the full payment of all his debts, legacies and funeral expenses, to divide the residue of the monies to be produced by such sale unto and between his son John Graves and his daughter Elizabeth Graves, their executors, administrators and assigns. And, as to all the rest of his real estates, whereof he or any person or persons in trust for him were or was seised either in possession, remainder, reversion, expectancy or otherwise howsoever, he gave and devised the same and every part and parcel thereof, to the use that his wife should receive, thereout, a rent-charge of £200 a year for her life, over and above all other legacies and provisions given to or made for her by his will or by the settlement made on her marriage with him, to be issuing out of all and every his said residuary real estates: and he declared that the provision thereby made for his wife, together with the provision made for her by their marriage settlement, should be taken by her for and in the nature of a jointure and in lieu of dower: and he gave his said residuary estates, subject to the rent-charge, to the trustees, for the term of 1000 years, to be computed from the day of his decease, upon the trusts thereafter declared concerning the same: and, subject thereto, to the use of his son, Morgan Graves, for his life, with remainder to trustees to preserve, &c., with remainders to his son's first and other sons in tail male, with remainders to his first and other daughters in tail male, with remainder to his, the testator's son, John Graves, and his sons and daughters in

like manner, with remainder to his daughter, Elizabeth Graves, and her sons and daughters in like manner, with remainder to the heirs of the body of his son, Morgan Graves, with remainder to the heirs of the body of his son, John Graves, with remainder to the heirs of the body of his daughter, Elizabeth Graves, [45] with remainder to his own right heirs. And he declared the trusts of the term of 1000 years to be for raising the rent-charge of £200 a year, and, subject thereto, for raising and paying to his wife the sum of £1000, with interest from the day of his death, and for raising the two sums of £2000 and £4000 with interest from the same time; and he directed his trustees to stand possessed of the £2000 on certain trusts for the benefit of his daughter, Elizabeth Graves, and her children, and of the £4000 on certain trusts for the benefit of his son, John Graves, and his children: and he declared that, after the decease of his wife, and after full payment of all arrears of the rent-charge of £200, and also *from and immediately after* the sums of £1000, £2000 and £4000 thereinbefore by him directed to be raised by virtue of the trusts of the term of 1000 years, and the interest thereof should be raised and paid, *and when and as all and every the trusts thereinbefore by him declared of and concerning the same term should be fully performed and satisfied according to the true intent and meaning of his will*, either by becoming unnecessary or incapable of being performed by any ways or means whatsoever, and when the trustees should be fully reimbursed and satisfied all costs, charges and expenses occasioned by or relating to the execution of the trusts thereby in them reposed, or if the person or persons to whom the next estate of inheritance in his said several residuary real estates comprised in the term of 1000 years, in reversion or remainder expectant on the determination of that term, should, for the time being, belong, should pay or cause to be paid all the sums of money thereinbefore by him directed to be raised and paid under and by virtue of the trusts of the said term, together with all such costs, charges and expenses as aforesaid, then the said [46] term of 1000 years of and in the said hereditaments and premises comprised therein, or so much thereof as should remain unsold or undisposed of for all or any of the purposes aforesaid, should cease, determine and be utterly void, to all intents and purposes whatsoever. And he empowered his sons, Morgan Graves and John Graves, when they should respectively be entitled in possession to his residuary real estates under the limitations thereinbefore contained, to grant, thereout, certain yearly sums for jointures to any women with whom they might intermarry, and to charge the same estates with certain sums for the portions of their younger children. And he declared that the husband of his daughter, Elizabeth Graves, when she should, under the limitations thereinbefore contained, become entitled, in possession, to his residuary estates, and also the person or persons who should, thereafter, intermarry with any female or females, who, by virtue of the limitations therein contained, should become entitled, in possession, to his said residuary real estates, should take the name and arms of Graves only.

The will then contained powers for leasing the residuary real estates, and for the appointment of new trustees of the will.

And as to, for and concerning all the rest, residue and remainder of his personal estate and effects whatsoever and wheresoever, not thereinbefore by him given, bequeathed and disposed of, and which should remain after paying and satisfying, thereout, *in conjunction with the monies to arise by the sale of his Ocle Court estate as aforesaid*, all his just debts, legacies and funeral expenses, and all monies due and owing by him on mortgage, bond and otherwise, he thereby gave [47] and bequeathed the same and every part thereof unto his son, John Graves, and his daughter, Elizabeth Graves, equally to be divided between them, share and share alike, as tenants in common: and he appointed his wife, Elizabeth, and his son, Morgan Graves, to be the executrix and executor of his will.

The testator, by a codicil, gave his plate to his son, Morgan Graves, for his life, and declared that, after his decease, the same should be possessed, at all times, as an heirloom, as far as the rules of law and equity would permit, by the person or persons who, for the time being, under the limitations contained in his will, should be in possession of his family estate at Mickleton.

By another codicil he gave 50s. to be paid annually, for ever, by the possessor of his estate at Mickleton for the time being, to the poor of that parish: and, in case he

should not live to settle his son, John Graves, in his farm at Ringham, it was his will that his said son might be placed therein, at the rent paid by the then tenant thereof, for the term of 14 years: and he directed his executors to pay his son John £500, to assist him in stocking the farm: but provided his son John should be settled therein before his decease, then he gave the £500 to his executors, as part of the residue of his personal estate. The testator added that he had made the above bequests in consequence of having raised the rents of part of his estates, considerably, since the making of his will, *and of having sold his Ocle Court estate*, conceiving that he had done no more than his duty to his son John.

The testator died in October 1815, having, in March preceding, sold his Ocle Court estate for £7300: the whole of which sum, except £1000, remained unpaid [48] at his death. Morgan Graves, the testator's eldest son, died in November 1819 without issue.

Upon the hearing of a petition in the cause presented by the Plaintiff Elizabeth Ann Graves, the eldest daughter of John Graves, and the first tenant in tail male under the will, the question was whether the testator's residuary real estates were, by his will, charged with his debts.

Sir William Horne and Mr. Sandys, for the Petitioner. The counsel for the creditors will rely on the first clause in the will, by which the testator directs that all his debts, legacies and funeral expenses shall be paid as soon as conveniently might be after his decease. But if that clause amounts to a charge of debts, it amounts equally to a charge of legacies and funeral expenses; and no case decides that such a clause does amount to a charge of legacies and funeral expenses.

The other parts of the will shew, most conclusively, that the testator did not intend to subject all his real estates to the payment of his debts. The devisees were, at the least, as much objects of the testator's favour as the legatees. He directs that the pecuniary legacies shall be paid as soon as may be after his decease, without any deduction for legacy duty or otherwise, and that the specific legacies shall in nowise be subject to the payment of his debts, legacies and funeral expenses. He then devotes one of his estates in particular to the payment of his debts, legacies and funeral expenses (with the exception of certain legacies) in aid of his personal estate. That provision, however, would have been unnecessary, if he had, by the first clause, charged all his estates with the payment of his debts, legacies and funeral expenses. Besides he says that the pro-[49]-ceeds of his Ocle Court estate are not to be subject to the payment of all his legacies; could he mean then, by the first clause, that all his estates should be subject to the payment of all his legacies indiscriminately?

Now let us see what he does with respect to the residue of his real estates: he is not silent as to any interest that any person can take in them. He first devises those estates to the trustees for the term of 1000 years, and then settles every acre on his children and their issue, in as regular and accurate a strict settlement as ever was made. He gives to the tenants for life powers of jointuring, charging with portions, and leasing; and provides, with the greatest particularity, for all those who are to have charges on the estates; so that, by no possibility, can any other person claim any interest in or charge upon them. He declares that the trusts of the term of 1000 years are only for securing the rent-charge of £2000 a year, and raising the three sums of £1000, £2000 and £4000; he does not say that one of those trusts is to raise and pay such of his debts as his personal estate and the proceeds of the sale of his Ocle Court estate should be insufficient to pay; but that, immediately after the particular purposes are satisfied, the term shall cease to all intents and purposes whatsoever. This is a complete annihilation of the term for the benefit of the persons to whom he limits the residue of his estates in strict settlement. When the testator means to subject his estates to the payment of his debts, legacies and funeral expenses, he shews that he knew how to create trusts for that purpose: and, therefore, it may be fairly concluded that as, when he devises his residuary estates, he provides no machinery for payment of his debts, &c., he did not intend to subject those estates to them. The trusts [50] that are declared, operate, negatively, to exclude all trusts that are not declared. No trust is declared of the term, for paying the debts, legacies and funeral expenses; nor is there any individual taking an interest under the trusts and devises of the residuary estates who can sell those

estates for payment of the debts. If those estates are to be sold, they must be sold under the decree of a Court of Equity. Such a proceeding, however, was never contemplated by the testator, who has left nothing unprovided for in his will. No one can look at the will without seeing how full the testator's mind was of the objects which he had in view, and how full and complete the machinery is by which everything directed by the will was to be effected.

We now come to the clause by which the testator disposes of the residue of his personal estate. He says: "And as to, for, and concerning all the rest, residue and remainder of my personal estate and effects which shall remain after paying and satisfying thereout, in conjunction with the monies to arise by the sale of my said estate at Ocle Court as aforesaid, all my just debts, legacies and funeral expenses, and all monies due and owing by me on mortgage, bond and otherwise." Is not that a complete declaration of what the testator's intention was with respect to the charge of his debts, legacies and funeral expenses? He declares the residue to be a residue after paying thereout, in conjunction with the monies to arise from the sale of his Ocle Court estate, all his debts, &c.: so that he tells us what is the fund that he gives in aid of his personal estate, namely, his Ocle Court estate. Are then the general words at the commencement of the will to have a meaning given to them, which is not [51] only directly opposed to this express declaration, but which will have the effect of defeating all the full and particular limitations and declarations of trust that are found in the subsequent parts of the will?

Next, as to the authorities. It has never been decided that a clause like the one in question amounts to a general charge of debts. It is merely a direction that the testator's estate shall be administered as soon as may be after his death. In general, the executors are the only persons who are to pay debts, &c. Here that duty is devolved upon the trustees of the Ocle Court estate in conjunction with the executors: but there is no other person to whom the direction could be given; for, as was observed before, there is no person, except a Judge in a Court of Equity, who can order the other real estates to be sold for payment of the debts. The first case to which we call the attention of the Court is *Clifford v. Lewis* (Madd. & Geld. 33). There the testator did not mention his legacies, but only his debts and funeral and testamentary expenses, and the will was utterly unlike the present. No estate in particular was expressly dedicated to the payment of the debts; but all the real and personal estates were given, as one fund, to one and the same person absolutely. In *Ronalds v. Feltham* (Turn. & Russ. 418), also, legacies were not mentioned; and the observations of the Master of the Rolls in that case (which are equally applicable to *Clifford v. Lewis*) shew that both those cases are clearly distinguishable from the present. In *Douce v. Lady Torrington* (2 Myl. & Keen, 600; see 606) the testator directed his debts, funeral and other incidental expenses to be paid *with all convenient speed after his decease*. That clause, [52] therefore, was very like the introductory clause in this case, except that the legacies were not mentioned: and Sir John Leach, in his judgment, relies upon those words. There, too, a particular estate was directed to be applied for the payment of the debts; and *that* is another ground upon which the judgment is founded. Indeed, the two cases are not distinguishable from each other, except that the present is stronger. *Douce v. Lady Torrington* is important also in another point of view: for it shews that Sir John Leach, when he decided *Clifford v. Lewis*, thought that he was deciding a case in which the debts were directed to be paid *in the first place*; so that he would not have decided as he did in *Clifford v. Lewis* unless he had thought that there was that expression in the will. If, however, *Clifford v. Lewis* were rightly decided, it does not touch the present case; for the real and personal estates were not separated from each other, nor was any particular estate devised for payment of the debts, nor were there any particular declarations of trust or devises with respect to the estates.

Mr. Wray, for some of the Defendants, who were in the same interest as the Plaintiff. No case, except *Clifford v. Lewis*, decides that a dry, simple direction that all the testator's debts shall be paid, amounts to a charge on his real estates. In every other case in which that effect has been given to such a direction, the testator has either connected it with the disposition of his real estates, or has directed his debts to be paid in the first place. *Thomas v. Britnell* (2 Vez. 313), *Earl of Godolphin*

v. *Penneck* (*Ibid.* 270), *Willan v. Lan-[53]-caster* (3 Russ. 108), *Henvell v. Whitaker* (3 Russ. 343), *Finch v. Hattersley* (*Ibid.* 345, note), *Bridgen v. Lander* (*Ibid.* 346, note), *Powell v. Robins* (7 Ves. 209), *Williams v. Chitty* (5 Ves. 545). The cases referred to by Sir John Leach, in *Clifford v. Lewis*, are *Finch v. Hattersley* and *Leigh v. Earl of Warrington* (see Belt's Supplement to Vez. 341, and 1 Bro. P. C. 511): but those cases do not warrant the decision; for in both of them the debts were directed to be first paid. But supposing that the general words at the commencement of the will would, if they stood alone, create a charge, they cannot have that effect except by implication, and that implication may be rebutted by the subsequent dispositions in the will being inconsistent with it. In *Thomas v. Britnell*, the Master of the Rolls says: "Though in the first part the Court might take the whole real to be charged with debts, yet, as there is no express lien on the real by these general words, and afterward he distributes such part of his real for debts and such for legacies, it is too much to lay hold on the general words to say the whole should be charged with payment of debts. It can be done only by implication on the general words; which may be explained afterward, and that implication destroyed." Here the clause in which the testator disposes of his residuary personal estate clearly shews that he contemplated that no fund was to be added to and applied to the same purposes as his personal estate, except the monies to arise from the sale of his Ocle Court estate. In declaring the trusts of the term, too, he has not said a word as to the payment of his debts; and he directs the term to cease, to all intents and pur-[54]-poses, as soon as the specific purposes which he has pointed out have been satisfied. He clearly thought that he had sufficiently provided for the payment of his debts by adding the proceeds of the sale of his Ocle Court estate to the residue of his personal estate.

Next, there is no case in which a clause like the present has been held to charge legacies on real estate. In this case, however, if you hold that the debts are charged, you must hold that the legacies also are charged. *Parker v. Fearnley* (2 Sim. & Stu. 592).

Mr. Knight, Mr. Wigram, Mr. Jacob, Mr. Koe, Mr. Williamson and Mr. Hill appeared for the creditors, in opposition to the petition. They referred to *Keeling v. Brown* (5 Ves. 359), and *Kightley v. Kightley* (2 Ves. j. 328), as shewing that the Court did not always hold that legacies would be charged on real estates by the same words as would charge them with debts.

THE VICE-CHANCELLOR [Sir L. Shadwell]. If it is once established that the preliminary words in this will would charge the real estates with the debts, then we have only to consider whether there is anything in the subsequent parts of the instrument which is a revocation or alteration of the intention expressed in those preliminary words. I have always considered it to be perfectly settled that those words would create the charge.

When *Henvell v. Whitaker* was before Sir John Leach, I was surprised that he directed it to stand over, and thought it necessary to have a second argument. That case, however, does not apply to the present; for the [55] question there was, how far the direction for payment of the debts could be carried into effect, when the property which was to pay the debts was devised to the executors: a point which does not arise in this case.

In *Earl Godolphin v. Penneck*, Lord Hardwicke says: "The rule of law is, and more strongly of this Court, that such a construction is to be made of wills as tends to do justice to creditors of testator, and to attain satisfaction of just debts as far as possible." Ever since I first read *Williams v. Chitty*, I have been surprised at the manner in which Lord Rosslyn expressed himself.

I do not think that the charge is made to rest on the mere circumstance that the testator has used the words "*in primis*" or "in the first place;" for, if a testator directs his debts to be paid, is it not, in effect, a direction that his debts shall be paid in the first instance?

In *Earl Godolphin v. Penneck* the testator directed that all his debts and funeral charges should be first paid and satisfied; but Lord Hardwicke does not rely on the use of the words, "in the first place."

In *Finch v. Hattersley* the testator merely directed that all his debts to the value

of twenty shillings in the pound, and his funeral expenses, should be paid by his executrix, and then made a disposition to her of all his real and personal property.

In *Williams v. Chitty*, the preliminary words were followed by a disposition of the real estate without any connection with those words.

In *Bridgen v. Lander* (see 3 Ves. 5 and 7 Ves. 211), Lord Thurlow relied on [56] the circumstance that the direction was that the payment should be made by the executrix, and that the fund was not so put in her possession as to enable her to dispose of it: that was the point in that case.

I should have said that the decision in *Clifford v. Lewis* was right: but it is a very singular thing that the Master of the Rolls, when he speaks of it, in *Douce v. Lady Torrington*, mistakes the fact and says that the decision was made on a ground that did not exist.

Douce v. Lady Torrington seems to have been taken as an amicable decision and to have been decided without much consideration.

My opinion is that the preliminary words in this will do, of themselves, create a charge on all the real estates: and then the only question is, can you collect, from the subsequent parts of the instrument, that that intention has been altered?

The testator gives certain personal chattels to his wife; and then he gives certain pecuniary legacies, and directs that those legacies shall be paid as soon as may be after his decease, without any deduction being made thereout, for legacy duty or otherwise: all which legacy duties he desires may be paid out of his estate and effects. There is there a reference to the whole of his estate and effects for payment of the legacy duty, which he would not have charged upon a fund that was not liable to pay the legacies also. The testator then directs that certain articles which he had before bequeathed should not be subject to the payment of his debts, legacies and funeral expenses; and, in the codicil, he directs that his plate shall go [57] as heirlooms; the fair inference from which is that he intended all the rest of his property to be subjected to the payment of his debts, funeral expenses and legacies. Then, having devised the Ocle Court estate to trustees, in trust to sell, he directs the proceeds to be applied, in aid of his personal estate, in payment of his debts, legacies and funeral expenses (except certain legacies which he mentioned), and that the surplus shall be divided equally between his son and daughter. The exception of the legacies shews that he was aware that the words which he had used before would have had the effect of charging those legacies on the Ocle Court estate. He seems to have thought that the proceeds of that estate, together with his personal estate, would be more than sufficient to pay his debts, legacies and funeral expenses, for he contemplates that there will be a surplus after making those payments: but he does not say, in express terms, that the residue of his real estates shall not be applied in payment of his debts, &c., in case his personal estate, in conjunction with the proceeds of his Ocle Court estate, should not be sufficient for that purpose. The testator then devises the residue of his real estates, subject to the term of 1000 years, to his children in strict settlement; and, he directs that, after the death of his wife, and when the sums of £1000, £2000 and £4000 should have been raised and paid, *and when and as all and every the trusts thereinbefore by him declared concerning the term should have been fully performed*, then the term should cease. The testator therefore seems to have considered that the term was created for some other purpose than merely securing the annuity of £200 to his widow and raising the three sums of £1000, £2000 and £4000: and as, in the prior part of his will, he has directed that all his debts, legacies and funeral expenses should be paid, it may be reasonably inferred [58] that the payment of them was intended, by him, to be comprehended in the trusts of the term.

Then comes the disposition of the general residuary estate, which is in these words: "And as to, for and concerning all the rest, residue and remainder of my personal estate and effects whatsoever and wheresoever, not hereinbefore by me given, bequeathed and disposed of, and which shall remain after paying and satisfying thereout, in conjunction with the monies to arise by the sale of my said estate at Ocle Court as aforesaid, all my just debts, legacies and funeral expenses, and all monies due and owing by me on mortgage, bond and otherwise, I hereby give and bequeath the same and every part thereof, unto my son John Graves and my daughter Elizabeth Graves, equally to be divided between them, share and share alike, as tenants

in common." Although this will appears to be accurately drawn, this clause shews how inaccurate it really is: for the testator here speaks of the residue of his personal estate which should remain after paying and satisfying, thereout, in conjunction with the monies to arise by the sale of his Ocle Court estate, all his just debts, legacies and funeral expenses, and all monies due and owing by him on mortgage, bond and otherwise. But there could not be any residue of his personal estate after paying thereout, in conjunction with the proceeds of the Ocle Court estate, the debts, legacies and funeral expenses; for the proceeds of that estate were not to be applied in payment of the debts, legacies and funeral expenses, unless the personal estate should be insufficient to pay them. In this same clause, too, the testator speaks of the residue that should remain after payment of all his just debts, legacies and funeral expenses, and all monies due and owing by him on mortgage, bond and otherwise: just as if they were not debts which he had before spoken of.

[59] There appears to have been a laboured anxiety in the mind of the testator, to provide for the payment of all his debts: and, looking at the whole of the will, I cannot infer that he intended that the whole of his real estate should not be resorted to for payment of his debts, if it should be required for that purpose, or, in other words, my opinion is that the general direction at the commencement of the will is not cut down by what follows.(1)

[59] CLARKE v. CLARKE. May 7, 1836.

[S. C. 5 L. J. Ch. (N. S.) 286. See *In re Mervin* [1891], 3 Ch. 203.]

Will. Construction.

Testator bequeathed a fund in trust for A. for life, and, after her death, in trust for all and every the children of B. and C. who should attain 21. Held, that all the children of B. and C. who were born before the eldest child attained 21, though after A.'s death, would be entitled to a share on attaining 21.

Richard Clarke, by his will, dated the 4th of September 1821, gave to his son John Were Clarke, and Charles Henry Hotchkys, the sum of £4000, to be paid to them by his executrix within two years after his decease, upon trust, during the life of his daughter, Mary Ann Welsford, to pay the interest thereof to her for her separate use, and, after her death, to pay the principal unto and amongst all and every, or such one or more of her children, whether then born or thereafter to be born, at such ages, &c., in such parts, &c., subject to such provisoes, &c., and in such manner and form as she, by deed or will, should appoint, and in default of appointment, to all her children, whether then born or thereafter to be born, equally, share and share alike, the shares of sons to be vested at 21, and the shares of daughters, at that age or marriage; and, if all her children should die without having acquired a vested interest in the £4000, then, in trust to pay [60] that sum to her next of kin. And he gave £7000 to the same trustees, to be paid to them as before mentioned, in trust, during the life of his daughter Anna Sophia Clarke, to pay the interest thereof to her for her separate use, and, after her decease, in trust to pay the principal to all and every her child or children, equally, share and share alike, the shares of sons to be vested at 21, and the shares of daughters at that age or marriage, and upon trust, after the death of Anna Sophia Clarke and until the £7000 should become payable under the trusts aforesaid, to apply the interest thereof for the maintenance and education of such children, in proportion to their presumptive or apparent rights and interests in the principal; and he empowered the trustees, after the death of Anna Sophia Clarke, to apply one-half of the presumptive shares of her sons in the principal, for their advancement, notwithstanding such shares should not then have become vested or payable: "And in case there shall not be any such children or child of the said Anna Sophia Clarke, or, their being such, all of them shall die without having acquired a vested interest in

(1) An appeal to the Lord Chancellor from the above decision is now pending.

the said principal sum of £7000 under the trusts hereinbefore declared, then the said John Were Clarke and Charles Henry Hotchkys, and the survivor of them, his executors, administrators and assigns shall, from and after the decease of the said Anna Sophia Clarke, stand and be possessed of the same principal sum, or of so much as shall not have been applied or disposed of for the advancement of any such sons or son as aforesaid, upon trust for *all and every* the children of my said son John Were Clarke, and of my daughter Mary Ann Welsford, who shall live to attain the age of 21 years, equally to be divided between or amongst them and their several and respective executors, administrators and assigns."

[61] The testator died in November 1821, leaving his three children named in his will him surviving. Anna Sophia Clarke died in May 1831, without having been married. John Were Clarke and Mary Ann Welsford had several children, some of whom were born in the testator's lifetime, others after the testator's death but in Miss Clarke's lifetime, and one after Miss Clarke's death, but before the eldest child attained 21. All the children were infants at Miss Clarke's death; but five of them (who were the Plaintiffs in the cause) afterwards attained 21.

The bill alleged that the Plaintiffs, on attaining 21, became entitled to receive a distributive share of the £7000: that the Defendants John Were Clarke and Charles Henry Hotchkys alleged that the Plaintiffs were not then entitled to receive such distributive share, and that under the will all and every the children of John Were Clarke and Mary Ann Welsford then born or thereafter to be born, who should live to attain 21, would be entitled to share in the £7000: that the same Defendants at other times alleged that, under the will all the children of John Were Clarke and Mary Ann Welsford who were living when the eldest attained 21, and who should live to attain that age, would be entitled, in equal shares, to the £7000, or that all such of the said children who were living at the death of Anna Sophia Clarke and who should live to attain 21 would be entitled thereto: whereas the Plaintiffs charged that, according to the true construction of the will, such only of the children of John Were Clarke and Mary Ann Welsford as were living at the death of the testator and who should live to attain 21 would be entitled to share in the £7000.

[62] The bill prayed that the rights and interests of the Plaintiffs and of the infant Defendants in the £7000 might be declared, and that it might be also declared that such only of the children of John Were Clarke and Mary Ann Welsford as were living at the testator's death and who should attain 21 were entitled to share in the £7000, and that the Plaintiffs, on attaining 21, became entitled to receive a distributive share of that sum.

Mr. Jacob and Mr. Follett, for the Plaintiffs, cited *Davidson v. Dallas* (14 Ves. 576), *Whitbread v. Lord St. John* (10 Ves. 152), *Gilbert v. Boorman* (11 Ves. 238), *Scott v. Harwood* (5 Madd. 332), *Walker v. Shore* (15 Ves. 122).

Mr. Knight and Mr. Sharpe appeared for the Defendants.

But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: My opinion is that all the children who were born before the eldest attained 21 may, by possibility, be participators in the fund: otherwise, seven children might be born in the lifetime of the tenant for life, and then another child might be born and live to attain 21, but the seven might die under that age, and then the only child who attained 21 would be excluded.

[63] WILSON v. PAUL. May 25, 1836.

Administration. Debtor and Creditor.

Executors, before suit commenced, paid some of the testator's creditors a certain proportion of their debts. Held, that they were not entitled to any further payment, until the other creditors had been paid proportionably.

This was a suit by creditors against the executors of the debtor who died possessed of personal estate only.

Before the institution of the suit the executors paid to some of the creditors a dividend of 13s. 4d. in the pound on the amount of their debts.

After the usual decree had been made, the question was whether those creditors were entitled to be paid the balances remaining due to them, *pari passu* with the creditors whose debts were wholly unpaid.

Mr. Knight, for the Plaintiffs.

Mr. Jacob, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell] held that the creditors who had been partly paid were not entitled to any further payment until all the other creditors had been paid proportionably with them. (See next case.)

[64] MITCHELSON v. PIPER. May 27, 1836.

[S. C. 5 L. J. Ch. (N. S.) 294.]

Executor. Administration. Debtor and Creditor.

Executors will not be allowed payments to creditors made after a decree for administering the debtor's estate.

Where an executor has paid a creditor part of his debt, the Court will not make any further payment to him out of either the legal or the equitable assets of the debtor, until all the other creditors are paid proportionably.

The suit was instituted for the administration of the real and personal estate of Robert Piper, who, by his will, dated the 23d of December 1829, devised certain of his real estates to the Plaintiffs, in trust, by sale or mortgage, to raise so much money for payment of his debts as his personal estate should fall short of paying.

The testator's general personal estate was more than sufficient to pay his specialty debts, but was not sufficient to pay his simple contract debts also.

Before the bill was filed, after it was filed but before the decree, and also after the decree, the Plaintiffs (who were creditors of the testator as well as executors and trustees of his will) made payments to some of the simple contract creditors, in part discharge of their debts: and, on the hearing of the cause for further directions, one question was whether the executors and trustees ought to be allowed those payments.

Another question was whether the creditors who had received a part of their debts were entitled to be paid the remainder, *pari passu* with the other creditors who had received no part of their debts.

Mr. Wigram and Mr. Sidebottom, for the Plaintiffs, cited *Maltby v. Russell* (2 Sim. & Stu. 227), *Mason v. Williams* (2 Salk. 507), [65] *Robinson v. Tonge* (3 P. W. 398, 401), *Darston v. Earl of Orford* (Prec. Ch. 188, and 3 P. W. 401), *Perry v. Phelps* (10 Ves. 34), *Waring v. Danvers* (1 P. W. 295), *Baily v. Ploughman* (Mos. 95), *Shepherd v. Kent* (Prec. Ch. 190, and 2 Vern. 435).

Mr. Bethell, for the creditors, whose debts were wholly unpaid. I admit that the executors ought to be allowed the payments to the creditors made prior to the decree, but they ought not to be allowed those that were made afterwards.

With respect to the second question, I wish to call the attention of the Court to the manner in which a creditor brings his charge into the Master's office. He first states the amount due at the testator's death, and then he gives credit for what he has received: the Court then, having taken into its hands the administration of the testator's assets, has to determine what is a due course of administration. Now what can be a due course of administration in this Court, but that equality which is synonymous with equity? And accordingly the Court, finding that the executor has paid a certain proportion of the debt, makes, in the first instance, proportionate payments to all the other creditors who stand *in pari jure*. The case of *Shepherd v. Kent* decides that the Court, where it has to administer both legal and equitable assets, and a creditor has taken part of his debt out of the legal assets, will not allow him to receive any part of the equitable assets until he has brought into hotch-pot what he has received out of the legal assets.

[66] Mr. Wright, for one of the creditors who had been paid in part, said that an executor might, if he pleased, prefer a creditor and pay the whole of his debt, leaving

the other creditors wholly unpaid; and, consequently, that the creditors who had received part of their debts were entitled to be paid the remainder, without regard to what they had received. *Maltby v. Russell*; *Langton v. Higgs* (*ante*, vol. 5, p. 228).

Mr. Jacob and Mr. Wilbraham, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The executors are not entitled to be allowed the payments made since the decree: the utmost that they are entitled to is to stand in the place of the creditors with respect to those payments.

I cannot but think that Mr. Bethell has pointed out the ground on which the other question ought to be decided, namely, that when a creditor goes into the Master's office to establish his debt, he must shew what was the amount due at the testator's death and what he has received since: and, as it is one of the leading maxims of this Court that equality is equity, the creditors who have been paid in part ought not to receive any further part either of the legal or of the equitable assets until the other creditors have been paid the same proportion of their debts. (See the preceding case.)

[67] BRAZIER v. HUDSON. May 30, 1836.

[S. C. 5 L. J. Ch. (N. S.) 296. Approved, *In re Dallas* [1904], 2 Ch. 409.]

Executor. Probate.

If an executor does an act and dies without proving the will, the act will be valid if the will is ultimately proved.

A term for years was vested in one Hodgson. He died, having appointed his wife his executrix. She assigned the term to Baxter, and died without proving her husband's will. After her death letters of administration, limited as to the term, were taken out to Hodgson.

On the hearing of an exception to the Master's report as to the title to the estate, one question was whether the administrator was the proper person to assign the term to a trustee for the purchaser.

Mr. Jacob and Mr. T. H. Hall, in support of the exception. An executor derives his title under the will, and not from the Ecclesiastical Court; and, if he acts, he becomes complete executor, although he does not prove the will. Although the probate is the only legal evidence that he is executor, yet he need not prove in order to give validity to his acts. The assignment to Baxter is valid; but no legal evidence of it can be given so long as the will remains unproved. When the probate is granted, the assignment will not only be good, but capable of being proved; and, consequently, an assignment by the administrator will be void. 1 Williams on Executors, 160. *Wankford v. Wankford* (1 Salk. 299; see 308).

[68] Mr. Knight and Mr. Coote, in support of the report. If an executor does an act and afterwards proves the will, it is considered as his act from the beginning; but if he dies without proving the will, a subsequent recognition of the will by the Ecclesiastical Court cannot be an affirmance of the act; for that Court never constituted him the personal representative of the testator. In this case, therefore, the term remained part of the assets of Hodgson, and administration of his goods was properly granted.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Lord Holt, in his judgment in *Wankford v. Wankford*, says that an act done by an executor is valid, provided the will is ultimately proved, although the executor who did the act died without proving the will. And I cannot but think that the convenience of mankind requires that all the acts of an executor that would be valid if probate had been taken should be considered as valid if the will is ever afterwards proved. The consequence is that upon letters of administration to Hodgson, with his will annexed, being taken out, the assignment to Baxter will be established.

Exception allowed.

[69] TUFNELL v. CONSTABLE. May 5, 1836.

Volunteer. Debtor and Creditor. Release.

A. bequeathed to B. £700, part of £1200 which B. owed him on bond. A. afterwards revoked the bequest, but made an indorsement on the bond, by which he forgave B. the £700. A.'s executors brought an action against B. for the £1200. B. filed a bill to restrain the action, offering to pay to the executors the balance of £500. The Court refused the injunction, because B. had given no consideration for the indorsement on the bond.

The Plaintiff, the Rev. W. Tufnell, having borrowed of James Robinson, first, £500, and, afterwards, £1200, gave to Robinson his promissory note for the former sum, and his bond for the latter. Some years afterwards Robinson made his will, by which he gave to the Plaintiff £700, "being part of the £1700 which he owes me; my intention being to forgive him £700 in part of the said debt of £1700: and I direct that he shall account for and pay to my executors the remaining sum of £1000." The testator, by a codicil, revoked the legacy of £700, which he had, by his will, bequeathed to the Plaintiff, and declared such bequest to be null and void. On the 7th of June 1832 (which was the day of the date of the codicil) the testator signed the following indorsement on the bond: "I do this day forgive the Rev. W. Tufnell the sum of £700, part of the within-named sum of £1200, for which he is indebted to me; and I hereby acquit him of this bond upon the payment of the sum of £500, with interest upon the whole till the same be paid off. In consequence of this gift I have revoked, by my codicil of this date, a former bequest to the amount of the said sum of £700." On the 27th of August 1832 the testator made another will, in which he did not even name the Plaintiff; and, on the 14th of September following, he died. In June 1835, after a litigation in the Ecclesiastical Court between George Tufnell, the executor named in the first will, and the Defendants, the executors named in the second, the latter will was admitted to probate. In February 1836 [70] the Defendants brought an action in the Court of Common Pleas against the Plaintiff for the recovery of the £500 and £1200; whereupon the bill was filed praying for a declaration that the testator, by the indorsement on the bond, forgave and acquitted the Plaintiff, and relinquished and annulled all claim against him to and in respect of the £700; and that the Plaintiff might be declared to be responsible to the Defendants for £1000 principal money only, and for interest on the £1700 down to the testator's death, and on the £1000 since that time; and that the Defendants might be restrained from further proceeding in their action, the Plaintiff being willing that they should receive the amount of such principal and interest out of a sum which he had paid into Court in the action.

Mr. Knight and Mr. Jeremy, for the Plaintiff, now moved for the injunction. They cited *Eden v. Smyth* (5 Ves. 341) and *Norton v. Wood* (1 Russ. & Myl. 178).

Mr. Jacob and Mr. James Russell, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Plaintiff gave no consideration for the alleged release, and that, as he was a volunteer, he had no right to come into equity for relief.

Motion refused, with costs.

[71] THE ATTORNEY-GENERAL v. THE CORPORATION OF NEWARK.(1)
May 24, 1836.

Vendor and Purchaser. Costs.

Where an estate has been sold under a decree, and the Master reports against the title, the purchaser is entitled to be paid, out of the fund in the cause, his costs of and consequent upon his becoming purchaser, and of investigating the title.

(1) *Ex relatione.*

By the decree in this cause, a sale before the Master had been directed, and upon the application of the purchaser it was referred to the Master to inquire whether a good title could be made. The Master reported in the negative.

Mr. Jacob, for the purchaser, moved that he might be discharged from the purchase, and that his costs, charges and expenses might be paid out of the fund in Court.

THE SOLICITOR-GENERAL, *contrà*.

THE VICE-CHANCELLOR considered that the purchaser was entitled to be paid the costs of the orders for confirming him as purchaser of the reference and of the application, and the expense of investigating the title.

The order was for payment out of the fund of the purchaser's costs of and consequent upon his having become purchaser, and also of the application, and his reasonable charges and expenses of investigating the title.

[72] BARNETT v. GRAFTON. June 1, 1836.

Amendment. Practice.

After a plea allowed and replied to, the Plaintiff moved to withdraw the replication and amend the bill, with a view to vary the case originally made. Motion refused.

The Defendant, Welch, put in a negative plea, which was allowed by the Master of the Rolls on the 24th of March last. The Plaintiff then replied to it. The other Defendants put in answers; the last of which was filed on the 31st of March, and an office copy of it was obtained on the 4th of April.

The Plaintiff now moved (by way of appeal from a decision of one of the Masters) for leave to withdraw the replication and amend the bill. The motion was supported by an affidavit made in compliance with the 15th of Lord Lyndhurst's Orders.

Mr. Knight and Mr. Webster, for the Plaintiff, said that the amendments had become necessary in consequence of matter disclosed in the answers; that it was always in the discretion of the Court, after plea pleaded, to allow the bill to be amended; and that, in *Carleton v. L'Estrange* (Turn. & Russ. 23), Lord Eldon decided that the Court might interpose to regulate the record in order that it might stand right.

Mr. Jacob, Mr. Piggott and Mr. Greene appeared for the Defendants.

But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: I cannot interfere with the order of the Master of the Rolls allowing the plea.

[73] If, at the time when the plea was allowed, you had applied to his Lordship, he might perhaps have permitted you to amend. The plea having been allowed, the bill would have been out of Court unless the Plaintiff had taken issue on the matter of fact by replying to the plea: and as it appears from the affidavit that the proposed amendments, if they were introduced into the bill, would vary the case made against the Defendant Welch, I have no power to make the order.(1)

[73] MARTINS v. GARDINER. June 1, 1836.

Will. Revocation.

Testator directed his executors to pay an annuity to his sister _____, the wife of Francis Betley, or to such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said E. Betley, and the receipt of the said _____ to be a sufficient discharge.

The testator, after executing his will, drew his pen through his sister's name in those places where blanks are left. Held that the bequest was not revoked.

(1) See *Taylor v. Shaw*, 2 Sim. & Stu. 12.

The testator in this cause, by his will, directed his executors to set apart a fund sufficient to produce the annual sum of £10, and to pay that sum into the proper hands of his sister , the wife of Francis Betley of Yarmouth in the county of Norfolk, butcher, for her life, or into the hands of such persons as the said Elizabeth Betley should appoint, to the intent that the same might be for the separate use of the said Elizabeth Betley; and he directed that the receipt of the said should be a sufficient discharge for the annuity: and he also directed his executors to divide the residue of his estate equally amongst his brother, W. Gardiner and his sisters, Sarah Gardiner and , the wife of the said Francis Betley.

In those places in which blanks are left the name of Elizabeth Betley (whose right name was Bateley) [74] was written: but the testator afterwards drew his pen through the name. The question was whether the bequests to her were revoked.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as the description and, in some places, the name of Elizabeth Betley remained uncanceled, the Court would not be warranted in holding that the bequests to her were revoked.

Mr. Turner, for the Plaintiff.

Mr. Jacob and Mr. Wright, for the Defendant.

[74] MURRELL v. CLAPHAM. June 2, 1836.

Next Friend.

The next friend of the infant Plaintiff was insolvent, and had been indemnified from the costs of the suit; and for those reasons the Defendant moved that the proceedings in the suit might be stayed until the next friend was changed or had given security for costs.

Motion refused.

Motion by the Defendants that the proceedings in the suit might be stayed until the next friend of the Plaintiff (who was an infant) was changed, or had given security for the costs of the suit.

The motion was supported by an affidavit stating that the next friend was insolvent, and that he had refused to act as next friend until he had been indemnified from the costs of the suit by some person whose name was not disclosed, and that he had declared that he did not consider himself responsible for the costs.

Mr. Knight, in support of the motion.

Mr. O. Anderdon, *contrà*, said that, in an infant's suit, the poverty of the next friend was no reason for staying the proceedings in the suit or for appointing a new next friend. *Davenport v. Davenport* (1 Sim. & Stu. 101); *Fellows v. Barrett* (1 Keen, 119).

[75] Mr. Knight, in reply. In *Fellows v. Barrett*, the next friend was the mother of the infant, and, therefore, she was justified in taking up the case of the infant; but, in this case, there is no connexion between the infant and his next friend. Poverty does not prevent a party from suing in his own right; but it is different where he comes forward as the next friend of an infant: as appears by the cases referred to in the note to *Davenport v. Davenport*. The next friend in this case is not, really and in substance, the next friend of the infant. If he is indemnified from the costs, he has not the usual motive to see that the suit is properly conducted. The contract between him and the undisclosed person will not enable the Defendants to proceed against that person for the costs.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is very like *Fellows v. Barrett*: and I rather think that in that case the Master of the Rolls did not consider himself authorized to compel the next friend to give security for costs.

The Court rather encourages persons to institute suits on behalf of infants; and it has this security against such suits being prosecuted for the mere purpose of harassing the Defendants: it may refer it to the Master to inquire whether the suit is for the infant's benefit.

I rather think that I have no authority to grant this application.

Motion refused, without costs.

[76] LAUTOUR v. HOLCOMBE. June 3, 1836.

[For subsequent proceedings, see S. C. 11 Sim. 71.]

Bankrupt. Fraud. Demurrer.

The assignees of a bankrupt having sold his estate whilst he was proceeding to get his commission superseded, he filed a bill against them and the purchaser and their respective solicitors, charging them with fraud and collusion in the sale, and alleging that he had settled with all his creditors and that they had consented to the commission being superseded. A demurrer to the bill was overruled.

By an indenture, dated the 18th of August 1829, the Plaintiff granted to the Defendant Holcombe a redeemable annuity of £350, and, for further securing it, demised a freehold estate of which he was seised in fee to a trustee for 99 years. In May 1830 the Plaintiff became bankrupt. Towards the latter part of that year the Plaintiff commenced a negotiation with several of his creditors, for the purpose of superseding the commission. The first, second and third meetings, and an adjourned meeting under the commission, took place prior to June 1831. At those meetings fifty-six creditors proved debts amounting to £19,000; and in November 1831 fifty-two of those creditors, whose debts amounted to £16,000, had signed their consent to the commission being superseded; but *Holcombe never came in under the commission.*

On the 25th of June 1831 Holcombe's solicitors, pursuant, as it was alleged to some previous collusion or understanding between them and the solicitors of the assignees, wrote to the latter, offering, on Holcombe's behalf, to give £400 for the estate on which the annuity was secured. The solicitors of the assignees replied that if Holcombe would increase his offer to £500, they would call a meeting of the creditors and recommend them to accept it. Holcombe's solicitors then wrote another letter offering £450 for the estate: and on the 20th of July the solicitors of the assignees replied that they accepted the offer *subject to confirmation*. On the 26th the assignees advertised for a meeting of the creditors to be held on the 4th of August, for the purpose of assenting to or dissenting from their accepting the offer. Out of fifty-six creditors who had proved under the commission, ten only (whose debts did not amount to £5000) attended the meeting, and six of those ten had, previously, signed a consent to the commission being superseded: and eight or nine of the creditors present signed a resolution for accepting the offer. On the 5th of August the solicitors of the assignees wrote to Holcombe's solicitors as follows:—"As less than one-third in value of the creditors attended the meeting yesterday, it became a question both for vendors and purchasers whether further authority is necessary. When you come this way, favour us with a call. *P.S.—Colonel Lautour is actively negotiating for a supersedeas, and, if he succeed, we suppose he will never confirm the sale to Mr. Holcombe.*"

On the 12th of November 1831 the Plaintiff presented a petition to the Lord Chancellor, praying that his commission might be superseded; and the *assignees* and all the other creditors who had proved (except four) signed the requisition to the Chancellor for the *supersedeas*; and a certificate from the commissioners, stating that they had done so and that there were no unsatisfied claims outstanding on the proceedings, was annexed to the petition. On the 9th of December 1831 (before which time two of the four creditors who did not sign the requisition had been paid their debts) the petition was heard; and his Lordship ordered, "with the view of superseding the said commission and previously to such *supersedeas* issuing," that the Plaintiff should indemnify the assignees from a certain power of attorney and against the contract (*if any*) with Holcombe, and that the indemnity should be settled by the Master; and that the Plaintiff should confirm the sale [78] of his furniture made by the assignees, and pay the debts due to the two unsatisfied creditors, and the costs of the assignees and messenger under the commission, and all the costs of the application; and that, upon the commission being superseded, the *Plaintiff's estate should be transferred to him by the assignees, subject to the contract with Holcombe, if it*

could be enforced; and his Lordship reserved the further consideration of the matters of the *supersedeas*, with liberty for the parties to apply.

On the 20th of the same month Holcombe presented a petition in the bankruptcy stating the before-mentioned order; that the contract for the sale of the estate to him had been approved of at a meeting of the creditors; that, if the estate was sold, it would not produce sufficient to pay what was due to him for the arrears and the repurchase of the annuity; *that the Plaintiff intended, if the commission should be superseded, to refuse to perform the contract*; and that it ought not to be superseded unless the Plaintiff would undertake to concur in carrying the contract into execution; and that he had abstained from proving under the commission on the faith of the contract; and praying that the order of the 9th of December might be discharged and that the commission might not be superseded. Holcombe, however, never brought his petition to a hearing.

On the 18th of January 1832 (at which time the reference to the Master as to the indemnity was pending, and all the creditors who had proved had either consented to the *supersedeas*, or had appeared on the hearing of the petition and been parties to the order made thereon) Holcombe filed a bill in the Exchequer [79] against the assignees, without making the Plaintiff a party for a specific performance of the alleged contract for the sale of the estate, and to restrain the assignees from taking any step with a view to the *supersedeas*. Although the assignees need not have answered the bill before the 20th of March, they, in collusion, as it was alleged, with Holcombe, and in order to promote his fraudulent purposes, and without any notice to or communication with the Plaintiff or his solicitor, filed their answer on the 8th of February; but did not claim the benefit of the Statute of Frauds or make any other objection to the performance of the contract.

The cause was heard on the 2d of June 1832; and no opposition being made on the part of the assignees, a specific performance was decreed; and on the 5th of July the assignees conveyed the estate to Holcombe.

In September 1833 the bill in this cause was filed against Holcombe and his solicitors (one of whom was also the trustee of the term for securing the annuity) and the assignees and their solicitors; and, after stating as above, it alleged that the contract for the sale of the Plaintiff's estate was entered into after it was known, to all the parties thereto, that the Plaintiff was negotiating for and about to obtain the consent of his creditors to a *supersedeas* of the commission, and after it was also known that it was unnecessary to sell any further part of his property; that the contract was entered into by fraud and collusion between Holcombe and his solicitors and the assignees and their solicitors; that the suit and decree in the Exchequer were instituted and obtained by fraud and collusion between the same parties, in consequence of the doubts entertained as to the validity of the contract, and after all the creditors who had then proved [80] had consented to the commission being superseded, and the Plaintiff had become the only person interested in his estate; *that all the creditors who, up to the time of filing the present bill, had proved debts against the Plaintiff's estate had been satisfied or arranged with and had either signed the requisition for, or had appeared by counsel, and consented to a supersedeas of the commission*; that the property comprised in the contract was worth £8000 at the least; that, after the order of the 9th of December 1831, it was not competent to the assignees to dispose of any part of the Plaintiff's property; that, except as a party to the contract, Holcombe had no interest in or under the commission, and had no right to interpose to prevent its being superseded; that, when the order of the 9th of Dec. 1831 was made, Holcombe attempted to be heard by his counsel in opposition thereto, but, by reason of his not having come in and proved any debt under the commission, the Lord Chancellor refused to hear him.

The bill prayed that it might be declared that the £450 was a grossly inadequate price for the estate, and that the contract was entered into by fraud and collusion between the Defendants, and that the decree in the Exchequer was obtained in like manner, and that, upon Holcombe being paid what was due for the arrears and repurchase of the annuity, the trustee of the term might be decreed to reassign the premises comprised therein to the Plaintiff; and that the letters and resolution which were alleged to constitute the contract for the sale of the estate, and the deeds by

which the assignees had conveyed the estate to Holcombe, might be delivered up to the Plaintiff to be cancelled, and that the estate might be reconveyed to him.

[81] Holcombe and his solicitors demurred for want of equity.

Mr. Knight and Mr. James Russell, in support of the demurrer. There is no instance in which an uncertificated bankrupt has been allowed to sue in this Court, and interfere with the administration of his estate. The Court of Bankruptcy has complete jurisdiction over all the dealings by the assignees with the bankrupt's property; and, if they act improperly, that Court will remove them and order new assignees to be chosen. As there is a subsisting commission in this case, if the cause proceeds to a hearing and the Defendants succeed in dismissing the bill, a new bill may be filed against them by a creditor. [THE VICE-CHANCELLOR. The bill alleges that all the creditors have been satisfied.] Although it is stated that the Plaintiff has settled with all the creditors who have proved under the commission, yet there is no allegation that there are not other creditors who may come in and prove. In *Hammond v. Attwood* (1) the commission was alleged to be invalid. That allegation was as good as any that is found here; and yet it was considered not to be sufficient to sustain the bill. The principle upon which that case was decided applies to this.

Sir W. Horne and Mr. Koe, in support of the bill. Before the negotiation for the sale of the estate took place, fifty-six of the creditors had proved debts amounting to £19,000; and fifty-two of those fifty-six, whose debts amounted to £16,000, had consented to the com-[82]-mission being superseded. The assignees also consented (2) and signed the requisition for the *supersedeas*. This negotiation, carried on without the knowledge of the bankrupt, after what had taken place, was a gross fraud on him. Ten only of the creditors (which was not a third of those that had proved) attended the meeting held on the 4th of August; and six of those ten had consented to the commission being superseded. On the following day the solicitors of the assignees wrote a letter to Holcombe's solicitors, in which there was the following postscript: "Colonel Lautour is actively negotiating for a *supersedeas*, and, if he succeed, we suppose he will never confirm the sale to Mr. Holcombe." This was a letter written by the solicitors to the assignees, whose duty it was to protect the bankrupt's interest. In November 1831 the Plaintiff presented a petition for a *supersedeas*, which was accompanied by a certificate from the commissioners, by which it appeared that the assignees and all the other creditors, except four, had signed the requisition to the Lord Chancellor. On the 9th of December 1831 (before which time two of the four creditors had been paid) the petition was heard; and the two remaining creditors appeared by their counsel on the hearing of the petition. The language of the order made on that occasion shews, most clearly, that the Lord Chancellor considered that the Plaintiff would be entitled to have the commission superseded on his giving the indemnity and doing the other acts therein prescribed. It was merely preliminary to the issuing of the *supersedeas*: and was tantamount to an injunction restraining the assignees from proceeding to [83] carry the contract into effect. The direction, that the Plaintiff should give an indemnity to the assignees, was equivalent to a declaration that he was to be considered no longer as a bankrupt, but, for the future, as a solvent man, who had rights to defend and preserve; and on the commission being superseded, the assignees were ordered to transfer the estate to him, subject to the contract with Holcombe, if it could be carried into effect. Holcombe then presented a petition alleging that the Plaintiff intended if the commission should be superseded to refuse to perform the contract, and insisting that it ought not to be superseded, unless he would concur in carrying the contract into execution. Holcombe, however, abandoned his petition. After the order of the 9th of December had been pronounced, it was the duty of the assignees to insist that the Plaintiff should be made a party to any bill that might be filed against them. They, however, by a manifest

(1) 3 Madd. 158. See *Kaye v. Fosbrooke*, ante, p. 28, and the cases there cited in support of the demurrer.

(2) It appeared on referring to the proceedings in the bankruptcy, but it was not so stated in the bill, that two of the assignees signed the consent in March, and another in September 1831.

collusion with Holcombe, permitted him to file a bill against them for a specific performance of the contract, without making the Plaintiff a party to it. They put in their answer without any communication with the Plaintiff, and as they made no defence, Holcombe obtained a decree for a specific performance.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill represents that all the creditors who have proved debts against the Plaintiff's estate under the commission have been satisfied or arranged with, and have either signed the requisition for the *supersedeas*, or have consented to its issuing. Then all the creditors having been settled with, and the commission not being superseded, it does not appear to me that it is possible for the Plaintiff, by petition to the Court of Review, to get relief. Where the bankrupt is the only person interested [84] in the property, can that Court order a person who has not come in under the commission to give up and reconvey an estate which he has purchased? What original jurisdiction has the Court of Bankruptcy to interfere with a person who has never submitted to the commission? It is clearly stated that all the creditors have been settled with, and have consented to the commission being superseded, and therefore there is no person interested except the bankrupt; and the Court of Bankruptcy has no jurisdiction over Mr. Holcombe.

The bill represents a case of gross and abominable fraud; for it is a case in which a Court of Equity has been made an instrument of the fraud that has been perpetrated. The Plaintiff alleges that none of the creditors who have proved have any interest in the subject: and he files his bill in order to be relieved against the fraud. It has been said that the Plaintiff may have relief in bankruptcy. But that is not the case; for that jurisdiction has no power over Holcombe or any of the other persons who are named as Defendants on this record, except the assignees, as those other persons have not submitted to the commission.

Demurrer overruled.

[85] HUGHES v. WYNNE. June 9, 1836.

[S. C. affirmed, 1 Jur. 720.]

Vendor and Purchaser.

Where title-deeds are in the hands of persons residing in different parts of the country, the vendor must bear the expense of the purchaser sending a clerk to compare the abstract with the deeds.

Motion by the purchaser of lots six and seven of the estates sold under the decree in this cause for liberty to pay his purchase-money into Court, after deducting the amount of the costs, charges and expenses incurred by him in procuring the abstract to be examined with some of the title-deeds which were in the hands of different persons residing in distant parts of the country.

The purchaser's solicitor had sent one of his clerks to those persons, for the purpose of comparing the abstract with the title-deeds in their possession; and the question was whether the purchaser was entitled to be allowed the costs of having so done.

Mr. Knight and Mr. Bethell, in support of the motion.

Mr. Wakefield and Mr. Girdlestone, jun., *contrà*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot but think, in the absence of any decision to the contrary, that the vendor must be at the expense of the purchaser's solicitor going from place to place to compare the abstract with the deeds; and that he is not bound to send the abstract to an agent in a country town in order that he may compare the abstract with the deeds.

[86] BAINBRIDGE v. SMITH. June 11, 1836.

Power. Appointment.

A power was required to be exercised by a writing under the hand and seal of the donee, attested by two witnesses, or by will signed, sealed and executed in the presence of and attested by three witnesses. Held, that a *will* under the hand and seal of the donee, but attested by two witnesses only, was not a good execution of the power.

Power was given to the testatrix in the cause to dispose of a freehold estate, *by any writing* under her hand and seal, attested by two or more witnesses, or by her last will and testament in writing, to be by her signed, sealed and executed in the presence of and attested by three or more witnesses. She professed to exercise the power by her will, which was signed and sealed by her, but was attested by two witnesses only. The question was whether the power was well exercised.

THE VICE-CHANCELLOR said that the donor of the power had himself drawn the distinction between writings that were testamentary and writings that were not testamentary; and had required the former to be attested by three witnesses, and the latter by two only; that the instrument in question was testamentary in its nature, but was attested by two witnesses only, and, consequently, that it was not a good exercise of the power.

Mr. Knight, Mr. Wigram, Mr. Jacob, Mr. Keene, Mr. Anderdon and Mr. Bird appeared for the different parties.

[87] SPENCER v. SPENCER. June 25, 1836.

[S. C. 5 L. J. Ch. (N. S.) 310. See *Peacocke v. Pares*, 1838, 2 Keen, 701; 48 E. R. 799; *Reid v. Hoare*, 1884, 26 Ch. D. 367; *Domville v. Winnington*, 1884, 26 Ch. D. 387.]

Settlement. Construction. Portions.

By a marriage settlement estates were limited in strict settlement, subject to a term for raising £15,000 for the portions of all the children of the marriage (*except an eldest or only son*), and to be vested and paid at such times as the husband should appoint, and, in default of appointment, to vest at 21, but not to be paid till after the husband's death: provided that if any son should become an eldest or only son before the time appointed *for payment* of his portion, then and in default of any such appointment, his share should go to the other children. There was issue of the marriage two sons and three daughters. The eldest son attained 21, and, together with his father, suffered a recovery of the estates to the use of the father for life, remainder in himself in fee. After all the younger children had attained 21, the eldest son died intestate and without issue, whereupon the reversion in fee of the estates descended to the other son. Afterwards the father appointed the £15,000 amongst that son and the three daughters, and directed that the shares should vest immediately, but should not be paid till after his death. The second son died before the father. Held, that the share of the £15,000 appointed to him did not go over to his sisters, but belonged to his estate.

By indentures of the 4th and 5th of February 1790 (being the settlement on the marriage of John Spencer, Esq., the eldest son of Lord Charles Spencer, with Lady Elizabeth, the second daughter of George Duke of Marlborough), Lord Charles Spencer and John Spencer conveyed certain manors, &c., to John Archbishop of Canterbury and Lord Robert Spencer for 500 years, to commence from the solemnization of the marriage, upon the trusts after mentioned, and, subject thereto, to Lord Charles Spencer for life, with remainder to John Spencer for life, with remainders to

the first and other sons of the marriage in tail male, with divers remainders over. The trusts of the term were declared as follows:—

“That in case there shall be any child or children of the body of the said John Spencer on the body of the said Lady Elizabeth Spencer begotten, be such child or children a son or sons, or a daughter or daughters, or be there both sons and daughters among them, then that they, the said John Lord Archbishop of Canterbury and [88] Lord Robert Spencer, do and shall, after the decease of the survivor of them, the said Lord Charles Spencer and John Spencer, or during the lives or life of them or the longer liver of them, in case they or the survivor of them shall so direct, levy and raise such sum and sums of money for the portion or portions of all and every such child and children as aforesaid (*other than and except an eldest son or only son*), as hereinafter is and are mentioned (that is to say), if there shall be but one such child, not being an eldest or only son, be such child a son or a daughter, the full sum of £10,000 for the portion of such one child, to be paid to him or her at such age, day or time as the said John Spencer, by any deed or deeds, instrument or instruments in writing, with or without power of revocation, to be by him sealed and delivered in the presence of and attested by two or more credible witnesses, or by his last will and testament in writing, &c., shall direct or appoint, and, for want of such direction or appointment, to be paid to such child, being a son, at his age of 21 years, or to such child, being a daughter, at her age of 21 years, or on the day of her marriage, which shall first happen after the decease of the survivor of them, the said Lord Charles Spencer and John Spencer, or during the lives or life of the longer liver of them, in case they, the said Lord Charles Spencer and John Spencer or the survivor of them, shall, by any such deed or writing, to be sealed and delivered by them or him and attested as aforesaid, signify their or his consent and direction for that purpose: and in case there shall be two or more such children (*not being any of them an eldest or only son*), be such children sons or daughters, or be there both sons and daughters among them, then the sum of £15,000 for the portions of such two or more children, to go and be paid to, or shared and divided between or [89] among such two or more children, in such parts, shares and proportions, and in such manner and form, and to vest and become transmissible, and to be paid and payable at such respective ages, days or times, and subject to such provisos, conditions and limitations over (such limitations over to be for the benefit of some or one of them except an eldest or only son), as the said John Spencer, at any time or times during his life, by any deed or deeds, instrument or instruments in writing, with or without power or revocation, to be sealed and delivered by him in the presence of and attested by two or more credible witnesses, or by his last will and testament, &c., shall limit, direct or appoint; and, in default of any such direction, limitation or appointment, then the said sum of £15,000 to go and be equally shared and divided between or among all such children (except as aforesaid) in equal shares and proportions, the share or shares of such of them as shall be a son or sons to be paid to him or them respectively at his or their age or respective ages of 21 years, and the share and shares of such of the said children as shall be a daughter or daughters to be paid to her or them respectively at her or their age or respective ages of 21 years, or on the day or days of her or their marriage or respective marriages, which shall first happen after the decease of the survivor of them, the said Lord Charles Spencer and John Spencer; but it is hereby declared that if, in case of such default of limitation, direction or appointment as aforesaid, it shall happen that any such child or children, being a son or sons, shall attain his or their age or respective ages of 21 years, or, being a daughter or daughters, shall attain her or their said age or respective ages of 21 years, or shall be married during the lives of the said Lord Charles Spencer and John Spencer, or in the lifetime of either of [90] them, then and from thenceforth all and every the right and rights of such son and sons so attaining the said age of 21 years, and of such daughter or daughters so attaining the said age of 21 years or marrying as aforesaid, in and to the said respective portions, shall be considered as a vested interest or vested interests in him, her or them respectively, and shall be transmissible to his, her or their respective executors or administrators, yet so, nevertheless, as that the payment of the same portion and portions shall be postponed to the end of six calendar months next after the decease of the survivor of them, the

said Lord Charles Spencer and John Spencer, and then the said portion and portions shall be paid and payable with lawful interest for the same from the time of the decease of the survivor of them, the said Lord Charles Spencer and John Spencer, unless such portion or portions shall be raised and paid during the lives or life of the said Lord Charles Spencer and John Spencer or of the survivor of them, which it shall be lawful for the said John Lord Archbishop of Canterbury and Lord Robert Spencer to levy and raise accordingly, in case the said Lord Charles Spencer and John Spencer or the survivor of them shall so direct.

“Provided always that if any such child, being a daughter, shall die before she shall attain the age of 21 years or be married, or being a son shall depart this life or *become an eldest or only son* before he shall attain his age of 21 years, or *before such other time or times as shall or may be appointed in manner aforesaid for the payment of his, her or their portion or portions, then, and in default of any such limitation, direction or appointment as aforesaid,* the portion or sum of money hereby provided for each such daughter so dying, and [91] for each such son so dying or becoming an eldest or only son (other than and except what shall or may actually have been raised for or for the advancement or benefit of such child or children as hereinafter is mentioned) shall, from time to time, go and accrue to the survivors or survivor or others or other of them (except an eldest or only son) if more than one, share and share alike, and the same shall be paid and payable at such respective ages, days and times, and shall go in the same manner to such surviving and other child and children then in being, as is hereby provided and declared, or as shall be appointed as aforesaid touching his, her or their original portion or portions; and in case of the death of any other or others of the said children, or if any other such son shall become an eldest or only son before he, she or they shall have attained such age or respective ages, or before such time or times as shall or may be appointed as aforesaid, then all and every such accruing or surviving share or shares, then unraised or unpaid, of and in the said portions and sums of money hereby provided for such child or children so dying, or for such son so becoming an eldest or only son shall, from time to time, again be subject and liable to such further right or condition of accruer or survivorship to the survivors or survivor and others or other of the said children as hereinbefore is declared touching his, her or their original portion or portions.

“Provided nevertheless that in case there shall be no such child or children as is or are hereinbefore mentioned to be intended to have or to be provided with a portion or portions as aforesaid, or there being any such child or children, in case all of them shall happen to die before any of them, being a daughter or daughters, shall attain the age of 21 years or be married, or [92] before any of them, being a son or sons, shall attain the age of 21 years, or before such other age or ages, days or times as shall or may be appointed *for the payment* of his, her or their portion or portions respectively as aforesaid, and in case all and every the trusts hereby declared as aforesaid of and concerning the said term of 500 years shall be fully performed, or become incapable of being performed, then and from thenceforth the said term of 500 years shall cease and determine.”

There was issue of the marriage two sons, namely, George John Spencer the eldest, and Frederick Charles Spencer the second son, and three daughters. Lady Elizabeth Spencer died in December 1812. George John Spencer attained 21 on the 20th of December 1813, and by indentures of the 27th and 28th of that month and a recovery he, together with Lord Charles Spencer and John Spencer, limited part of those estates to such uses as Lord Charles Spencer, John Spencer and George John Spencer should jointly appoint, and, in default thereof, as the survivor of Lord Charles Spencer and John Spencer, together with George John Spencer, should jointly appoint, and, in default thereof, to the use of trustees for 99 years, for securing to George John Spencer an annuity of £400 during the joint lives of Lord Charles Spencer, John Spencer and George John Spencer, and during the joint lives of the survivor of Lord Charles Spencer and John Spencer and George John Spencer, and, subject thereto, to Lord Charles Spencer, John Spencer and George John Spencer for their lives successively, with remainders to the first and other sons of George John Spencer in tail male, with remainder to the heirs of his body, with remainder to him in fee. And the rest of the settled estates were in like manner limited to such uses

as Lord Charles Spencer and John Spencer [93] should jointly appoint, and, in default thereof, then as the survivor of them should appoint, and, in default thereof, to the uses thereinbefore declared of the other parts of the settled estates.

In June 1820 Lord Charles Spencer died. In August 1820 George John Spencer died intestate and unmarried, leaving his brother, Frederick Charles Spencer (who then became the only son of John and Lady Elizabeth Spencer), his heir at law, and, consequently, the reversion in fee of the estates thereupon became vested in F. C. Spencer under the limitations in the deed of the 28th of December 1813; but subject to several incumbrances created under the powers given by that deed. Frederick Charles Spencer and his three sisters attained 21 in the lifetime of their brother George John Spencer.

By a deed-poll, dated the 5th of February 1823, under the hand and seal of John Spencer and attested by two witnesses, after reciting the settlement, John Spencer, in exercise of the power thereby given to him for that purpose, appointed that the trustees of the term of 500 years should, forthwith after his decease, raise the sum of £15,000, and should stand possessed thereof in trust for Frederick Charles Spencer and his three sisters equally, as tenants in common, *and to be paid forthwith after the decease of him John Spencer*, but to be vested interests in them immediately on the execution of the deed-poll.

In October 1831 Frederick Charles Spencer died intestate, and on the 17th of December in the same year John Spencer died.

The question on the hearing of a petition in the cause presented by the widow and administratrix of Frederick [94] Charles Spencer was whether one-fourth of the £15,000 belonged to Frederick Charles Spencer's estate or whether his three sisters were entitled to the whole of that sum, in consequence of his having become the only son of the marriage.

Mr. Barber, Mr. Jacob and Mr. Jervis, in support of the petition. Although Frederick Charles Spencer did, in fact, become the eldest or only son of the marriage, he did not become entitled to the estates *under the settlement*, but under the recovery, owing to the accident of his brother dying intestate and without issue. Nor did he take the same estate as he would have done under the settlement; for he did not acquire an estate in tail male, but an estate in fee; and *that*, too, subject to heavy incumbrances which eat up nearly the whole income of the property; he got only that portion of the estates that his elder brother thought proper to allow to devolve upon him. *Beale v. Beale* (1 P. W. 244), *Lord Teynham v. Webb*, *Duke v. Doidge* (2 Vez. 198; *Ibid.* 203, note), *Windham v. Graham* (1 Russ. 331), *Leake v. Leake* (10 Ves. 477).

F. C. Spencer's share of the £15,000 was indefeasibly vested in him either under the settlement or under the deed-poll of 1823. *Butler v. Duncomb* (1 P. W. 448), *Perfect v. Lord Curzon* (5 Madd. 442).

[THE VICE-CHANCELLOR. There is no question, I apprehend, as to the vesting of the portion. It vested under the appointment of 1823.]

[95] Mr. James Russell, for the sisters of F. C. Spencer. When we look at the settlement we find that a term is vested in trustees in trust after the decease of the survivor of Lord Charles Spencer and John Spencer, or in their lifetimes, if they should so direct, to raise a sum of money for the portions of all the children of the marriage, other than and except an eldest or only son. An eldest or only son is, throughout, excepted from the benefit of the provision. The money is to be raised for a class of children who shall answer a particular description *at the time when it is raised*. The time at which the shares are to vest is to be in the discretion of the father; but if he gives no direction upon that subject, then they are to vest in sons at 21 and in daughters at 21 or marriage. Then comes this clause:—"Provided always that if any such child, being a daughter, shall die before she shall attain the age of 21 years or be married, or, being a son, shall depart this life or become an eldest or only son before he shall attain his age of 21 years, or before such other time or times as shall or may be appointed in manner aforesaid *for the payment* of his, her or their portion or portions." Now that event did take place; for Frederick Charles Spencer had become an only son before the time appointed for the payment of his portion. [THE VICE-CHANCELLOR. Supposing that the appointment to Frederick Charles Spencer was valid, could there then be any survivorship? According to my

understanding of the clause the survivorship was to take effect only in case there was no direction as to the time when the shares were to vest.] The clause provides that if any child who should have a share appointed to it should die or become an eldest or only son before the time of payment, the share should go over, unless the father should provide for the event of the child so dying or becoming an eldest or only [96] son. [THE VICE-CHANCELLOR. The clause contemplates two things; an appointment simply, and an appointment that would exclude survivorship. If the father appoints the time when the shares are to vest, survivorship is excluded; for *that* is to take effect only in case there is no such appointment. The father might either simply name the children and the shares which they were to take, or he might declare that there should be no survivorship, by directing at what time the shares should vest.] The question mainly turns on this: whether F. C. Spencer was within the class of children for whom portions were provided, or, in other words, whether, as he had become the only son of the marriage, he was capable of being an appointee of a share of the £15,000. The case of *Windham v. Graham* was decided on this ground, namely, that there it was provided that if any son died or became an eldest or only son *during his minority* he should be excluded from a portion. The Master of the Rolls, however, in his judgment in that case, acknowledged the general rule that, where provisions are made for younger children to the exclusion of an eldest son, and a younger son becomes an elder son before the time of vesting, or, according to some of the authorities, before the time of distribution, he is to be excluded. There is no case that decides that in order to exclude the son he must take the estate under the settlement. The phrase used in this settlement is not "eldest son" simply, but "eldest or only son;" nor are the words "becoming entitled as aforesaid" used. *Savage v. Carroll* (1 Ball. & Bea. 265). No substantial distinction can be established between that case and this. It decides that the son, in order to become entitled to a portion, must continue to fill the character of a younger child until the por-[97]-tion is payable to him. In *Matthews v. Paul* (3 Swans. 328; see 340) the Master of the Rolls says: "It is not necessary to refer to former cases, some of which have proceeded much further than this, as *Chadwick v. Doleman* (2 Vern. 528), an excessively strong case; for there, though an appointment had been in favour of an individual by name, that individual, having become an eldest son, was excluded; the Lord Keeper declaring that the appointment was upon a tacit or implied condition of not becoming the eldest son." In *Chadwick v. Doleman* the portions vested in every child as it came into *esse*; but here they would not vest until the sons attained 21 and the daughters attained that age or married. In *Savage v. Carroll*, *Matthews v. Paul* and *Chadwick v. Doleman*, the son who was excluded took nothing under the settlement, nor is there any allusion to the necessity of his taking anything under it. The case of *Duke v. Doidge* has no application; for there the power was given to raise portions for *all* the children; and it was held that an individual, who had been always an eldest son, was entitled to a portion.

The settlement provides that in case all the younger children should die before any of them, being daughters, should attain 21 or be married, or being sons, should attain 21, or before such ages, days or times as should be appointed for payment of their portions, then the term should cease. Here, therefore, there is an express proviso that, if all the children should die before the day of payment, then nothing should be raised. Suppose that all the children had died, and that Frederick Charles Spencer had been the survivor, and he had died before the day of payment, could his representatives have said that they were entitled to have the [98] money raised? That would be contrary to the tenor and express language of the settlement.

We submit, therefore, that the three ladies are entitled to the whole £15,000, on the ground that F. C. Spencer had ceased to be an object of the power, and if not, then that they are entitled to it under the clause of survivorship.

THE VICE-CHANCELLOR [Sir L. Shadwell], after stating the limitations of the settlement and the trusts of the term of 500 years, proceeded thus:—It is apparent on the face of the settlement, that the persons intended to take the portions were such of the children as should be other than an eldest or only son; and that the amount of the portion which each child was to take, and the time at which it was to vest and be paid, was to be subject to the appointment of Mr. John

Spencer, the father; and he was also to have the power of declaring whether the portions should vest in the children absolutely, or should be subject to any provisos, conditions or limitations over for the benefit of one or more of the other children for whom the portions were intended to be provided. Then follows the clause of survivorship. [His Honor here read the clause.] There were five children of the marriage; two sons and three daughters. In 1813 George John Spencer, the eldest son, attained 21; and, by lease and release and a recovery, he barred the estate tail and the remainders over; and such a disposition was made of the estates that they were incumbered to a considerable extent. In August 1820 George John Spencer died intestate and without issue, leaving his brother, Frederick Charles Spencer (who, as well as his sisters, [99] had then attained 21), his heir at law; and, upon the death of George John Spencer, the reversion in fee of the estates descended to Frederick Charles Spencer. In February 1823 Mr. John Spencer, the father, made an appointment in exercise of the power in the settlement to which I have before adverted; and the question is whether that was a good appointment, *modo et formâ*, as it appears.

The father considered that the four surviving children were the objects of the power; and he made an appointment of the £15,000 to them, equally, as tenants in common; and directed that their shares should be paid forthwith after his decease, but should be vested interests in them immediately on the execution of the deed.

It is plain that Frederick Charles Spencer must be taken not to have been "an eldest or only son" in the sense in which those words are used in this settlement. What the parties meant was that a child who should take the estate by virtue of the limitations of the settlement, should not have a portion, but that all the other children should have portions. It is established, by a series of cases that, in deciding on questions like the present, you are to look at the instrument itself and see what the real meaning of the parties was. There are several cases in which a daughter, who was the eldest child of the marriage, has been considered to be entitled to a share of a fund provided for the portions of the younger children.

If the construction which I think ought to be put upon this settlement is the true one, then it was competent to Mr. John Spencer to appoint the £15,000 to [100] Frederick Charles Spencer and his three sisters; and the only question that remains is whether, in consequence of Frederick Charles Spencer having died in the lifetime of his father, that is, before the time appointed for payment of his portion, the clause of survivorship operated upon it.

When we look at the deed by which the appointment was made, we find that the father has not only appointed what share each child should take, but has named the time at which the shares should vest, namely, immediately on the execution of the deed. The consequence is that there can be no survivorship, but I must make an order according to the prayer of the petition.

[100] TAYLOR v. BACON. June 28, 1836.

Will. Construction. Vesting.

Testator gave £1500 to trustees and directed them to pay the interest to his son's wife, for the benefit of his son, herself and children, during his son's life, and, after his son's decease, the £1500 was still to remain in trust for the benefit of the wife and children for her life, and, at her death, to be divided equally among the children, if they should have attained 21, but if any of them were minors, their shares were to be held in trust for them till they were 21, and the interest was, in the meantime, to be applied for their maintenance; but should the wife marry again, the children were then to receive their shares as they attained 21. Held, that the wife was a trustee of the interest for herself, her husband and children, and that the shares of the children in the principal did not vest in them until they attained 21.

Daniel Taylor made a codicil to his will in the following words:—"I revoke that part of my will which bequeaths the sum of £500 to my son George Bridges Taylor,

and now desire that, in lien thereof, the sum of £1500 sterling be invested in the public funds, and held in trust by the same trustees, John Bacon, [101] Edward Norton Thornton and William Phillips, already named in the foregoing will, the dividends arising from which to be paid to Rebecca, wife of my son George Bridges Taylor, for the benefit of my son George, of herself and of their children, during my son George's life, and, after his decease, the said £1500 still to remain in trust for the benefit of his wife Rebecca and her children during her lifetime, if she should remain a widow, and then, at her decease, to be divided equally among all her children by my son George if they shall have attained the age of 21 years; but, should any of them still be minors, the share of such child or children to be held in trust for them till 21 years of age, when the principal shall be paid to them, the dividends on their shares being applied by the trustees to their maintenance while minors, and, in the event of my said daughter-in-law Rebecca marrying again, her children by my son George are then to receive their separate portions hereby devised, as they attain 21 years, although their mother be living; and I desire and direct that, after the decease of my dear wife Susannah Taylor, a further sum of £1000 sterling be vested and added to the stock purchased with the above-named £1500, and held in trust for my said son George, his wife and children, subject to the same conditions, provisions and afore-named directions of this codicil, in every respect, as that £1500 first invested; and, should my son George survive his wife Rebecca, the afore-named dividends to be paid to him for himself and children."

The testator died in April 1827, leaving all the persons named in the codicil him surviving; and George Bridges Taylor and Rebecca his wife had two sons and three daughters then living. In December 1827 Rebecca Taylor died. In January 1834 one of the daugh-[102]-ters died an infant, intestate and unmarried. Both the sons attained 21; but, in February 1835, one of them died intestate and unmarried; and, in March following, Susannah Taylor, the testator's widow, died. George Bridges Taylor took out administration to his two deceased children.

The bill was filed by the two surviving daughters, one of whom was still under age, alleging that the interests of the two deceased children in the £1500 and £1000 had ceased by their deaths in the lifetime of George Bridges Taylor, and praying that the £1000 might be paid into Court and invested; and that, during the life of George Bridges Taylor, one-fourth of the dividends of the stock to be purchased therewith, and of the stock in which the £1500 had been invested under a previous order, might be paid to the adult Plaintiff, and that another fourth might be applied for the use of the infant Plaintiff, and that the remaining two-fourths might be applied as the Court should direct, having regard to the rights of George Bridges Taylor and of two of the Defendants who claimed under assignments made by him and his surviving son.

Sir W. Horne and Mr. O. Anderdon, for the Plaintiffs, said that the testator intended that the trustees should hand over the dividends of the two funds to Mrs. Taylor, and that she should distribute them amongst herself, her husband and children equally; (1) and that, if she died in her husband's lifetime, he should receive the dividends and divide them equally amongst himself and [103] his children; and that, as Mrs. Taylor and two of her children were dead, the number of parties interested was reduced to four, and consequently the dividends were now divisible into four parts.

Mr. G. Richards and Mr. Wood, for the Defendants George Bridges Taylor and his assignee, said that the same construction applied to the £1000 as to the £1500; that this case could not be distinguished from *Robinson v. Tickell* (8 Ves. 142); in which a fund was given to the testatrix's niece for her and her children's use, and it was held that the niece was entitled to the whole of the fund; that G. B. Taylor was, at all events, entitled to the shares of the children that had died; for they took vested interests; *Wadley v. North* (3 Ves. 364); and more especially as there was a gift of

(1) An order had been made by the Master of the Rolls after Mrs. Taylor's death, which recognised the right of the children to share the dividends of the £1500 equally with their father.

the dividends for the maintenance of the children, which was always considered as strong evidence of the testator's intention that their interests should be vested.

Mr. Walker, for the assignee of the deceased son, contended that the children did not take vested interests in the capital of the legacies until they attained 21, as there was no gift to them except in the direction for payment.

Mr. Bacon appeared for another Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The codicil in this case does not resemble the will in *Robinson v. Tickell*. It is clear that the testator must be taken to have intended that Rebecca Taylor, during her life, should be a trustee of the £1500 for herself, [104] her husband and her children; and it cannot be reasonably supposed that the testator meant that, after her death, her husband and children should take, as between themselves, in a different manner from what they had done in her lifetime. If that be so, there is an end of the doctrine laid down in *Robinson v. Tickell*.

The Master of the Rolls has, to a certain extent, put a construction on the language of this codicil; and, so far as that construction goes, I am bound by it. Two of the children are dead. One of them, who is represented by the father, attained 21; but the other died under 21. And as I think that, according to the true construction of the words of the codicil, there is no gift to any of the children except those who attain 21, one-fourth of the principal and interest of the £1500 belongs to the father; and two other fourths belong to the two surviving children who have attained 21.

Taking the whole of the codicil together, I am of opinion that the testator intended that the £1000 should go in the same manner as the £1500; and consequently the shares of the father and of the two children who have attained 21, in both sums, may be paid out to them or to those who claim under them; but the remaining share must continue in Court, and the interest of it must be applied for the maintenance of the infant child.

The costs of the father and children must be paid out of the fund; but the costs of the assignees must be borne by the shares assigned to them.

[105] CLUTTON v. FLEMING. July 18, 19, 1836.

Covenant. Construction. Landlord and Tenant.

A., a lessee under a dean and chapter, for 21 years renewable under every seven, under-let to B., and covenanted, within two months after the dean and chapter should have renewed the lease under which he then held, to execute to B. a lease for such further terms as would make up a certain term of which 24 years were then unexpired; B. from time to time surrendering his then subsisting lease, and paying, upon every such renewal, such a proportion of the fine which A. should have paid to the dean and chapter on renewing the lease or leases under which he should hold the premises, as should have been imposed on account of any new buildings erected, or to be erected by B. upon the premises. Held, that B. was not bound to contribute to the fine paid on any renewal subsequent to that which first enabled A. to make up the term agreed to be granted.

Henry Penton, being tenant of certain lands at Newington in Surrey, under a lease granted to him by the Dean and Chapter of Canterbury for 21 years, renewable at the end of every seven, by an indenture, dated the 8th of June 1779, demised the premises to Thomas Clutton for 21 years from the 29th of September 1778, and covenanted, with Clutton, "that he, the said Henry Penton, his executors, &c., shall and will, at the request, costs and charges of the said Thomas Clutton, his executors, &c., within two months next after the Dean and Chapter of Canterbury, or their successors, shall have renewed the lease by virtue whereof the said Henry Penton now holds the premises hereby demised, make and execute, unto the said Thomas Clutton, his executors, &c., a new lease of the premises hereby demised for a further term of 21 years, to be computed from the commencement of such renewed lease, and

so, from time to time, within two months next after every renewal by the said dean and chapter, or their successors, of the lease or leases by virtue whereof he, the said H. Penton, his executors, &c., shall or may hold the premises hereby demised, until the full term of 61 years, to be computed from the said 29th day of September last past, shall have been granted, he the said T. Clutton, his executors, &c., [106] from time to time surrendering, unto the said Henry Penton, his executors, &c., the then subsisting lease, and paying, upon every such renewal, unto the said Henry Penton, his executors, &c., such a proportion of the fine and fines which he, the said H. Penton, his executors, &c., shall have paid unto the said dean and chapter, or their successors, on renewing the lease or leases by virtue whereof he, the said H. Penton, his executors, &c., shall hold the premises hereby demised, as, in the judgment of two indifferent persons, one to be named by the said H. Penton, his executors, &c., and the other by the said T. Clutton, his executors, &c., shall be deemed to have been set and imposed upon the said H. Penton, his executors, &c., by the said dean and chapter, or their successors, for, or in respect, or on account of any new buildings or improvements which, at any time or times hereafter, shall have been erected, built or made by the said T. Clutton, his executors, &c., in or upon the premises hereby demised, or in or upon any part or parcel thereof."

In 1788 Penton assigned his interest in the premises to T. and S. Brandon. In 1791 T. Clutton died. In 1813, at which time T. Brandon was dead, the dean and chapter renewed the lease of the premises to S. Brandon and to J. Carter, the executor of T. Brandon.

By an indenture, dated the 15th of August 1815 (up to which time Clutton's lease had never been renewed), Brandon and Carter, in pursuance of the covenant in that lease, renewed the same to W. Clutton, the executor of T. Clutton, for 21 years from the 24th of June 1813, wanting two days; and they covenanted with him "that they, their respective heirs, &c., shall and [107] will, at the request, costs and charges of the said W. Clutton, his executors, &c., within two months next after the Dean and Chapter of Canterbury, or their successors, shall have renewed the lease by virtue whereof the said S. Brandon and John Carter now hold the said premises hereby demised or granted for the said term of 21 years, wanting two days, make and execute, unto the said William Clutton, his executors, &c., a new lease of the said premises hereby demised for such further term as will make up the full term of 61 years, to be computed from the said 29th of September 1778, he, the said W. Clutton, his executors, &c., from time to time surrendering, unto the said S. Brandon and J. Carter, their executors, &c., the then subsisting lease, and paying, upon every such renewal, unto the said S. Brandon and J. Carter, their executors, &c., such a proportion of the fine and fines which they, the said S. Brandon and J. Carter, or either of them, their or either of their executors, &c., shall have paid unto the said Dean and Chapter of Canterbury, or their successors, on their renewing the lease or leases by virtue whereof they, the said S. Brandon and J. Carter, their executors, &c., shall hold the premises hereby demised or any part thereof, as, in the judgment of two indifferent persons, one to be named by the said S. Brandon and J. Carter, their executors, &c., and the other by the said W. Clutton, his executors, &c., shall be deemed to have been set and imposed upon the said S. Brandon and J. Carter, their executors, &c., by the said dean and chapter, or their successors, for or in respect or on account of any new buildings or improvements which, at any time or times heretofore, shall have been erected, built or made by the said Thomas Clutton, his executors, &c., or which, at any time or times hereafter, shall have been erected, built or made by the said W. Clutton, his [108] executors, &c., in or upon the premises hereby demised, or in or upon any part or parcel thereof."

As the term of 61 years would expire on the 29th of September 1839, and the term granted by the lease of August 1815 would endure until the 22d of June 1834, five years and a quarter and two days only would have been wanting, at the end of that term, to complete the 61 years; and, consequently, if Brandon and Carter had renewed their lease in 1820, which was the regular time, they would then have been enabled to make up to Clutton the full term of 61 years. They did not, however, renew until 1826, when they took a lease for 16 years from Midsummer 1825: and, in 1827, they again renewed for 21 years from Midsummer in that year; and, in 1834, they took another renewal.

The object of the bill was to compel the Defendants, who claimed under Brandon and Carter, to execute to the Plaintiff a new lease of the premises, for such further term as would make up the full term of 61 years from the 29th of September 1778.

The question was whether, under the covenant in the lease of 1815, the Plaintiff was entitled to have the further term granted to him on paying to the Defendants a proportion of the fine paid to the dean and chapter on the renewal in 1826 only, or whether he ought also to pay to the Defendants a proportion of the fines paid on the renewals in 1827 and 1834.

Mr. Knight and Mr. G. Richards, for the Plaintiff. The renewed lease taken in 1826 will endure until 1841, which is longer than is requisite to satisfy Clutton's [109] interest. It is contrary to the meaning of the covenant in the deed of 1815 that Clutton should contribute to the fines paid on taking renewed terms, during a great part of which he would have no interest in the premises. He is not to contribute to any renewal beyond what would be sufficient to satisfy his interest, which will expire in 1839. There is, therefore, no pretence for charging him with any part of the fine paid on any renewal after 1826. In the covenant in the deed of 1815 there is a cautious departure from the language of the covenant in the deed of 1779: there is nothing, in the former covenant, importing a repetition of renewal. The words "shall or may hold," which are used in the covenant of 1779, do not occur in the latter, but the words "now hold" are substituted for them. Again, the words: "And so, from time to time, within two months next after every renewal by the said dean and chapter, or their successors, of the lease or leases," &c., which are found in the covenant of 1779, are omitted in the covenant of 1815: the words of that covenant provide for one renewal, and for one only. It would be absurd to suppose that it was the intention of the parties that Brandon and Carter should be benefited at the expense of Clutton. *Charlton v. Driver* (5 Moore, 59, and 2 Brod. & Bing. 345).

Mr. Jacob and Mr. Koe, for the Defendants the representatives of Brandon and Carter. The case of *Rubery v. Jervoise* (1 T. R. 229) decides that, if a lessee does not apply in time for his first renewal, he is not entitled to a second. Here no renewal of the under-lease was applied for until 1815, and, therefore, [110] Clutton could not have compelled Brandon and Carter to grant him the lease of 1815 if they had not chosen to do so.

Clutton knew that Brandon and Carter were bound to renew and pay a fine every seven years: and, according to the covenant in the lease of 1815, he ought to have applied for a renewal of his lease within two months after the renewal by the dean and chapter in 1826. But since 1815 there has been no renewal of his lease; and, therefore, he has forfeited the benefit of his covenant at law. We admit, however, that this Court will relieve him from the forfeiture, if the parties can be put in the same situation as if the application for the renewal had been made in due time, that is to say, upon the terms of his paying principal, interest and the costs of this suit. Then, what are the sums that he is to pay? We contend that, during the whole of the 61 years, Clutton was bound to indemnify his lessor from the additional fines occasioned by his buildings. There is no substantial distinction between the covenant in the deed of 1779 and the covenant in the deed of 1815, as to the terms upon which Clutton was to entitle himself to a renewal; nor is there anything in the deed of 1815 which shews that Brandon and Carter intended to give up any right that they were entitled to under the covenant in the deed of 1779. The covenant in that deed contemplated septennial renewals, and so did the covenant in the other deed. The language of the covenant in the deed of 1815 is as follows:—"He, the said William Clutton, his executors, &c., from time to time, surrendering unto the said Samuel Brandon and John Carter, their executors, &c., the then subsisting lease, and paying upon every such renewal, unto the said S. Brandon and J. Carter, their executors, &c., such a [111] proportion of the fine and fines which they, the said S. Brandon and J. Carter, or either of them, their or either of their executors, &c., shall have paid unto the said dean and chapter, or their successors, on their renewing the lease or leases by virtue whereof they, the said S. Brandon and J. Carter, their executors, &c., shall hold the premises hereby devised." There is nothing in this covenant to confine the renewal to one lease; but the meaning of the parties was that Clutton should, from time to time, surrender his lease and accept a new one. The parties

knew that septennial renewals were usual, and that the lease of 1815 would give to Clutton the whole of his 61 years, short of five years and a fraction; and, notwithstanding, they introduced into the covenant a stipulation that Clutton should, from time to time, surrender his lease, and pay upon every renewal a proportion of the fines (not of five-sevenths of the fines) which Brandon and Carter should have paid to the dean and chapter on their renewing the leases by virtue whereof they should hold the premises; referring, therefore, not only to the existing lease, but to every lease under which they should, from time to time, hold the premises. The word "paying" amounts to a covenant to pay (Platt on Covenants, 50); so that Clutton covenanted, from time to time, to surrender his lease, and to pay from time to time, on every renewal by the dean and chapter (and not on the granting to him of every new lease), a proportion of the fines which Brandon and Carter should have paid to the dean and chapter. The reason was that Brandon and Carter were receiving a moderate and uniform amount of rent from Clutton, but had to pay a fine to the dean and chapter on account of his buildings. It cannot be supposed to have been the intention [112] of the parties that Brandon and Carter should pay the whole of the fines for the renewals in 1827 and 1834, and yet receive no benefit from those renewals. In *Charlton v. Driver* the under-tenants were to pay such part of the fine as should be paid by their lessors in respect of the premises thereby demised; but, here, Clutton is to pay that proportion of the fines which shall have been imposed on account of any new buildings or improvements—not for five years' interest in the new buildings and improvements.

Mr. Temple, Mr. Bacon, Mr. Ellison and Mr. Webster appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. My opinion upon this case is in favour of the Plaintiff; for, after having bestowed a good deal of consideration upon the case, my opinion is that I am bound by the language of the covenant, contained in the deed of 1815, to hold that it applies to the case of the renewal of the lease by which the lessors in that deed then held. That it is so on the face of it, there is no doubt: and the sole question is this, whether the subsequent words, which are words that, when they were contained in the deed of 1779, obviously referred to more renewals than one, are to be taken to have the effect, by themselves, of making the preceding words, which clearly apply to one renewal only, apply to more renewals than one. Now I cannot but think that it is the most unsafe rule of construction that can be adopted to depart from what is plain, merely because some subsequent words, or some other words than those that are plain, cannot very well be construed without departing from the plain and obvious construction of what is found in the instrument. The words of the covenant are that Brandon [113] and Carter "shall and will, at the request, costs and charges of the said William Clutton, his executors, administrators or assigns, within two months next after the Dean and Chapter of Canterbury, or their successors, shall have renewed the lease by virtue whereof the said Samuel Brandon and John Carter now hold the said premises hereby demised or granted for the said term of 21 years wanting two days, make and execute, unto the said William Clutton, his executors, administrators and assigns, a new lease of the said premises hereby demised, for such further term as will make up the full term of 61 years, to be computed from the said 29th day of September 1778." Now it is observable, with respect to that expression, that the original lease from the dean and chapter having been made in the year 1778, according to the courtesy by means of which there would be septennial renewals, the regular times of renewal would have been in the years 1785, 1792, 1799, 1806, 1813 and 1820: but the times at which the renewals actually were made were different: they were made in the years 1785, 1789, 1805, 1813, 1826, 1827 and 1834: but it is quite plain that the parties to the deed of 1815 must have been aware that, if the septennial renewal were made in the year 1820, it would pass a term to the lessors in that deed, sufficient to enable them to grant a lease to Clutton so as to make up the whole of his term 61 years from the year 1778, that is, in other words, to give him a lease for the term of 19 years, which would expire in the year 1839. That that was the meaning of that clause, taken by itself, I think no one can doubt.

But then there follow these words: "He, the said William Clutton, his executors,

administrators or assigns [114] from time to time surrendering unto the said S. Brandon and J. Carter, their heirs, executors, administrators or assigns, the then subsisting lease, and paying, upon every such renewal, unto the said S. Brandon and J. Carter, their executors, administrators or assigns, such a proportion of the fine and fines," &c.: and it is said that these words shew that the former words must be extended so as to be made to speak not only of one renewal which would be adequate to the purpose contemplated, but of successive renewals according to the septennial course. In my opinion, however, it is manifest how this blunder arose; because, if any person will compare the two covenants with each other, he will see that the whole error has arisen from leaving out of the covenant, in the deed of 1815, those words which were in the covenant in the deed of 1779, namely, "and so, from time to time, within two months next after every renewal, by the said dean and chapter or their successors, of the lease or leases by virtue whereof he, the said Henry Penton, his executors, administrators or assigns shall or may hold the premises hereby demised." Those words were, I think, designedly left out by the framers of the covenant of 1815; and, being designedly left out, I must take it for granted that it was the intention of the parties to that covenant that any other renewal than the renewal of the lease by which the lessors then actually held was intended to be excluded; and, by a blunder, the subsequent words were introduced. It so happens, too, that those subsequent words have no antecedent: there is nothing to which they apply. I should be introducing a most dangerous rule of construction if I were to say that a clause which, in its terms, applies to one renewal only, shall, by reason of the slovenly words afterwards introduced, be made to extend to more renewals than one.

[115] I do not think that the language of the covenant in *Charlton v. Driver* is at all similar to the language of the covenant in the deed of 1815: because it is quite plain that the words "premises hereby demised" are, very easily and without any force, capable of receiving the construction of "the interest hereby demised:" but here the reference is, in express words, to the tenements demised.

Declare that the Plaintiff is bound to pay that portion of the fine which would have been imposed on account of his new buildings and improvements, in case the lease from the dean and chapter had been renewed in 1820, with interest from that time; but that he is not bound to pay any part of the fine paid on any subsequent renewal.

[115] WOODHOUSE v. OKILL. June 28, 1836.

Will. Revocation.

A., having the legal estate in leaseholds, and being beneficially entitled to one-third part of them, in right of his late wife, and being entitled, under the will of B. (whose executor he was) to another third for his life, with remainder to his children as he should appoint, with remainder to them absolutely; by his will, gave one-third to one of his daughters for life, with remainder to her children, and the other third to another daughter for life, with remainder to her children. A. afterwards joined with the other tenant in common, in a deed of partition, by which they assigned the leaseholds, in trust, as to one portion, for A., his executors, &c., as administrator of his late wife; as to another portion, in trust for A., his executors, &c., as executor of B., and, as to the remainder, in trust for the other tenant in common. Held that the deed was not a revocation of the will.

John Woodhouse, as the personal representative of Thomas Heyes, was possessed of the legal estate in several closes near Liverpool, for the remainder of a term of 1000 years; to one undivided third part whereof he was beneficially entitled, in right of Jane, [116] his late wife; and, under the will of William Heyes, to whom he was executor, he was entitled to another third part, for his life, with remainder to his children as he should appoint, and, in default of appointment, to them absolutely: and Catharine Pyke, the administratrix and only child of Thomas Heyes, who was one of

the nephews of the first-named Thomas Heyes, was beneficially entitled to the remaining third part.

J. Woodhouse, by his will, dated the 12th of February 1807, gave one-half of the two-thirds of the leasehold premises, "to which he was then legally or equitably entitled," to trustees, in trust to sell, if they thought proper, and to pay the rents, and the interest of the monies to arise from the sale, to his daughter Jane, the wife of Charles Okill, for her separate use for life, and after her death, for her children: and he gave the other half of the two-thirds, upon similar trusts, for the benefit of his daughter Ann, the wife of James Manifold, and her children.

By an indenture, dated the 16th of July 1807, and made between John Woodhouse (who was described as the surviving executor of Catharine Heyes, the widow and surviving executrix of Thomas Heyes, the uncle, and as administrator of Jane, his late wife, and also as executor of William Heyes) of the first part, John Pyke and Catharine his wife (who was described as the administratrix of Thomas Heyes, the nephew) of the second part, and Thomas Hassall of the third part: after reciting the wills of Thomas Heyes, the uncle, and William Heyes, and the other instruments under which Woodhouse and Catharine Pyke derived their interests in the leasehold premises; and that Woodhouse, as the administrator of Jane, his wife, was possessed of one undivided third part [117] thereof, and, as the executor of William Heyes, of another undivided third part, and that Catharine Pyke, as the administratrix of her father, Thomas Heyes, the nephew, was possessed of the other undivided third part, and that they had come to an agreement to make partition of the premises, and that, accordingly, the same had been divided into three parts, and that Woodhouse and Pyke and his wife were satisfied that the same was a fair division, and, that in order that the agreement might be effectually carried into execution, they had mutually agreed to assign the premises to Hassall, upon the trusts thereafter mentioned: it was witnessed that Woodhouse and Pyke and his wife, in pursuance of the agreement, did, according to their respective estates and interests in the premises, assign the same to Hassall, to hold the same, as to that proportion of the premises marked in the plan indorsed on the indenture, with the letter A., in trust for Woodhouse, his executors, administrators and assigns, *as administrator of his late wife*, and as to that portion of the premises marked in the plan with the letter B., in trust for Woodhouse, his executors, administrators and assigns, *as executor of William Heyes*, and, as to that piece or parcel of land marked in the plan with the letter C., in trust for Catharine Pyke, as administratrix of Thomas Heyes, the nephew, and to the intent that Woodhouse and Catharine Pyke might hold the several pieces or parcels of land, in severalty, for the remainder of the term of 1000 years. Woodhouse died in December 1812. He had, by Jane, his wife, five children, namely, the two daughters named in his will, and three sons.

The suit was instituted by one of those sons against the persons interested, under Woodhouse's will, in the two-thirds of the premises; and, on the hearing of the [118] cause, it was referred to the Master to inquire whether the will was, by any and what means, and to any and what extent revoked. The Master reported that Woodhouse, by executing the deed of partition, revoked his will as to the leasehold premises. Some of the Defendants excepted to the report; and the exception now came on to be heard.

Mr. Jacob and Mr. Koe, in support of the exception.

The transaction which the Master has found to be a revocation of the will was a mere partition, unaccompanied by any alteration in the powers which the testator previously had over the estate. If he had taken back a divided third part, with different powers over it from those he had before, it would have been a revocation: but here the testator took back precisely the same estate as he had before, except that it was equitable instead of legal; and he had the same power of disposition over the equitable as he before had over the legal estate. A fine levied for the purpose of partition is not a revocation of a will: nor is it a revocation, if the party places the legal estate out of himself for the purpose of partition merely. *Parsons v. Freeman* (3 Atk. 741), *Loyd v. Spillet* (3 P. W. 344), *Webb v. Temple* (Freem. 542), *Brain v. Brain* (Madd. & Geld. 221).

[THE VICE-CHANCELLOR. Suppose that Woodhouse and Mr. and Mrs. Pyke, for

the purpose of making the partition, had assigned the whole legal interest to Hassall, and that on the following day Hassall had reassigned a certain portion of the lands to Woodhouse, and the remainder to Mr. and Mrs. Pyke, and then Woodhouse had assigned his portion to a trustee in trust [119] for himself, would that have been a revocation? The rule as to chattels is different from the rule as to freeholds; for all that is required to make chattels pass by a will is that the testator should have them at his death.]

Mr. Spence and Mr. Twells, in support of the report. The testator, by his will, has disposed of two-thirds of the leaseholds as if they were his own absolute property; and the question is whether he has not shewn, by the deed of partition, that he intended to stand in a different situation with respect to the property from that in which he stood at the date of his will. We refer to the deed, not as a mere partition, but as an instrument by which he declared his interests to be quite different from those which he professed to bequeath. He took the divided shares in a character different from that which he professed to have when he made his will; for he took one-third as administrator of his wife, and the other third as executor of William Heyes; so that he acknowledged the rights of their creditors, if there were any. It is clear that he did not intend the bequest in his will to stand, as by the deed he declared himself to be a trustee for persons to whom he did not bequeath the property, and deprived himself of the interest which he previously had. There was, therefore, an object beyond the mere partition; and, consequently, the bequest was revoked. Whether it is called revocation or ademption is of no importance. *Heseltine v. Heseltine* (3 Madd. 276), *Williams v. Owens* (2 Ves. j. 595), *Attorney-General v. Vigor* (8 Ves. 256; see 281), *Colegrave v. Manby* (Madd. & Geld. 72), *Knollys v. Alcock* (5 Ves. 648, and 7 Ves. 558).

[120] Mr. Jacob, in reply. The rule as to freeholds is different from the rule as to leaseholds; for a testator can devise such freeholds only as he has at the date of his will; but he may bequeath all the leaseholds that he may have at his death. The share which Woodhouse took as the representative of William Heyes was settled on himself for life, and then for such of his children as he should appoint. Therefore his will, so far as the life interests of Mrs. Okill and Mrs. Manifold are concerned, would operate as an execution of the power. If a man devises my estate, and afterwards acknowledges to me that the estate is mine, that acknowledgment does not affect his will; for the devise was bad before.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It appears, by the recitals in the deed of partition, that John Woodhouse, as executor of Catharine Heyes, who was the executrix of Thomas Heyes, was, at the date of his will, entitled to the legal estate in the entirety of the leaseholds; for Thomas Heyes, by his will, gave all his real and personal estate to his wife, Catharine Heyes, for her life, and directed that, after her death, it should be equally divided between Thomas, George and Jane Heyes, the sons and daughter of his brother William Heyes; and he appointed his wife and two other persons, who died in her lifetime, his executors. Woodhouse, therefore, as the executor of Catharine Heyes, would be clearly entitled to the legal estate; and the interests of Thomas, George and Jane would not, strictly speaking, be interests in the term in remainder, but in the whole produce of the residue of Thomas Heyes's estate, after it had been sold and converted into money. It appears that Woodhouse married Jane Heyes; and, if the term was to be considered as a [121] term, then as he survived her, he would take it as part of her chattels real; but if it was to be considered as part of her uncle's residue, then he would take it as her administrator. George Heyes died, and his father, William Heyes, administered to him. The father made his will, whereby he gave his personal estate to the present testator, John Woodhouse, for life, with remainder to his children as he might appoint, and, in default of appointment, to be equally divided between them. Thomas Heyes, the third child of William Heyes, died intestate, and Mrs. Pyke, as his only child, administered to him. In this situation of things J. Woodhouse makes his will, and (there being no evidence that he had any want of knowledge as to how the property was, in reality, circumstanced) he takes upon himself to devise, specifically, one-half of the two-thirds of the leaseholds to trustees in trust to sell, if they thought proper, and to pay the rents and the interest of the monies to arise

from the sale, to his daughter, Mrs. Okill, for life, and, after her death, to stand possessed of that half part and of the monies to arise from the sale, in trust for her children; and he devised the other half part to other trustees, upon similar trusts for the benefit of his daughter Mrs. Manifold and her children. It is clear that the testator meant to dispose of the interests which he had in the two different characters, as if he had had one consolidated interest in the collective two-thirds; for he dealt with the two-thirds as one entire subject. Having made his will, which was, apparently, inconsistent with the way in which the one-third that belonged to William Heyes was disposed of, he then makes this deed of partition, by which he and Mr. and Mrs. Pyke assign the whole of the leaseholds to Hassall upon the following trusts. [His Honor here read the trusts.] It is clear, supposing those words which describe the characters in which Wood-[122]-house was to take had not been inserted, that this deed would have been no revocation at law; for the rule as to chattels is different from the rule as to freeholds. If a person having a freehold estate devises it, and then conveys it to a trustee, in trust for himself in fee, it is a revocation; if he conveys it by way of mortgage, it is a revocation *pro tanto* only. But if he has a term, and devises it, and afterwards assigns it to a trustee for himself, then there is no revocation in equity at least.

Now, with respect to the description of character in the deed of partition, it is plain that, as Woodhouse took one-third of the leaseholds as administrator of his wife, he must take it beneficially. The report is therefore clearly wrong as to one moiety of the lands marked A. and B.

Then as to the other moiety. If it were proved that the testator, when he made his will, meant to dispose of it only on the supposition that he had the power which he assumed to have, and that when he was subsequently informed that he had no such power he had it assigned to himself in such a manner as to shew that he did not intend it to pass by his will, there would be good ground for saying that his will was revoked as to that moiety. But here there is nothing to shew that Woodhouse, at the time of making his will, was not aware of everything that he knew at the time of making the deed of partition. Upon the whole, it does not appear to me that I am authorized in saying that, merely because there is this distribution of character in which he was to take the different parts of the property allotted to him, there is such a taking of a different estate as would make void in equity what he had given by his will.

[123] I will, however, think of it, and if I see any ground to alter my opinion I will mention it.(1)

[123] GARDNER v. LACHLAN. July 15, 1836.

[S. C. affirmed, 4 My. & Cr. 129; 41 E. R. 51 (with note).]

Bankrupt. Order and Disposition. Deed.

A., a broker, on behalf of the owner of a ship, entered into a charter-party with B., by which B. agreed to pay to A., on behalf of the owner, a certain sum for the freight of the ship. The owner assigned the freight and earnings that might become due under the charter-party to C., as a security for a debt; and C. gave notice of the assignment to A., but not to B. The vessel completed her voyage, and afterwards the owner became bankrupt. Held, that the money due on the charter-party was not in his order and disposition at his bankruptcy.

No person can bring an action on an indenture, unless he is a party to it or claims through a party. But a deed-poll may be so constructed as to give a right of action against the person who executed it.

A motion in this cause, in which the facts of the case are stated, is reported *ante*, vol. 6, page 407.

The cause now came on to be heard.

A ship-broker, who was examined as a witness for the Plaintiff, deposed that, as

(1) The case was not mentioned again.

far as his experience extended, the following was the almost invariable course pursued in the chartering of vessels by the Lords of the Admiralty:—A tender of the vessel to Government is made by the broker, in his own name, and, subjoined to such tender, is an authority signed by the owner, authorizing the broker to enter into the contract with Government on his behalf. The subsequent business in entering into the contract is transacted with Government by the broker on the behalf of the owner, without the owner's name being specified; and the broker receives the freight from the Treasurer of the Navy. The witness added that he knew of very few instances in which the owner dealt with Government after the tender [124] had been made, or received, from Government, any part of the freight.

Mr. Jacob and Mr. Stevens, for the Plaintiff, referred to the report of the motion, and to *Schack v. Anthony* (1 M. & S. 573).

Sir William Horne and Mr. Koe, for the Defendants, the assignees of Scott. The contract for the hire of the ship was made between the owner and the Government. Lachlan is described in the charter-party as acting for the owner; throughout, he contracts for the owner, whose name was known to the Government before the contract was entered into. Lachlan was nothing but an agent, declaring that he contracted, not for himself, but for the owner; and the Government considered the owner as the party with whom they were contracting. The liabilities and the benefits of the contract are all to fall upon the owner. There is one clause in the charter-party which enables the Government to mulct the owner to the extent of £1000, in case of any misconduct. How can these stipulations be satisfied by considering Scott as having no interest in the contract? If Scott is made liable by the contract, and is to have all the benefit of it, he has a most material interest in it. If Lachlan had become bankrupt, the freight would not have passed to his assignees; or if Scott had released the charter-party to the Government, Lachlan could not have set it up. The Government were Scott's debtors: and no one can deny that if Scott had been solvent the Government would have paid the freight to him. If Lachlan had set up any claim to it on the ground that his name appeared on the charter-party, and had compelled Scott to come into equity to enforce his [125] rights, Lachlan would have had to pay all the costs of his unjust litigation. *Schack v. Anthony* did not decide that no action could be brought by the owner, but the ground of the decision was that, as the charter-party was an instrument under seal, an action of *assumpsit* could not be brought by the person entitled to the benefit of the contract, inasmuch as a simple contract merges in a specialty. [THE VICE-CHANCELLOR. *Schack v. Anthony* decides that the *cestui que trust* of a covenantee cannot maintain an action of *assumpsit* for the purpose of having the benefit of the covenant. Lord Ellenborough gives his reason in the commencement of his judgment. His Lordship says: "If a bond were given to a trustee, it could hardly be contended that an action of *assumpsit* might be maintained by the *cestui que trust* for the recovery of the money secured by the bond." Is there any instance in which a party has been allowed to bring an action on a specialty to which he was not a party?] We wish to be allowed to try the question in a Court of law. [THE VICE-CHANCELLOR. If any case can be produced in which the *cestui que trust* of a covenantee has been allowed to maintain an action, then I admit that this is a case to be decided in a Court of law.] Taking the law to be as your Honor states it, then we are entitled to have this case decided on principles of equity. If there had been no assignment to the Plaintiff, Lachlan would have been our trustee, and his duty would have been to receive the freight from the Government, and, when he had received it, to pay it to us. A sum of money due from a third party cannot be effectually assigned in equity without notice to the party who owes the money. Policies of insurance cannot be validly assigned without giving notice to the office in which they are effected; notice to an intermediate party would be of no avail. [126] The Plaintiff, on the face of the assignment, admits Scott to be entitled to the benefit of the charter-party, and that the freight is due from the Government to Scott. Has he then done all that he ought to have done? Ought he not to have given notice of the assignment to the Government? *Douglas v. Russell* (ante, vol. 4, p. 524).

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the legal point, the only person who could bring an action, by virtue of the charter-party, to recover

the freight, would be Lachlan. I admit that if there had been a separate promise of any sort made by the Commissioners of the Admiralty to Mr. Scott, he might recover on that separate and independent promise. But it is, I think, quite clear, from the case of *Schack v. Anthony*, that Scott could not recover from the Lords of the Admiralty by means of the charter-party, he being no party to it. I have always understood the settled rule of law to be that a party not named in a deed cannot recover by means of it, if it be a deed between parties. A deed-poll may be so constructed as to give a person a right of action against the party who executed it; but, where there is a deed between parties, I have always understood it to be the settled rule that no person can bring an action on it, except a party or those who claim through him.

If there had been one case in which that proposition was questioned, or which raised so much doubt on the general rule of law as would have justified me either in permitting the Plaintiffs to bring an action or to take the opinion of a Court of law by means of a case, I certainly should have done so; but I must say that the point appears to me to be perfectly plain; and, as it is unaffected by any decision, I do not think I [127] should be taking a right course if I were to suspend giving my judgment on this part of the case until I had, in some shape or other, taken the opinion of a Court of law.

The next question is whether sufficient notice has been given, so that Scott can be fairly said to have had no longer the order and disposition of the subject in dispute. Now what is the subject in dispute? The subject in dispute is a right in Scott to receive from Lachlan, to whom the Lords of the Admiralty had to pay it, a sum of money which would be due on a charter-party from the Lords of the Admiralty to Lachlan. Now, as I understand the charter-party and the evidence which has been given with respect to the dealings between the Lords of the Admiralty and persons with whom they make charter-parties, the object of the Lords of the Admiralty is to deal with one defined person, and not be subject to the inconvenience of dealing with those who, from time to time, may happen to be the owners of the ship which is the subject of the charter-party. And it is evident that there is much greater convenience in dealing with one of those few persons who happen to be ship-brokers, than in dealing with the numerous and changeable persons who may, from time to time, happen to be the owners of the ship. There may be, I admit, a very good reason why the Lords of the Admiralty, before they make a charter-party with any broker, should require from him something like an assurance that he is really authorized to pledge the ship; and, therefore, they may require from him something like an authority from the shipowner, shewing that he is the person selected to deal with them. But, when that has been done, I consider that they mean to deal with him alone; and I am not prepared to accede [128] to the proposition of Sir William Horne that Scott could, at all events and under all circumstances, have released the Lords of the Admiralty from what was due on the charter-party; because the making of the charter-party with a broker implies that the broker himself, not at the time when the charter-party was made, but at or before the time when the money was paid to him by virtue of the charter-party, might have a cross-demand against the person who employed him, that is, the shipowner; so that he would have a right to set-off against what might be due to the shipowner the amount that might be due to himself; and we know it is the constant practice of brokers to keep a running account, and, from time to time, to settle the account and hand over the balance. I should also think that any notice which might have been given by Scott to the Lords of the Admiralty would, as a matter of course, be disregarded by them until they had an authority from the broker to deal with the shipowner as the principal. My notion is that the charter-party is made between the Lords of the Admiralty and the broker, in order that, in the negotiations, and in regard to the performance of the voyage and to the payment of what is due in respect of the voyage, the Lords of the Admiralty should always have at hand the one person named in the charter-party. Then the only right that Scott had, in my opinion, was a right to receive from Lachlan, when the freight was paid, so much as he could fairly, in account between himself and Lachlan, claim from Lachlan. If nothing was due to Lachlan, Scott, of course, would be entitled to the whole. Scott then does,

in effect, by the assignment of the 13th of August 1832, assign all that would be due on the charter-party in question, because the assignment notices that he is the owner of the "Princess Royal" then on her voyage; [129] and it then assigns to the Plaintiff all the money that would be due on the charter-party; and notice of that assignment was given to Lachlan. It was not at all necessary that Lachlan should be made a party to the assignment, because, by the notice, he is placed in this situation, namely, that, at his peril, he pays over to any other person than the party who gives him the notice the sum of money which he might receive from the Lords of the Admiralty.

This case does not appear to me to be exactly similar to the case of a policy of insurance. In the case of a policy of insurance the assurers make themselves liable to pay the assured a certain sum; and, in that case, in order to make the assignment from the assured to a third person good as against the assignees of the assured if he become bankrupt, it is held necessary to give notice to the assurers; but, in the case of money being due on a charter-party, there is, of necessity, a third person introduced, who does not exist in the case of a policy of insurance, that is, the Government; but it is quite plain, and I must, I think, take it for granted, that what the Government has to pay will be paid to the person to whom the Government has contracted to pay it; and the assignment being, in fact, an assignment of what will become due from Lachlan to Scott, it appears to me, from that circumstance, that it was not necessary to give notice to any other person than to Lachlan.

My opinion, as I said before, is that if the notice had been given to the Government, it would have been disregarded. They never meant to place themselves in such a situation as that they should be obliged to notice any person who should claim through Lachlan. The [130] subject of the assignment was the money that might be due from Lachlan to Scott; and, therefore, the notice to Lachlan intercepted the right of Scott to demand it from him, and, consequently, placed it out of the order and disposition of Scott.

My opinion, therefore, on both points, is in favour of the Plaintiff.

[130] SANDS v. NUGEE.(1) July 5, 1836.

[S. C. 5 L. J. Ch. (N. S.) 329.]

Construction. Power to Appoint New Trustees.

By a settlement in the Scotch form, estates were vested in two trustees, and each of them was empowered to nominate another person to succeed him in the trusts after his death. One only of the trustees accepted the trusts, and he, by his will, appointed three persons to succeed him. Held, that the appointment was good.

By a settlement in the Scotch form, dated the 5th of November 1803, and executed by John 3d Duke of Roxburgh, certain estates of the duke were vested in two trustees, with power for him to appoint any other persons he thought proper to be trustees; and it was directed that two trustees should be a quorum; and each of the trustees therein named or to be named by the duke, who should accept the trusts, was empowered to nominate any other person he pleased to succeed to himself in the trust after his decease; and the said nominees also were empowered to name other persons to succeed to them respectively, after their deaths, and until the trusts should be completely executed.

One of the trustees named by the duke disclaimed; and the other by his will, dated the 8th of March 1823, appointed three persons to succeed him in the trusts, and devised and bequeathed to them all the property, real and personal, of the duke in England, then vested in him in trust as aforesaid.

One only of those three persons accepted the trusts; and he contracted with the Defendant for the sale of [131] some of the real estates. The Defendant refused to

(1) *Ex relatione.*

complete the purchase, on the ground that the appointment of three trustees was not authorized by the power in the settlement. The Plaintiff, thereupon, filed a bill against him to compel specific performance of the agreement.

The Master reported in favour of the title; upon which the Defendant excepted to the report.

Mr. Campbell appeared in support of the exception, and Mr. Jacob and Mr. Martineau, in support of the report.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The trustee named in the settlement was authorized, by the power, to determine what other person should succeed to himself; he does so by naming three persons. I see nothing in the objection.

Exception overruled.

[132] GIBBS v. TAIT. July 4, 1836.

[S. C. 5 L. J. Ch. (N. S.) 344.]

Will. Construction.

A testator bequeathed the residue of his personal estate to his widow, in trust to apply the interest and proceeds for her own use, and, after her decease, he gave *what should be remaining* of such residuary monies, unto and equally among all the daughters of T. D. and their issue, with benefit of survivorship and accruer. T. D. had three daughters living at the testator's death. One of them died without issue in the lifetime of the testator's widow. The two others survived the widow and had issue living at her death. Held, that the two surviving daughters were entitled to the whole of the residue, absolutely.

John Dixon bequeathed the residue of his personal estate unto his wife, Hannah Dixon, and her assigns; and he directed her to place the same out at interest and apply the interest and proceeds thereof for her own use and benefit, if she should continue his widow, and, after her decease or marriage, he gave *what should be remaining of such residuary monies*, in manner thereafter mentioned (that is to say) one moiety unto James Dixon, son of Thomas Dixon, his executors and administrators, and the other moiety unto and equally among *all the daughters* of the said Thomas Dixon and their issue, with benefit of survivorship and accruer.⁽¹⁾

Hannah Dixon and Thomas Dixon survived the testator; and, at the testator's death, Thomas Dixon had three daughters living, one of whom died in the lifetime of Hannah Dixon, and without issue.

Upon the death of Hannah Dixon the bill was filed, by the two surviving daughters of Thomas Dixon, against their children and grandchildren and the personal representative of their deceased sister, claiming to be entitled to one-fourth each of the testator's residuary estate.

Mr. G. Richards, for the Plaintiffs, contended that [133] the daughter of Thomas Dixon, who died in the lifetime of Hannah Dixon, was not entitled to any share of the residue, and that the word "issue" was used in the will as a word of limitation, and, consequently, that the Plaintiffs, who were the only daughters of Thomas Dixon, who survived Hannah Dixon, the tenant for life of the residue, were entitled to a moiety of it absolutely and in equal shares. *Lyon v. Mitchell* (1 Madd. 467), *Cripps v. Wolcott* (4 Madd. 11), *Daniell v. Daniell* (6 Ves. 297), *Pope v. Whitcombe* (3 Russ. 124).

Mr. Bird, for the personal representative of Thomas Dixon's deceased daughter, cited *Pearson v. Stephen* (5 Bli. N. S. 203), *Butter v. Ommancey* (4 Russ. 70), *Brown v. Bigg* (7 Ves. 279).

Mr. Blunt and Mr. Keene, for the children and grandchildren of the Plaintiffs, contended that, under the words "unto and equally among all the daughters of the said Thomas Dixon and their issue," all the issue of the Plaintiffs who were alive at

(1) The clause of survivorship and accruer was not set out in the bill.

the death of Hannah Dixon, were entitled to take as tenants in common with the Plaintiffs. *Davenport v. Hanbury* (3 Ves. 257), *Freeman v. Parsley* (*Ibid.* 421).

THE VICE-CHANCELLOR [Sir L. Shadwell]. On the first point it is plain that the persons who were in the contemplation of the testator were those who were in existence at the time when the property which they were to take was to be ascertained. He speaks of the residue as if it would be uncertain, until the [134] death or second marriage of his widow, what the residuary estate would consist of; and, therefore, he meant that those only should take who should be in existence when the property which they were to take was to be distributed; and, consequently, the deceased daughter did not become entitled to any share.

On the second point it would be a very inconvenient decision to make the mother's children and grandchildren all take simultaneously. This case is weaker than *Pearson v. Stephen*; and I cannot but think that the true construction is that the two daughters who survived the tenant for life take absolutely.

[134] ROBINSON v. WADDELOW. July 6, 1836.

[S. C. 5 L. J. Ch. (N. S.) 350.]

Will. Construction.

Testator gave all the residue of his effects, to be equally divided between his two daughters and their husbands and families. The Court rejected the words, "husbands and families," and held that the two daughters took the residue equally and absolutely.

Samuel Robinson made his will, dated the 1st of April 1830, in the following words:—"I give and bequeath all my property, of what nature or kind soever, to Thomas Robinson, Henry Crabb Robinson, and Thomas Mills, in trust for the following purposes: after the discharge of all my just debts and funeral expenses, I give and bequeath the following sums to my different relations and friends; to my youngest daughter Lætitia, now Lætitia Featherston, the sum of £4000, to be paid to her within three months from the time of my decease; this I consider her entitled to receive, as a similar proportion of my property has already been paid to her sister Marianne; to my three executors, £200 each; to my niece, Elizabeth Thornton, £300, but if not then living, to be paid to her husband, Thomas Thornton, or her children who may then survive them; to Robinson John Kitchener, if surviving, £300, or to [135] his wife, Ann Kitchener; but if neither should survive, then to become part of my residuary property." The testator then gave some pecuniary legacies, and proceeded as follows:—"I hereby further direct that the sum of £10,000 shall be invested in the Government or real securities in the names of trustees to be chosen by my executors, with a power of renewal in case of death, upon trust on account of my eldest daughter Marianne, now Marianne Waddelow; the interest of which to be paid to her every half-year for her own private use, without being subject to the direction or control of any husband or other person whatever; and, further, that the said sum of £10,000 shall remain untouched during her natural life, and, at her death, then to be equally divided between the children who may survive her legally begotten; but if none shall survive her, then the said sum of £10,000 to be wholly at her own disposal, agreeable to any arrangement she may have made in the anticipated event of such a circumstance. I also direct that the same amount of £10,000 shall be invested, in the same manner in every respect, on account of my daughter Lætitia, now Lætitia Featherston, the interest to be paid to her every six months. *All the rest and residue of my effects to be equally divided between my said daughters and their husbands and families.*"

The bill was filed by the executors and trustees of the will against Mr. and Mrs. Waddelow and their five children, and Mr. and Mrs. Featherston and their three children, praying that the rights and interests of all parties in the testator's residuary estate might be ascertained and declared.

Mr. Craig appeared for the Plaintiffs.

[136] Mr. Knight, for Mr. and Mrs. Waddelow, said that the testator had expressed himself in a circumlocutory manner, but that his intention clearly was to give his residue to his two daughters absolutely. *Cooper v. Thornton* (3 Bro. 96, 186), *Robinson v. Tickell* (8 Ves. 142), *Hammond v. Neame* (1 Swans. 35). The word "family" is much more vague than "children," and yet Sir W. Grant decided in *Robinson v. Tickell* that, under a gift to Mary Ann Robinson, for her and her children's use, Mary Ann Robinson was entitled to the fund. The testator has settled all that he intended to settle; and has used words apt and fit for the purpose.

THE SOLICITOR-GENERAL, for Mr. and Mrs. Featherston.

THE VICE-CHANCELLOR. If the words of the residuary bequest comprehend all the children of the two daughters, then they must, of necessity, comprehend all their husbands.

Mr. Duckworth, for the children of Mr. and Mrs. Waddelow. In *Cooper v. Thornton* Lord Thurlow decided that the legacy had been properly paid to the father, not for his own benefit, but as a trustee for his children. *Robinson v. Tickell* is a decision to the same effect. Sir W. Grant there says: "I think this is like *Cooper v. Thornton*." In *Hammond v. Neame* it clearly appeared, from the context of the will, that the testator intended his daughter to have a beneficial interest in the dividends of the stock; that case, therefore, does not apply. Here the words that imply equality of division are inseparably connected with the gift. In *Barnes v. Patch* (8 Ves. 604) there were words somewhat similar [137] to those in the present case. [THE VICE-CHANCELLOR. That case decides only that "family" means "children."]

Mr. Sharpe, for the children of Mr. and Mrs. Featherston. It is clear, from the frame of the will, that the testator's object was to divide his property into moieties, and that one moiety should go to one daughter for life, and, after her death, to her children, and the other moiety to the other daughter and her children, in like manner. The residuary bequest is merely a short reference to what was expressed, more at length, in the previous part of the will. *Jeffery v. Honywood* (4 Madd. 398).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In the gift of the £10,000, the testator does take notice of future husbands; for he says: "for her own private use, without being subject to the direction or control of any husband or other person whatever." Why then am I to suppose that, in the gift of the residue, he did not mean to include future husbands?

The word "family" is an uncertain term; it may extend to grandchildren as well as children. The most reasonable construction is to reject the words "husbands and families." In *Doe v. Joinville* (3 East, 172) there was a gift to the brother's and sister's families; and the Court of King's Bench held that it was void for uncertainty. I think that the best construction in this case is to hold that the two daughters take the residue equally and absolutely as tenants in common.

[138] THE ATTORNEY-GENERAL v. GEORGE. July 9, 1836.

Cumulative Legacies. Will. Construction. Specific Legacy.

Testator, by his will, gave his wife an annuity of £279 for life, and directed his executors to purchase, out of the proceeds of his residuary real and personal estate, a sum of three per cents., sufficient to pay the annuity; and after his wife's death he gave £2000 of the stock to be purchased to trustees, in trust to pay the dividends, in sums of £5 each, to poor decayed tradesmen and women, *residents* of Aylesbury; and, if the dividends should be more than sufficient to pay such poor men and women of the description before mentioned £5 each, then to divide the rest amongst such poor men and women, and in such shares as the trustees should think fit. The testator, at the date of his will, had £2000 three per cents.; and, although he did not mention that sum in his will, he, in a codicil, recited that he had sold out the £2000 three per cents., as mentioned in his will, and bought £2042 in the long annuities; and he gave the dividends thereof to his wife for life, and after death the capital to the same trustees as were named in his will, in trust to pay

the dividends, in sums of £5 each, to poor decayed tradesmen and poor women, *natives and residents* in Aylesbury; and if the dividends should be more than sufficient to pay £5 to each of such poor men and women of the description before mentioned, *then to pay to six poor men and six women £7 instead of £5 each.* Held, that the bequests by the codicil were not substitutional for the bequests by the will. Testator bequeathed £2042 in the £5 per cent. Bank long annuities for 30 years, which he had purchased. It appeared that he had bought £106 annuities for terms of years ending January 1860, for £2042. Held, that the £106 annuities passed.

Stephen Holloway, by his will, dated the 11th of July 1829, gave to his wife an annuity of £279, 8s., which, with the dividends arising from the stocks or funds to which she was entitled for life under the settlement therein mentioned, would make the annual sum of £300, for her life, to be paid half-yearly, on the 5th of January and 5th of July in each year, the first payment to be made on such of the said days as should first happen after his decease: and he gave to Edward Lowes his freehold and leasehold hereditaments in the parish of St. George the Martyr, Southwark, for his life, subject, nevertheless, as thereafter mentioned: and he also gave to Edward Lowes all his leasehold premises in Redcross Court in the parish of St. Saviour, in the county of Surrey, for the natural life of his wife, subject, nevertheless, as thereafter mentioned: and he charged all his freehold and leasehold hereditaments aforesaid, with the payment of the annuity of £279, 8s., in case the dividends of the monies thereafter by him directed to be laid out in the funds for that purpose should be insufficient to answer the same; but, nevertheless, it was his will that the same freehold and leasehold hereditaments should be subject only to such part of the annuity as those dividends should be insufficient to satisfy: and after the decease of his wife, or in case of the death of Edward Lowes in her lifetime, then, after his decease, he gave his leasehold hereditaments in Redcross Court to William Rickford, Woodford Blake Eagles, John Churchill, Thomas Dell and Robert Dell, all residing at Aylesbury in the county of Buckingham, subject, nevertheless, to the payment of the annuity to his wife in the event of Edward Lowes dying in her lifetime: and he gave all the residue of his estate and effects, both real and personal, to William George, Samuel Ritchie and L. Redhead, their heirs, executors, &c., upon trust to get in such parts thereof as might be outstanding, and to sell such parts thereof as might be in their nature saleable; and upon trust, out of the monies to arise from the residue of his estate, to invest so much thereof, in their names, in the purchase of such a sum in the three per cent. consols, as, from the dividends thereof, would be sufficient to pay the annuity given to his wife, and to pay the residue of the monies (if any), after setting apart and investing such sum as therein-before mentioned, to [140] Edward Lowes for his own use and benefit: but in case the whole of the monies to arise from his residuary estate should not be competent to purchase such a sum of stock as before mentioned, then upon trust to invest the whole of the monies to arise from his residuary estate in the purchase of three per cent. consols, and to stand possessed thereof in trust to pay to or permit his wife to receive the dividends to arise therefrom, as the same should become payable, for her life, for her sole and absolute use, independent of the debts, &c., of any husband with whom she might thereafter intermarry, and after her decease, in trust to pay the several legacies and for the purposes thereafter mentioned: (that is to say) he gave to Rickford, Eagles, Churchill, Thomas Dell and Robert Dell, the sum of £2000 three per cent. consols (to be transferred to them free from legacy duty, which he directed to be paid by W. George, S. Ritchie and L. Redhead), and he directed that Rickford, Eagles, Churchill, Thomas Dell and Robert Dell should stand possessed of the £2000 consols and also of the leasehold hereditaments in Redcross Court, upon trust, out of the dividends and rents thereof, upon Christmas Day in every year for ever, to pay unto such number of poor decayed tradesmen and women, *residents of Aylesbury*, who had not received any parish relief, being of good moral characters and members of the Church of England, and who should have attained the age of 60 years, as the same dividends and rents would extend to pay, the sum of £5 each; and, in case the dividends and rents should be more than sufficient to pay to such poor men and

women of the description thereinbefore mentioned the sum of £5 each, *then to divide the residue of the dividends and rents among such poor men and women, in such shares and proportion as his trustees should, in their discretion, [141] think fit.* The testator then gave to several persons legacies of £100 and £50 sterling each; and he gave all the residue of the said three per cent. consols, after the several payments aforesaid, to Thomas Edmonds, Samuel Edmonds and Edward Lowes, equally to be divided between them.

The testator made a codicil which was not dated or attested, but was as follows:—
 “Having sold out the £2000 stock (as mentioned in my will, dated the 29th of July 1829 (1)), in the three per cent. consols, and bought £2042 in the five per cent. Bank long annuities for 30 years; I desire that my executors, William George, Samuel Ritchie and L. Redhead, as named in my will, do pay the whole of the above dividend of the said £2042 into the hands of my dear wife, Mary Holloway, for and during the term of her natural life, and that, from and after the decease of my said dear wife, my said executors do immediately transfer the whole of the said £2042 long annuities into the names of William Rickford, W. B. Eagles, John Churchill, Thomas Dell and Robert Dell, all of the town of Aylesbury, the trustees as mentioned in my above-mentioned will, three of them to be a *quorum*, and always to be three, and the survivors and survivor of them, upon the trusts hereinafter mentioned and declared concerning the same, subject, nevertheless, to the payment, as hereinbefore mentioned, of the aforesaid annuity to my wife, Mary Holloway, in the event of the said Edward Lowes dying in her lifetime: and it is my will, and I do hereby direct, that the said William Rickford, W. B. Eagles, John Churchill, Thomas Dell [142] and Robert Dell, and the trustees to be appointed as set forth in my will, do and shall stand possessed of and interested in the said sum of £2042 of five per cent. Bank long annuities, and also of and in the said leasehold hereditaments and premises in Redcross Court in the parish of St. Saviour aforesaid, upon trust, by, with and out of the interest and dividends, rents and profits of the said stocks or funds and leasehold hereditaments and premises, upon Christmas Day in each and every year for ever hereafter, to pay unto such number of poor decayed tradesmen and poor women, *natives and residents* in the town of Aylesbury aforesaid, who have not and who do not receive any relief from the poor rate, being of sober and good moral character and members of the Church of England, and who shall have attained the full age of 60 years, as the same interest, dividends, rents and profits will extend to pay, the sum of £5 each; and in case the said interest, dividends, rents and profits shall be more than sufficient to pay to such poor men and women of the description hereinbefore mentioned the sum of £5 each, *then to divide and pay unto six poor men and six women the sum of £7 instead of £5 each.*”

The testator died on the 8th of July 1831.

The information (which was filed against Mary Holloway and the executors and trustees and residuary legatees of the will), after noticing the mistaken reference in the codicil, alleged that the executors had possessed themselves of the testator's personal estate, including the sum of Bank long annuities mentioned in the codicil, which was standing in the testator's name, and that they ought to have secured that sum upon the trusts thereof declared by the codicil, and [143] particularly for the charitable purposes therein mentioned, and that they ought, out of the testator's general personal estate, to have invested in the three per cent consols a sum sufficient to produce the annual sum of £279, 8s., in order that the same might be properly secured, and that the sum of £2000 consols, part thereof, might, upon Mary Holloway's death, be applied for the charitable purposes expressed by the will: that the Defendants alleged that the bequest by the will of the £2000 consols for the charitable purposes therein mentioned was revoked by the codicil; but the information charged the contrary, and that, upon Mary Holloway's death, that sum, and also the Bank long annuities, ought to be transferred to the trustees upon the charitable trusts expressed by the will and codicil respectively: and the information prayed for a declaration to that effect, and that the trusts of the will and codicil might be carried into execution.

(1) The will above set forth was dated the 11th July 1829, and it did not notice any sum of £2000 stock as then belonging to the testator.

The decree referred it to the Master to inquire and state whether the testator, at the date of his will, had any and what sum of three per cent. consols; and whether, after the date of his will, he, at any time and when, purchased or became possessed of any and what sum or sums of that stock; and whether, after the date of his will, he, at any and what time, sold out any and what sum or sums of such stock, and what was the amount of the money produced by such sale or sales respectively, and what sum of consols the testator had at the time of his death; and whether, at the date of his will, he had any and what sum of long annuities; and whether, after the date of his will, he, at any and what time or times, invested any and what sum or sums of money in the purchase of some and what sum or sums of long annuities; and whether [144] after the date of his will he, at any time or times and when, respectively, sold out any and what sum or sums of long annuities; and what sum of long annuities he had at his death: and the decree declared the bequest of the leaseholds in Redcross Court for charitable purposes to be void by the Statute of Mortmain.

The Master found that the will bore date the 11th of July 1829, on which day the testator had £2000 three per cent. consols, and that, after the date of his will, he did not purchase or become possessed of any more of that stock; and that, after the date of his will, namely, on the 23d of February 1830, he sold out £1000, part of it, which produced £920 cash, and that, on the 3d of March 1830, he sold out the remainder, which produced £922, 10s. cash, and that he had not any sum of consols on the day of his death.

The Master further found that the testator had not at the date of his will, or at his death, any sum of long annuities; nor did he at any time after the date of his will invest any sum of money in the purchase of any long annuities, or sell out any such annuities; but that, on the 3d of March 1830, he purchased £106, 15s. 11d. per annum of the "annuities for terms of years ending January 1860," which were then worth £2042, 9s. 4d. cash (and which last-mentioned annuities are in effect long annuities, and are so called by many persons, although, in the bank books, they are styled "annuities for terms of years ending January 1860"), and that, at different times between the 18th of August 1830 and the 29th March 1831, the testator made purchases of like annuities to the amount of £47, 10s., making, in the whole £154, 5s. 11d. per annum of such annuities purchased by him between the [145] date of his will and his death, and being worth altogether, at the respective times of purchasing the same, £2863, 17s. 5d. cash; and that, after the date of his will, he did not sell out any of such annuities; and that he had, at his death, the said sum of £154, 5s. 11d. per annum of such annuities.

On the cause coming on for further directions, the question was whether Mrs. Holloway and the charity were entitled under the bequest in the will, and also under the bequest in the codicil, or whether the latter was a substitution for the former.

THE SOLICITOR-GENERAL, Mr. Jacob and Mr. Ellison, for the relators and the trustees of the charity. The testator, in his will, directs the monies to arise from his residuary estate to be invested in consols, but does not mention any specific sum of £2000 three per cents., although, in his codicil, he says that he had sold out a sum of stock to that amount. There may, perhaps, have been some subsequent testamentary paper in which some mention was made of £2000 stock. There can be no doubt, having regard to what is stated in the Master's report, that the testator, when he speaks in his codicil of the £2042 in the five per cent. long annuities for 30 years, means the £106, 15s. 11d. per annum of the annuities for terms of years ending in January 1860. The trusts declared by the will, after the death of the widow, vary in some measure from the trusts declared by the codicil; and, therefore, as far at least as the charity is concerned, the gift by the codicil cannot be a substitution for the gift by the will.

Mr. Knight and Mr. Lovat, for Mrs. Holloway, said that the provision made for her by the codicil was smaller in amount than the provision by the will; and [146] that the subject-matter of the two provisions also was different; the one being an annuity charged upon the testator's general residuary estate, and the other being the whole of the dividends of a sum of long annuities.

Mr. Wakefield, Mr. Wigram, Mr. Walker and Mr. Stuart, for the residuary legatees,

said that the objects of the trusts declared by the will and by the codicil were the same or very nearly so : and that, by the codicil, the testator meant to substitute the stock that he had purchased for that which he had withdrawn by sale from the operation of his will, and to make the directions in his will apply to the altered state of his property.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator probably intended, by the codicil, to do only what the law would have done if he had made no codicil. He may have intended that the fund purchased with the £2042 should be considered in the same manner as the £2000 consols. But, as he has chosen to make a codicil, this Court must decide what is the effect of the language that he has used. He might have said, merely, that the sale of the consols should produce no effect upon his will ; but instead of doing so, he has gone into a laboured detail in order to express what he does mean.

It is plain that, by his codicil, he has made a specific disposition of the £2042 long annuities, by referring to them under the description of the stock which he had bought in the £5 per cent. Bank long annuities for 30 years ; and then, speaking of that fund, he directs his executors to pay the dividends of it into the hands of his wife for her life : therefore he has, by his codicil, given a *specific* annuity to his wife. Now, it is new to me to say that, where a person has given a general annuity to his wife, and afterwards gives her a specific [147] annuity, the latter shall be a substitution for the former. Even if the two gifts had been *ejusdem generis*, they must have been cumulative, as they are given by different instruments.

The testator then directs that, after the decease of his wife, his executors shall transfer the £2042 long annuities into the names of the trustees, and that they shall stand possessed thereof and of the leaseholds in Redcross Court, in trust to pay to such number of poor decayed tradesmen and poor women, natives and residents in Aylesbury, who have not received and do not receive parochial relief, &c., as the same dividends and rents will extend to pay, the sum of £5 each ; and, in case the dividends and rents should be more than sufficient to pay that sum to such poor men and women, then to pay to six poor men and six women the sum of £7 instead of £5 each. Now I am not authorised to say, when the testator speaks in one instrument of residents of Aylesbury, and, in the other, of natives and residents in Aylesbury, that he does not mean different persons. Again, when I find that, in his will, he has given power to the trustees to divide the residue of the dividends and rents (if there should be any) amongst such poor men and women, and in such shares and proportions as they, *in their discretion*, should think fit ; and that, in the codicil, he has given specific directions as to the disposition of the residue, by requiring them to pay £7 to six poor men and six women, it appears to me that he has, to that extent at least, created a different charity. The testator then, having given one legacy to one charity, by his will, and another legacy to another charity, by a codicil, I am bound to say that the latter is not a substitution for the former.

The consequence is that the wife takes the benefits [148] given to her by the will, and also the benefits given to her by the codicil ; and that there are two charities.

Declare that the gift of the £2000 consols to the trustees was not revoked by the codicil, and that, under the codicil, Mary Holloway is entitled for her life to the £106, 15s. 11d. per annum of the annuities for terms of years ending January 1860, and that, after her death, the trustees will become entitled thereto, upon the trusts expressed in the codicil concerning the annuities therein mentioned ; and declare that Mary Holloway is also entitled to the annuity of £279, 8s., by the will directed to be paid out of the income of the three per cent. consols in which the testator's residuary estate is directed to be invested, so far as such income may extend, and that the remainder of such annuity is, by the will, charged upon the freehold and leasehold estates of the testator in the parishes of St. George the Martyr and St. Saviour's : order that the Master do inquire and state what, at the death of the testator, was the total amount and value of his chattels real, and what, at the same time, was the total amount and value of his other personal estate : and declare that the trustees will, on the decease of the testator's widow, be entitled to be paid, upon the trusts expressed in the will, rateably with the other legatees, out of the testator's residuary estate not consisting of chattels real, so much of the legacy of £2000 consols as will

bear the same proportion to the whole amount thereof as the value of such estate not consisting of chattels real shall be found to bear to the aggregate value of so much of such estate as shall not consist and so much thereof as shall consist of chattels real : and the Master is to ascertain the proportion of the legacy of £2000 consols which will be payable, having regard to the declaration aforesaid.

[149] BRADLEY v. HUGHES. July 12, 1836.

Construction. Feme Coverte. Separate Use.

By the settlement on the marriage of Maria S. with Moses L., her father limited a term of years in his estates to a trustee, in trust *during her life*, to raise yearly £200, and to pay the same after the solemnization of the marriage to such persons as she, notwithstanding her coverture, should appoint, and, in default of appointment, into her hands for her separate use, without the same being subject to the debts, &c., of Moses L., and her receipts, notwithstanding her coverture, to be good discharges. Held, that though the lady was entitled to the annuity for her life, yet that the trust for her separate use determined on the death of Moses L.

By the settlement on the marriage of Moses Lemon with Maria Solomon, the lady's father conveyed lands in Lancashire to trustees for a term of 1000 years, in trust, yearly, *during the life of Maria Solomon*, to raise £200, and to pay the same, by equal half-yearly payments, on the 1st of June and the 1st of January, the first payment to be made on such of the said days as should first or next happen after the solemnization of the marriage, unto such person or persons, and for such intents and purposes only as Maria Solomon, by any writing or writings under her hand, from time to time, notwithstanding her coverture, should direct or appoint, and, in default of such appointment, to pay the same into the hands of Maria Solomon for her sole and separate use and benefit (without the same being subject to the debts, contracts, engagements, intermeddling or control of Moses Lemon); and the receipt and receipts in writing of Maria Solomon, and of such person or persons as she should, from time to time, appoint to receive all or any part of the said annual sum should, from time to time, notwithstanding her coverture, be good and effectual releases and discharges for such sums of money as, in such receipts and discharges, should be expressed to be received.

The marriage took effect; and afterwards Moses Lemon died. His widow then married J. B. Bradley, who subsequently took the benefit of the Insolvent Debtors Act.

[150] The bill was filed by Mr. and Mrs. Bradley against the provisional assignee of the Insolvent Debtors Court, insisting that the Defendant was not entitled to any interest in the annuity, as the same was granted to Mrs. Bradley by her father during her life, notwithstanding her coverture; and that such coverture was not intended to apply to her marriage with Lemon alone, but to any marriage she might subsequently contract, in the event of his death; and that she was still entitled to the annuity for her separate use during her life; or that she was, at all events, entitled to some settlement or provision out of the annuity.

Mr. Jacob and Mr. K. Parker, for the Plaintiffs. There is no gift of the annuity to this lady, except in the direction to pay it to her separate use: therefore, if she is entitled to anything, she must be entitled to it for her separate use. Unless the trust be construed to endure for her life, there was, on the determination of the first coverture, a resulting trust as to the annuity for her father, whose property it was. If she is not entitled to the annuity as the settlement gives it to her, she is not entitled to it at all.

The case of *Benson v. Benson* (*ante*, vol. 6, p. 126) is somewhat analogous to this: but, in that case, there was not the preliminary direction to pay as the wife should appoint, and then to her separate use. Now, is the power of appointment in this case gone?

Mr. Reynolds, for the provisional assignee, said the trust for the separate use

created by the settlement extended only to the coverture that was in contemplation when the settlement was made. He referred to *Knight v. Knight* (*ante*, vol. 6, p. 121), and *Elliott v. Cordell* (5 Madd. 149).

Mr. Jacob, in reply. In *Knight v. Knight*, the property as to which the question arose was the lady's own property; and it is plain that the judgment proceeded on this, namely, that as the settlement did not contain any declaration of trust in her favour after the death of her first husband, there was a resulting trust for her.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I remember when *Benson v. Benson* was before me, I was a good deal pressed with what was supposed to have been the meaning of the judgment in *Massey v. Parker* (2 Myl. & Keen, 174). But it appeared to me that I could decide the case then before me without either adopting or contravening what was supposed to be the meaning of the Lord Chancellor in that case; and I decided on the construction of the will. The language that fell from me in *Knight v. Knight* was used in consequence of what was stated by the counsel for the Defendant.

It is now settled by *Woodmeston v. Walker* (2 Russ. & Myl. 197), *Brown v. Pocock* (*ante*, vol. 6, p. 257), and other cases, that property may be given for the separate use of a woman during a particular coverture: but if it is meant to be given for her separate use, so as to prevent her from alienating it, she may, before her marriage and if she be adult, dispose of it. But if she be *coverte*, then it will operate as a restriction on her alienating it during that coverture, but not afterwards.

[152] Here the question is whether, by the death of the first husband, the lady did not become entitled to the annuity of £200 for her own use. And it appears to me that there is nothing in the words of this settlement which restrains her from alienating the annuity. After the death of the first husband it is a trust for her, and then the marital right of her second husband intervenes, and, therefore, the assignee of that husband is entitled to the annuity.

I can conceive that words might be used which would, of necessity, prevent the second husband from having any right to his wife's property, as for instance, if the fund were given over in the event of payment not being made into the hands of the woman. In that case either she must take the fund, or it would go over. The words in this case are words by virtue of which this lady, during her coverture with Lemon, had the annuity for her separate use, and after his death it was held in trust for her.

Declare that the assignee is entitled to the annuity, subject to the wife's equitable right to have a provision made out of it for her maintenance. (See *Davies v. Thornycroft*, *ante*, vol. 6, p. 420.)

[153] SKEELES v. SHEARLY. August 4, 1836.

[S. C. affirmed, 3 My. & Cr. 112; 40 E. R. 867.]

Purchaser. Judgments. Notice.

A mortgagee of lands in Middlesex, who took under the exercise of a general power of appointment by the mortgagor, held not to be bound by a judgment previously recovered against the mortgagor and duly docketed and registered, although he had notice of the judgment, and part of the mortgage money was deposited with his solicitor as an indemnity against it.

By lease and release, dated the 17th and 18th of December 1819, an estate at Enfield in Middlesex was conveyed to W. Cook in fee, to the use of such persons, &c., for such estates, &c., as he by deed or will should appoint, and, in default of appointment, to the use of Cook for life, with a limitation to James Bacon, his executors, &c., during Cook's life, and in trust for him and his assigns, with remainder to the use of Cook in fee.

In 1828 the Plaintiff recovered a judgment in the Court of King's Bench, in an action which she had brought against Cook for the recovery of £1000 and interest due on a bond; and she caused the judgment to be duly entered and docketed; and

on the 22d of July in that year a memorial of it was registered in the register office for Middlesex.

By indentures of the 17th and 19th of July 1830, Cook, in exercise of the power reserved to him by the deed of the 18th of December 1819, appointed and also conveyed the estate to the Defendant in fee by way of mortgage for securing £4500 and interest. In November 1830 the Plaintiff sued out an *elegit* on her judgment, and the Sheriff of Middlesex extended a moiety of the estate for her benefit, but was unable to give her actual possession thereof. The Plaintiff thereupon brought an ejectment (which was defended by the Defendant) to recover possession of the lands extended; but was non-suited, owing to the legal estate being in the Defendant under his mortgage.

[154] The bill was then filed, alleging that the Defendant, before the mortgage was made to him, had actual notice of the judgment, and that £1000, part of the mortgage money, was retained by his solicitor for the purpose of being applied in payment of the judgment debt in case the Defendant should become liable to pay it. The question at the hearing of the cause was whether, under these circumstances, the Plaintiff, by virtue of her judgment, had a lien on the estate prior to the mortgage, or, if not, whether she was entitled to redeem the mortgage.

Mr. Wigram and Mr. Stuart, for the Plaintiff. It was decided, in *Doe v. Jones* (10 Barn. & Cress. 459), and *Tunstall v. Trappes* (*ante*, vol. 3, p. 300; but see *Eaton v. Sanster*, *ante*, vol. 6, p. 517), that where a purchaser takes under the exercise of a power of appointment reserved to the vendor, he is not affected by a judgment entered up against the vendor; but in those cases it did not appear that the purchasers had notice of the judgments. Here the judgment was entered, docketed and registered before the appointment was made, and the Defendant had the fullest notice of it; and, moreover, part of the mortgage money was set apart to discharge the debt. The conscience of the Defendant was affected by the notice, and, therefore, he cannot be allowed to take advantage of the mortgagor's estate being defeasible. A party who obtains an assignment of a term with notice cannot avail himself of the protection of the term. *Willoughby v. Willoughby* (1 T. R. 763). If, therefore, the Defendant had [155] got in an outstanding legal estate of the same date as the deed creating the power, this Court would not have allowed him to set it up against the Plaintiff. In *Taylor v. Stibbert* (2 Ves. 437) it was decided that a purchaser with notice of a covenant was bound by it, although he took the estate under the exercise of a power of sale. It would be singular, therefore, if a judgment, which is the perfection of a covenant, did not bind the purchaser. In *Ray v. Pung* (5 Barn. & Ald. 561, and 5 Madd. 310) it was decided that dower was defeated by the exercise of a power; but there is no analogy between dower and the claim of the judgment creditor; notice is of no avail with respect to it. In *Davis v. The Earl of Strathmore* (16 Ves. 419) the judgment was not docketed, and yet Lord Eldon held that the purchaser was bound by notice of it. *Thomas v. Pledwell* (7 Vin. Ab. 53, pl. 5; Creditor and Debtor (E.)), which was cited in the last case, and has been always considered as good law, is an authority in our favour, not only with respect to the notice, but also as to the retainer of part of the mortgage money, in order to satisfy the judgment debt.

Mr. Knight, Mr. Jacob and Mr. Bazalgette appeared for Shearly, and Mr. Wakefield and Mr. R. Roupell, for the other Defendant in whose hands the £1000 was deposited.

But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The point, I admit, is an important one, but it has not come upon me by surprise.

[156] The question is wholly unaffected by the doctrine laid down in the case in the 7th Viner, or *Le Neve v. Le Neve* (3 Atk. 646), or *Davis v. Lord Strathmore*. With respect to *Davis v. Lord Strathmore*, I remember that the late Lord Chief Baron Richards was surprised that Lord Eldon should have entertained any doubt upon the point in that case, as he considered it to be settled by *Le Neve v. Le Neve*.

The intention of the Register Acts, and of the Act of the 4th & 5th W. & M. c. 20, for docketing judgments, was to prevent mischief to purchasers who might not be able to ascertain whether any judgments had been entered up that would affect the land purchased. And, if the object of those Acts was only to take care that

purchasers should have the means of knowing whether any such judgments existed, that object was accomplished if it appeared that they had notice of the judgments *aliunde*. So with respect to the Register Acts; the object was to give increased security to purchasers of lands in the counties to which those Acts apply; but the protection of those Acts is not extended to purchasers who have notice of an unregistered deed.

In this case the question that we have to consider is whether, if a party having an estate limited to such uses as he shall appoint, generally, and, in default of appointment, to himself in fee, has a judgment recovered against him, and then appoints the estate to A., who has notice of the judgment, A. does not take the estate free from the judgment? Now, the effect of the transmission of the estate by the appointment is that the appointee takes it in the same manner as if it had been limited to [157] him by the deed under which the appointor takes in default of appointment, and, consequently, free and disconnected from any interest that the appointor had, in the tenements, in default of appointment.

In *Roach v. Wadham* lands and hereditaments were conveyed to the use of such persons and for such estates as W. Watts by deed or will should appoint, and, in default of appointment, to Watts in fee; and Watts covenanted for himself, his heirs and assigns, to pay a certain fee-farm rent to the Plaintiffs. Watts afterwards executed a deed, by which the premises became vested in Wadham; and the question arose, on the form of the deed by means of which Wadham took, whether the covenant in the conveyance to Watts ran with the land, so as to bind Wadham. The mode in which the question was dealt with was by considering whether the deed was intended to operate as a conveyance of Watts's interest, or as an execution of his power; and the Court of King's Bench were of opinion that the deed was intended to operate as an execution of the power, and, consequently, that Wadham took an estate that was never vested in Watts, and, therefore, that he was not bound by the covenant. That decision shews that the appointee is in no sense the assignee of the appointor; how, then, can he be affected by judgments which affect only the estate and interest of the appointor? If that be so, the circumstance of his having notice of those judgments is immaterial; for the appointee has no estate that can be taken in execution under a judgment which, at the time when he had notice, might have been made available against the estate of the appointor.

In order to understand the case of *Taylor v. Stibbert* [158]-*bert* (see the observations on this case in 2 Sugd. Pow. 394, and Lloyd & Goold's Rep. 218), it is necessary to observe that it appears by the judgment that the legal estate in fee was in the trustees of the settlement, and, therefore, the trustees held for all those persons who had equitable interests in the estate; and when the tenant for life, with power of leasing, contracted with Taylor to execute his power for valuable consideration, Taylor had an equitable interest under the settlement; for the covenant bound the equitable interest, which was distinct from the legal interest; and the trustees then held in trust for him as well as for the other parties interested under the settlement. Where land is limited to the usual uses to bar dower, the equitable estate is merged in the legal; but where the legal estate is vested in a trustee, it is distinct from the equitable estate. In *Taylor v. Stibbert* Lord Rosslyn decided on the ground that the purchaser had notice that the legal estate was outstanding in the trustees of the settlement, and that Taylor had an equitable interest for which they were trustees. As it is impossible that a settled estate can be enjoyed except by means of the exercise of a power to lease, the Courts never allow leases granted by the tenant for life under his power to be defeated by the exercise of a power in the trustees to appoint new uses with the concurrence of the tenant for life.

It does not appear to me that the circumstance relied on in the case in 7th Viner, namely, that an allowance was made to the purchaser, in respect of the judgment debt, applies to this case. It was thrown out by Lord Macclesfield merely as a subsidiary point. In this case the money, in point of fact, did pass from the mortgagee to a third person, who, at the utmost, could be con-[159]-sidered only as a trustee for the judgment creditor; but, whatever private bargain there may have been between the mortgagor and mortgagee, it was a matter that remained for themselves alone to act upon; and the judgment creditor does not acquire any right on

the land, merely because he might claim to have the money in the hands of the mortgagee's agent applied in satisfaction of his debt.

My opinion is that the circumstance of the Defendant having had notice of the judgment is wholly immaterial; for, as he took by virtue of the appointment, he took an estate that never was affected by the judgment.

Bill dismissed, with costs.(1)

[159] *Ex parte* SHAW. August 4, 1836.

Will. Construction.

Testator devised all his property to his wife, her heirs, &c., for all his estate and interest therein, for her own absolute use and benefit, and to be disposed of by her by deed or will as she might think fit. Held, that a freehold estate in fee, of which the testator was a trustee, passed by the devise.

Thomas Street made his will in the following words: "As to the property I may die possessed of or may hereafter acquire, of whatsoever description and wheresoever situated, I give, devise and bequeath unto my dear wife, Ann Ready Street, to hold to her, my said wife, her heirs, executors, administrators and assigns, according to the nature and quality thereof, respectively, for all my estate and interest therein, to and for her own absolute use and benefit, and to be disposed of by her by deed, will or otherwise as she, my said wife, may think fit. And I do hereby nominate, constitute and appoint my said dear wife sole executrix of this my will."

[160] The question on the hearing of a petition presented under 11 G. 4 and 1 W. 4, c. 60, was whether a freehold estate in fee, of which the testator was seised as a trustee, passed by the will.

Mr. Rudall, in support of the petition.

THE VICE-CHANCELLOR [Sir L. Shadwell] held that the estate did pass.

[160] *MILBANKE v. STEVENS.* Jan. 13, 1838.

Jurisdiction of the Masters under 3 & 4 W. 4, c. 94. New Orders.

The Masters, on applications made before them under 3 & 4 W. 4, c. 94, s. 13, have the same power to dispense with the strict letter of the General Orders as the Court itself has.

After the time limited by the 13th Order of 1831 for amending the bill had expired, the Plaintiff applied to the Master, under 3 & 4 Will. 4, chap. 94, sect. 13, for leave to amend. The Master refused the application, on the ground that he had no jurisdiction to make the order.

Mr. Elmsley, for the Plaintiff, now moved by way of appeal from the Master for leave to amend. He said that this was a special application, and, therefore, the motion had been properly made before the Master, in the first instance: and that under the circumstances of the case leave to amend ought to have been granted.

Mr. Torriano, for the Defendant.

THE VICE-CHANCELLOR said that he had the sanction of the Lord-Chancellor for stating that the Masters, on applications being made before them under the Act, had the same power to dispense with the strict letter of the General Orders of the Court as the Court itself had, and that, under the circumstances of the case, the Master ought to have granted the application: and His Honor made the order.

(1) Affirmed by the Lord Chancellor on the 15th of November 1837.

[161] SHIRREFF v. BARNARD. July 2, 1836.

Affidavits. Injunction.

A landlord obtained an injunction, *ex parte*, to restrain his tenant from removing a building erected by the latter on the demised premises. The tenant in his answer alleged that the building was not affixed to the freehold. On a motion to dissolve the injunction the Court would not allow the Plaintiff to read affidavits filed after the answer, and tending to shew that the building was affixed to the freehold.

By an indenture, dated the 22d of December 1781, Joseph Hales (under whom the Plaintiffs claimed) demised to William Barnard, a shipbuilder, two old timber-built messuages, with the wharf, outhouses, ground and buildings belonging thereto, situate at Deptford in Kent, with liberty to take down the two old messuages and all the outhouses and buildings standing on the demised premises, and to convert the materials thereof to his own use, he, his executors, &c., leaving all such new erections and buildings as should be erected upon the demised premises during the term, at the end thereof, in good and sufficient repair; to hold the demised premises and the new erections and buildings for 51 years from Lady Day 1785, at the yearly rent of £30; and Barnard covenanted to keep, and at the end of the term to deliver up to Hales, his heirs or assigns, in good repair, the demised premises (except such parts thereof as he had liberty to take down) and [162] all new erections and buildings to be erected on the demised premises during the term.

Barnard entered into possession of the premises under the lease, and pulled down the two old messuages; and, as the bill and the affidavits in support of it alleged, he erected on the demised premises an extensive building standing upon brick foundations which were sunk deep in the ground; and part of the said building consisted of massive wooden pillars, with supports partly sunk into the ground and partly resting on and secured to plates of timber attached to the said brickwork, and which building was 90 feet long and 60 feet wide, and was covered with slates, and was used by Barnard for the purposes of his business of shipbuilding. The bill further alleged that, in March 1836, Barnard began to pull down and remove the building; and prayed for an injunction to restrain him from so doing.

The Plaintiffs obtained, *ex parte*, an injunction according to the prayer.

Barnard then put in his answer, in which he stated that, after he entered into possession of the demised premises, he took measures for making them subservient to the purpose for which he had taken them, namely, for carrying on the trade or business of a shipbuilder, and, in order thereto, he caused a range of 16 sawpits to be dug upon the premises parallel to and side by side with each other; that the sawpits were included within a continuous brickwork in the form of a parallelogram and built wholly below the surface of the ground, and forming, in part, the faces of the several pits; the upper surface of which brickwork was flush or level with the ground; the length of which parallelogram, traversing [163] the whole range of sawpits, was 93 feet, and the breadth of it 49 feet, and three of the cross-subdivisions which separated the sawpits from each other were also faced with brickwork, the upper surface of which last-mentioned brickwork was, in like manner, flush or level with the ground: and that another line of brickwork dividing the parallelogram into two parts in the direction of and parallel with its longest sides was also built below the surface of the ground, and was also, in like manner, flush with the surface, and that such last-mentioned line of brickwork formed one of the facings of the range of sawpits; that, after the completion of the sawpits, Barnard, in further prosecution of his purpose of converting the premises to the use of his business, caused an extensive mould loft to be made on the premises upon the construction after mentioned (that is to say) plates of oak plank of about five inches in thickness, and in many parts double, were laid upon the upper surface of the brickwork parallelogram, and similar plates, but not double, of oak plank were laid upon the upper surface of the three cross-subdivisions, and also similar double plates were laid upon the upper surface

of the divisional line of brickwork; that none of the plates of oak plank were let into or in any manner affixed to the brickwork, but were simply laid thereupon; that 19 large fir posts or uprights were then, by means only of mortices and tenons, steadied upon the oaken plates which were laid upon the upper surface of the brickwork parallelogram, and six similar fir posts or uprights were, in like manner, steadied upon the oaken plates laid upon the three cross-subdivisions, and seven similar fir posts or uprights were, in like manner, steadied upon the oaken plates laid upon the surface of the divisional line of brickwork; but none of the fir posts or uprights were let into the ground or into the brick-[164]-work, but, save as aforesaid, all of them were entirely unconnected with the ground and soil of the demised premises, and with the brickwork, and were respectively steadied or kept in an upright position by means of mortices and tenons and of the superincumbent weight resting thereupon as after mentioned; that several of the first-mentioned uprights, being external ones, had and were protected by wooden spurs; that a mould loft of timber materials was constructed by Barnard over the range of sawpits, and was entirely supported by the uprights before mentioned, and was 93 feet in length and 49 feet in breadth; that the fir posts or uprights were respectively 11 inches square; that the mould loft was never used or intended to be used for a habitation, but only for the purposes of the shipbuilding business; that the longest side of the mould loft fronted the Thames, and that, next and immediately adjoining to and extending the whole length of the opposite side thereof, Barnard made a long shed, consisting of a roof supported by uprights of the dimensions aforesaid, and steadied in like manner upon plates of timber as the uprights of the mould loft, and which last-mentioned plates of timber were laid upon the ground, but not affixed thereto or let into or below the surface; that the shed was made as a cover for machinery employed for heaving timber upon the sawpits, and was 20 feet in breadth and 93 feet in length; that the mould loft and its supports and uprights, either alone or together with the shed, was, as the Defendant believed, the building referred to in the bill; and he admitted he had begun to pull down such building and to carry away the same; and he submitted that he was entitled so to do, but said that he did not intend to remove, or in any degree to disturb, the brickwork or the ground or soil of the demised premises, or to remove [165] anything in any manner affixed or attached thereto or to the freehold of the premises.

Upon the hearing of a motion to dissolve the injunction, the Plaintiffs' counsel proposed to read certain affidavits, which were filed *after the answer*, in order to shew that the building in question was, in fact, affixed to the freehold of the premises.

Mr. Jacob and Mr. Lloyd, for the Defendant, objected to those affidavits being read, on the ground that the question was to whom the property in dispute belonged, which was a question of title. (*Norway v. Rowe*, 19 Ves. 144.)

Mr. Knight and Mr. Koe, for the Plaintiffs. The question whether the Defendant is entitled to remove the building or not, depends upon the character of the property. We tender the affidavits in order to shew that the building is fixed to the freehold. Where the question turns on the character of the act done and not on the title to the estate, everything that bears on the character of the act done may be proved by affidavits filed after the answer. *Peacock v. Peacock* (16 Ves. 49; see 51), *Countess of Strathmore v. Bowes* (2 Dick. 673; 2 Bro. C. C. 88; 1 Cox, 263), *Potter v. Chapman* (Amb. 98), *Morphett v. Jones* (19 Ves. 350; and see 1 Swanst. 254, note).

THE VICE-CHANCELLOR [Sir L. Shadwell]. No precedent has been produced which meets this case.

[166] If a bill is filed for an injunction to restrain the commission of waste, and the Defendant, in his answer, denies the act of waste, it is competent to the Plaintiff to shew, by affidavits filed after the answer, that the denial is false; and it is equally plain that, where the Defendant by his answer denies the title of the Plaintiff, the latter is not at liberty to support it by affidavits filed in opposition to the answer.

If the erection over the sawpits is let into the freehold, the Plaintiff has a right to it; and, consequently, his title depends upon its sustaining that character. This case, therefore, is so constituted that a matter of fact becomes a matter of title; and, even where it is doubtful whether affidavits filed after the answer ought to be admitted or not, the most convenient course is to reject them; for a Plaintiff ought

to state his case fully, in the first instance, and not to bring in a mass of affidavits for the purpose of propping up his case after the Defendant has put in his answer.

My opinion, therefore, is that the affidavits now sought to be read are not receivable. (See the next case.)

[167] BODDINGTON v. WOODLEY. *April 23, May 3, 1838.*

Affidavits.

Plaintiff, after answer, made amendments in his bill which contradicted some of the allegations in the answer. He then moved for a receiver, and tendered affidavits verifying the amendments. Held that the affidavits were not receivable, as they contradicted the answer.

The Plaintiff was a mortgagee of an equitable interest in a West India estate. The bill prayed for a foreclosure, and for the appointment of a receiver and consignee. After the answer was put in the Plaintiff amended the bill. The amendments contradicted several of the allegations in the bill. The Plaintiff did not call for an answer to the amendments, but filed a replication as soon as the rules of the Court would permit. He then moved for a receiver and consignee; and, in support of his motion, tendered affidavits verifying the amendments.

Mr. Knight Bruce and Mr. L. Wigram appeared for the Plaintiff, in support of the motion.

Mr. Jacob and Mr. James appeared for the Defendant.

One question was whether the Plaintiff's counsel were entitled to read the affidavits.

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that the affidavits were not receivable, as they tended to contradict the answer; and His Honor refused the motion, on the ground that there was no admission of debt in the answer.

May 10. The Plaintiff appealed from the above decision to the Lord Chancellor.

[168] His Lordship thought that the answer contained sufficient grounds for appointing a receiver and consignee, and made an order accordingly; but expressed an opinion that, according to *Norway v. Rowe* (19 Ves. 144), the affidavits were not admissible. (See the preceding case.)

[168] SWIFT v. SWIFT. *July 26, 1836.*

[S. C. 5 L. J. Ch. (N. S.) 376. See *Harrison v. Symons*, 1866, 14 W. R. 959; Cf. *In re Warren's Trusts*, 1884, 26 Ch. D. 208.]

Construction. Marriage Articles.

By marriage articles a reversionary interest in a fund was agreed to be settled on the husband for life, remainder to the wife for life, and, after the death of the survivor, on the *issue* of the marriage living at the death of the survivor of the husband and wife, in equal shares if more than one, and if but one, then the whole was to go to such only *child*; and, if there should be no *issue* of the marriage living at the death of the survivor of the husband and wife, then the fund was to go as the husband should appoint. The only child of the marriage died in the father's lifetime, leaving a child. Held that the word *issue* was to be construed *child*, and therefore that an appointment of the fund made by the father was valid.

By articles of agreement, dated the 14th of January 1804, and made previously to the marriage of Edmond Swift and Mary Daly, after reciting that Edmond Swift, under the settlement on the marriage of his father and mother, was entitled to £2000 on the contingencies therein mentioned, and that, under the will of Mrs. C. Bacon, he

was entitled to £1500, in reversion expectant on his mother's decease; it was agreed that Edmond Swift should, by a good and sufficient deed of settlement, such as counsel should advise, assign to Deane Swift and John Mills the two sums of £2000 and £1500, in trust to permit Edmond Swift, when he should be entitled thereto, to receive the interest thereof, for his life, and, after his decease, to permit Mary Daly, in case she should survive him, to receive the interest thereof for her life, and, after the decease of the survivor of them, the two sums to go to the issue of the marriage, in case there should be any living at the death of [169] Edmond Swift and Mary Daly, in such manner, shares and proportions as Edmond Swift should, by deed in his lifetime, or by his will, appoint, and, for want of such appointment, then to such issue, share and share alike, if more than one, and if but one then the whole of the two sums to go to such only child; and in case there should not be any issue of the marriage living at the death of the survivor of Edmond Swift and Mary Daly, then the two sums to go to such person or persons as Edmond Swift should, by deed or will as aforesaid, appoint.

The marriage took effect, but no settlement was made in pursuance of the articles. Mrs. Swift afterwards died. There was issue of the marriage one child only, and that child died leaving a daughter, who was still alive. Edmond Swift, having made an appointment of the trust monies in his own favour, filed a bill against the trustees and his granddaughter, praying that those monies might be paid to him.

Mr. James Russell, for the Plaintiff, said that, if there was anything in an instrument which shewed that the word "issue" was intended to be confined to children, the Court would take it in that sense; that, in this case, the words, "and if but one, then the whole of the said two sums to go to such only child," shewed that the parties intended to provide only for the children of the marriage; and, as the only child of the marriage had died in the father's lifetime, the father was entitled to appoint the trust funds under the general power given to him by the articles. *Mandeville v. Lord Carrick* (3 Ridgw. P. C. 363), *Sibley v. Perry* (7 Ves. 522).

[170] Mr. G. Richards, for the Plaintiff's granddaughter, said that the intention of the parties was to provide for all the issue of the marriage; that the articles were executory merely; and that it was plain, from the language of them, that the parties contemplated that a regular settlement would be made: that, at the date of the articles, the husband's interest in the property was reversionary, and the issue were not to take vested interests on attaining 21, but on the death of the survivor of the husband and wife, which was a remote event: that, by the terms of the articles, the husband's general power of appointment could not be effectually exercised except in the event of there being no issue of the marriage living at the death of the survivor of the husband and wife, and, as the granddaughter was still living, effect could not be given to the appointment that had been made under that power. *Wyth v. Blackman* (1 Vez. 196) and *Dalzell v. Welch* (ante, vol. 2, p. 319).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The expression "and if but one, the whole to go to such only child," is demonstrative that the word "issue" means "children;" and, consequently, the father is entitled to the trust funds.

[171] BASAN v. BRANDON. July 27, 1836.

Legacy. Ademption.

A testator resident in Jamaica bequeathed to A. B. £2000, part of a sum of £7000 in the hands of his agents in England and received by them from the Transport Board on his account. The testator afterwards went to Philadelphia, where he died. Seven days before his death he wrote to his agent in Jamaica, desiring him to order his agents in England to invest all his monies in their hands, received from the Transport Board, in any stock most beneficial to his estate. The agent wrote accordingly; but, some time before his letter arrived in England, the agents there had, of their own accord, invested the whole of the testator's monies in their hands in the four per cents. Held that the legacy was not adeemed.

Jacob Basan, late of Jamaica, made his will, dated the 18th of June 1816, and

which was partly as follows: "Whereas I have now in the hands of Raphael Brandon, Joshua Brandon and David Brandon, carrying on trade and business in England under the firm of Brandon & Sons, the sum of £7382, 2s. 6d., which they received for me from the Commissioners of the Transport Board by a power of attorney which I sent over to them, being a part of a sum of money that they were empowered to receive from the said Commissioners of the Transport Board; out of which said sum of £7382, 2s. 6d. so received by them the said Raphael Brandon & Sons, I order and direct that the sum of £2382 be placed out and invested in the English three per cent. Bank stock by the said Raphael Brandon, Joshua Brandon and David Brandon, and that they do permit and suffer my said wife, Judith Basan, to receive and take the interest to accrue thereon, from time to time, as the same shall become due and payable, during the term of her natural life and, from and immediately after the decease of my wife Judith, then I give and bequeath the said last-mentioned sum of £2382, with whatever interest may then be due, unto my said son, David Basan, and to and for no other use, intent or purpose whatsoever." The testator afterwards made a codicil to his will, dated the 13th of October 1816, and thereby (among [172] other things) manumitted a slave named Edward, and desired his son, David Basan, immediately on his attaining 21, to confirm the freedom of the slave, and in case of his refusing to do so, he revoked all the bequests in favour of his son in his will contained.

The testator died at Philadelphia on the 25th of November 1816; and, shortly afterwards, his son executed a deed confirming the manumission of the slave.

It further appeared, by the Master's report, made in pursuance of the decree, that Raphael Brandon & Sons were the London agents and correspondents of the testator, acting under a power of attorney, by virtue whereof they, in January 1816, received from the Commissioners of Transports Government bills of exchange for £7382, 2s. 6d., which became due on the 11th of April 1816, and that the amount thereof was then received by Brandon & Sons, and was by them invested in the purchase of Exchequer bills, in which investment it remained until November 1816: that very shortly after making his will in June 1816, the testator being in an ill state of health, left Jamaica for Philadelphia, having appointed Abraham Rietti, by power of attorney, his agent for managing his affairs in Jamaica during his absence; that Messrs. Brandon, on the 10th of September 1816, received a letter from Rietti, dated the 7th of July 1816, which contained directions to them to invest £5000, part of the £7382, 2s. 6d. in their hands, in the purchase of four per cent. Bank annuities; and that, on the 7th of November in that year, Brandon & Sons invested the whole of the £7382, 2s. 6d. in the purchase of £9500 four per cent. annuities, in their own names: that, on the 18th of November 1816, seven days before the testator's death, he wrote a letter from [173] Philadelphia to Rietti, directing him to order Brandon & Sons to invest all his monies in their hands received from the Transport Board in any stock most beneficial to his estate, and that Rietti forwarded, in due course, a copy of such letter to Brandon & Sons, and that they, a short time previous to the testator's decease, received a further sum from the Commissioners of Transports on account of the testator, and invested it in the purchase, in their own names, of £2200 four per cent. annuities, making, together with the £9500, the sum of £11,700 like annuities which were standing in their names at the time of the testator's decease. The Master further found that David Basan died in 1827 and Judith Basan in 1834: and he submitted to the judgment of the Court whether the legacy of £2382 was to be considered as or in the nature of a specific legacy, and whether the same had or had not been adeemed by the investment of the debt or sum of £7382, 2s. 6d. in the manner and under the circumstances in his report set forth.

The question so submitted by the Master was argued on the hearing of a petition presented by the Defendant, R. Nunes, the administrator of David Basan, and praying that the Petitioner might be declared to be entitled to £3773, 9s. 4d. three per cents., in respect of the principal of the legacy of £2382, and to £283 sterling in respect of the interest thereon since the death of Judith Basan; and that a sum sufficient to purchase the £3773, 9s. 4d. three per cents. might be raised by sale of a sufficient part of £11,700 Reduced three and a half per cents. standing in the name of the Accountant-General in trust in the cause, and that the £283 might be raised by sale of a sufficient part of £1230, 11s. 1d. three per cents. standing in the name [174] of the Accountant-General in trust in the cause, "The Interest Account."

Mr. Jacob and Mr. S. P. White, for the Petitioner, contended, first, that the legacy was not specific but demonstrative, and, therefore, could not be adeemed: *Pulsford v. Hunter* (3 Bro. C. C. 416), *Gillaume v. Adderley* (15 Ves. 384), and *Savile v. Blacket* (1 P. W. 777); secondly, that if the legacy was specific and was adeemed by the investment, it was revived by the codicil: *Rudstone v. Anderson* (2 Vez. 418), *Coppin v. Fernyhough* (2 Bro. C. C. 291).

Sir W. Horne, Mr. Teed and Mr. Keen, for the other parties in the cause, said that the legacy was specific, and had been adeemed; for the testator had directed that the fund should not remain a debt due from Brandon & Co., in which state it was at the date of his will, but should be invested in stock, not for the benefit of the legatee, but of his estate.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It appears from the Master's report that, on the 11th of April 1816, Messrs. Brandon & Sons had, as agents for the testator, received from the Commissioners of Transport £7382, 2s. 6d., which they invested in Exchequer bills; but nothing is stated as to whether that investment was made by the testator's direction or not, but that is not immaterial; as in either case the legacy would be clearly specific; for it is perfectly plain that there is no gift, except of part of a sum in the hands of [175] Messrs. Brandon. The question then is, has the legacy been adeemed?

It appears that the testator appointed Rietti his agent for managing his affairs in Jamaica. Now, if that appointment did confer on Rietti the power to alter the state of the fund, the testator need not have written to him the letter of the 18th of November. Rietti was not the general agent of the testator, but only his agent for managing his affairs in the island. Rietti, however, as general agent, wrote a letter in July 1816 (the will having been made in June preceding), directing Brandon & Co. to invest £5000, part of the £7382, 2s. 6d. in the four per cents.; and Brandon & Co. thereupon invested the whole of the £7382, 2s. 6d. in the purchase of £9500 four per cents. Supposing that Rietti was the testator's general agent, yet neither the letter of July nor the investment made on the receipt of it could have any effect on the £2382; as that sum was not named in the letter, and, therefore, the investment of it was the spontaneous act of Brandon & Co. They were directed to lay out the £5000 only; and their unauthorized act would not alter the will. The codicil, which was made on the 13th of October 1816, was a confirmation of the will. The investment was made on the 7th of November following; up to that time there was no ademption. Then comes the letter of the 18th of November 1816, in which the testator directs Rietti to order Brandon & Sons to invest all his monies in their hands received from the Transport Board in any stock most beneficial to his estate. That would include the £2382, and all the money subsequently received. On the 25th of November the testator died: and, in my opinion, a mere unexecuted intention to change the state of a fund which the testator might [176] have revoked, and which, in fact, was never carried into execution, cannot in any sense be considered as an ademption.

As the testator authorized the investment of the £2382, I think that the representative of the legatee must take such a portion of the £9500 stock as was equivalent to the £2382 at the time when that stock was purchased, and he is also entitled to a like portion of the dividends from the death of Judith Basan.

[176] CURTIS v. SHEFFIELD. July 22, 29, 1836.

[S. C. 5 L. J. Ch. (N. S.) 377. See *In re Clagett's Estate*, 1882, 20 Ch. D. 644.]

Insolvent Debtor.

Where a person has twice taken the benefit of the Insolvent Debtors Act, a chose in action to which he became entitled between his first and second insolvencies, passes to the assignees under the second insolvency.

On the 6th of February 1827 the Defendant, Thomas Curtis, was discharged from the King's Bench prison under the 7th Geo. 4, c. 57 (the Act then in force for the

relief of insolvent debtors), having previously executed the usual conveyance and assignment of all his estate and effects to the provisional assignee of the Court, and also the usual warrant of attorney to confess judgment against him for the amount of the debts stated in the schedule to his petition.

Joseph Sheffield, the testator in the cause, died in July 1831; and under his will Curtis became entitled to a reversionary interest in a sum of stock. On the 4th of June 1832 Curtis was again discharged under the 7th Geo. 4, c. 57, which had been continued by 11 Geo. 4 and 1 Will. 4, c. 38.

The question was whether the stock ought to be transferred to the assignees under the first, or to the assign-[177]-ees under the second insolvency, or whether it ought to be apportioned between them.

Mr. Willcock, for the assignees under the second insolvency, referred to *Barton v. Tattersall* (1 Russ. & Myl. 237), and to 7 Geo. 4, c. 57, s. 11, which enacts that the prisoner shall, at the time of subscribing the petition for his discharge, execute a conveyance and assignment to the provisional assignee in the form annexed to the Act, of all his estate, right, title, interest and trust in and to all his real and personal estate and effects, and of all his future estate, right, title, interest and trust in and to any real or personal estate and effects, which he may purchase, or which may revert, descend, be devised or bequeathed or come to him, before he shall become entitled to his final discharge in pursuance of the Act, according to the adjudication made in that behalf: which conveyance and assignment shall vest all the real and personal estate and effects as aforesaid, of every nature and kind whatsoever, in the said provisional assignee.

Mr. Reynolds, for the assignees under the first insolvency, said that if the assignees under the second insolvency were entitled to the stock in question, they must hold it as trustees for the creditors under both insolvencies; and he referred to the 58th and 59th sections of the 7 Geo. 4, c. 57, which enact that in case any person shall, after he has become entitled to the benefit of the Act, become entitled to or possessed of in his own right, any stock in the public funds or other chose in action, or other property which, by law, cannot be taken in execution under the judgment entered up in the names of the assignees, and he shall have refused to [178] assign or transfer such stock or other chose in action, or other property, then it shall be lawful for the assignees to apply by petition in a summary way, setting forth the facts of the case to the Court, and to pray that the prisoner may be committed to custody, and if it shall appear to the Court that the contents of the petition are true, the Court shall order the prisoner to be committed to any prison which the Court shall direct, until he shall assign and transfer such choses in action or other property to the assignees for the general benefit of the creditors. That in case any person shall, after any insolvent shall have become entitled to the benefit of the Act, become possessed of or have under his power or control any stock in the public funds, or any legacy or any other property whatsoever belonging to such insolvent or held in trust for him, or to which such insolvent shall be in any way entitled, it shall be lawful for the Court upon application of any assignee or creditor of the insolvent, to cause notice to be given to such person directing him to hold the said property till the said Court shall make further order concerning the same, and thereupon it shall be lawful for the said Court further to order such person to deliver over such property to the assignees of the estate and effects of the insolvent, for the general benefit of the creditors of such insolvent, entitled to claim under the judgment entered up by order of the Court.

THE VICE-CHANCELLOR. I will look over the Act and see what construction ought to be put upon it.

July 29. THE VICE-CHANCELLOR [Sir L. Shadwell]. It appears to me that the first set of assignees have no title at all to this legacy. *Primâ facie*, by the as-[179]-signment directed to be made by an insolvent to his assignees, all the interest of every kind, which the insolvent has at the time of his discharge, passes to the assignees: but if, after his final discharge, any property accrues to him, it can only be obtained by the assignees by means either of the Court of Insolvency permitting execution to be taken out on the judgment entered up against the insolvent, or by means of such an application to the Court as is directed by the Act, in the case of choses in action and other things which cannot be taken in execution under the

judgment: but, in order to give the assignees who claim the future effects any title, they must apply to the Court, and *non constat* that this application would be successful; and, therefore, till application is made to the Court, the assignees of the insolvent who has been discharged have no interest against the assignees who came in since, and derive title under an assignment made since the prior assignment. The assignees of the first insolvency would not, without application to the Court, have the choses in action of the insolvent acquired after his discharge. The assignment which was made by the insolvent to his second assignees passed to them the actual chose in action in dispute; so that they are really entitled to it. It is not a question of apportionment, for they are entitled to the whole thing: *non constat* that there will be any surplus: *non constat* that the first assignees will ever make any application to the Court; and *non constat* that the Court would ever grant such application, if it were made.

In future it will be unnecessary to make the persons who are assignees under the first insolvency parties to a suit where the assignees under the second insolvency are [180] made parties. The prior Acts are repealed by 7 Geo. 4, c. 57, except as to proceedings commenced under those Acts.

[180] WOODYATT v. GRESLEY. July 30, August 1, 1836.

[See *Hastie v. Hastie*, 1875, 24 W. R. 243. Distinguished, *Fox v. Buckley*, 1876, 3 Ch. D. 511. See *In re Weston* [1900], 2 Ch. 170.]

Fraud. Receiver.

On the marriage of Sir N. and Lady G. two settlements were executed: by one, a sum of stock and estates in W., the lady's property, were conveyed to trustees in trust for her for life, with remainder in trust for the children of the marriage, and by the other Sir N. granted out of his estates a rent-charge to Lady G. for life. She, after her husband's death, fraudulently obtained a transfer of the stock, and sold it out: and, afterwards, she assigned her life interest in the estates in W., and the rent-charge to A., for valuable consideration, but with notice of the fraud. Held, that the rents of the estates in W., and the rent-charge, were liable to be applied to replace the stock; and a receiver of them was granted before answer.

On the treaty for the marriage of Sir Nigel and Lady Gresley, it was agreed that estates in Worcestershire and Herefordshire, the property of the lady, and £2609 Old South Sea annuities to which she was entitled, under her grandfather's will, in reversion expectant on the death of the survivor of her mother and aunt, should be settled for her separate use for life, and, after her death, for the benefit of the younger children of the marriage; and that Sir Nigel should grant, out of his estates in Staffordshire, a rent-charge of £800 a year to Lady Gresley for life, in case she should survive him. In pursuance of this agreement, by indentures of the 13th and 14th of June 1796, Lady Gresley's estates were vested in trustees in trust for her separate use for life, and, after her decease, in trust for Sir Nigel for life, and, after the decease of the survivor of them, in trust, for the younger children of the marriage; and the £2609 South Sea annuities, which were then standing in the name of the Accountant-General of the Court of Chancery in trust in a cause *Ross v. Berrow*, were assigned to the same trustees in trust for the separate [181] use of Lady Gresley for life, and, after her death, in trust for the younger children of the marriage: and, by indentures of even date, to which the trustees of the former deeds were parties and which recited those deeds, Sir Nigel granted a rent-charge of £800 a year, out of his estates in Staffordshire, to Lady Gresley for life, in case she survived him.

In March 1808 Sir Nigel died, leaving the Defendant Sir Roger Gresley, his son, and a daughter (who afterwards married the Defendant Edward Woodyatt) him surviving. In 1813 Lady Gresley, whose mother and aunt were then dead, but which was unknown to the trustees of the first-mentioned settlement, presented a petition in the cause of *Ross v. Berrow*, setting forth her title to the £2609 South Sea annuities under her grandfather's will, but suppressing the settlement on her marriage, and

obtained an order that the stock should be transferred to her ; and, shortly afterwards, she sold out the stock and applied the proceeds to her own use. The fraud thus committed by Lady Gresley remained undiscovered until the time after mentioned.

By the settlement on the marriage of Mr. and Mrs. Woodyatt, dated in February 1822, Mrs. Woodyatt assigned the £2609 South Sea annuities, subject to Lady Gresley's life interest therein, to the Plaintiffs, Thomas Woodyatt and Donald Cameron, in trust for Mr. and Mrs. Woodyatt, for their lives, and, after the death of the survivor of them, in trust for their children. On the 26th of June 1830 Lady Gresley assigned her life interest in the Worcestershire and Herefordshire estates, and the rent-charge of £800 a year, to Sir Roger Gresley, as a security for £5000 which he had paid to her or on her account. In September of the same year [182] Sir Roger informed Mrs. Woodyatt that he had recently discovered that the stock had been sold out by his mother.

The bill, which was filed by the children of Mr. and Mrs. Woodyatt and by the trustees of their settlement, alleged that the Plaintiffs were entitled to have the rents of the estates in Worcestershire and Herefordshire, and the rent-charge of £800 a year applied, during Lady Gresley's life, to replace the £2609 South Sea stock ; that the assignment to Sir Roger of the rents of the Worcestershire and Herefordshire estates was an assignment of a merely equitable interest ; and that, consequently, the same was posterior in equity to the equitable right of the Plaintiffs to have those rents applied for replacing the stock : that Sir Roger, prior to the execution of the assignment, or before he advanced the £5000, had notice that his mother had obtained the stock in violation of the contract on her marriage and of the trusts of the settlement, and, therefore, the Plaintiffs were entitled to have the rent-charge, as well as the rents of the Worcestershire and Herefordshire estates, applied in replacing the stock.

The bill prayed that it might be declared that the obtaining of the £2609 stock, by Lady Gresley, was a fraud on her marriage contract and on the settlements of June 1796, and that, upon obtaining the same, she was not entitled to receive the rents of the estates comprised in the first-mentioned settlement, or to receive the rent-charge of £800 limited to her by the second-mentioned settlement, but that those rents and the rent-charge became immediately applicable to replace the stock or to pay the proceeds of the sale of it (as might be most advantageous to the infant Plaintiffs) ; and [183] that it might be also declared that the assignment of the 26th of June 1830 was to be postponed to the right of the Plaintiffs to have the rent-charge and the rents of the Worcestershire and Herefordshire estates applied for the purpose aforesaid : and that an account might be taken of the rents of those estates and of the rent-charge, which had been received by Lady and Sir Roger Gresley since the former obtained the stock ; and that they might be decreed to apply what should be found due from them in purchasing and transferring £2609 South Sea annuities into the names of the trustees upon the trusts of the first-mentioned settlement, or in payment to them of the amount of the proceeds of the sale of the stock as might be most advantageous to the infant Plaintiffs, and that the proceeds might be laid out in the purchase of £2609 South Sea annuities, in the names of the trustees upon the trusts of the same settlement ; and that the rents of the Worcestershire and Herefordshire estates, and the rent-charge then due or thereafter to become due, might be applied in such purchase and transfer, or in the payment of the proceeds of the sale of the stock : and that Lady and Sir Roger Gresley might be restrained from distraining for or taking proceedings at law to recover those rents or the rent-charge, and from receiving the same, and that a receiver might be appointed thereof.

The Plaintiffs now moved, before answer, for an injunction and receiver, as prayed by the bill.

The motion was supported by affidavits, verifying certain letters written by Sir Roger Gresley to Mrs. Woodyatt, and which shewed that, prior to the assignment of June 1830, he had notice of the fraud committed by his mother.

[184] Mr. Treslove, for the Plaintiffs, and Mr. Knight, for the trustees of the first-mentioned settlement, said, with respect to Lady Gresley, that a party to a marriage contract who violated any of the provisions of it was not entitled to take any benefit under it ; and, with respect to Sir Roger, that the assignment of June 1830 passed to him a mere equitable interest in the rents of the Worcestershire and Herefordshire

estates, and, consequently, he took them subject to all the equities to which they were liable before the assignment; that, although he took the legal estate in the rent-charge, he took it with notice that the stock had been sold out in violation of the trusts of the settlement, and, consequently, the rent-charge, as well as the rents, were liable to be applied as against him, to repurchase the stock. *Priddy v. Rose* (3 Mer. 86), *Ex parte Turpin* (Mont. Rep. 443), *Ex parte King* (2 Mont. & Ayr. 410).

Sir Charles Wetherell and Mr. Hayter, for Sir Roger Gresley, said that a breach of trust created only a simple contract debt, and that *Priddy v. Rose* differed materially from the present case; for there the annuitants were Plaintiffs, and, consequently, the interference of the Court was asked by the parties who had taken assignments from the husband of parts of the funds agreed to be settled, without inquiring whether the husband had fully performed his covenant; but, in this case, the interference of the Court was asked *against* the party who had taken the assignment; that it was not the practice of the Court to appoint a receiver before answer, except under peculiar circumstances, which did not exist in this case.

[185] Mr. Bird appeared for Lady Gresley, and said that he was instructed not to offer any opposition to the motion, Lady Gresley being willing that her income under the settlements executed on her marriage should be applied to make good the stock.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The peculiarity of this case consists in this: that it is sought, with respect to what may be called the fraudulent abstraction of the sum of £2609 South Sea annuities, which was one subject of the settlement of June 1796, to proceed against the person who, at law, has become entitled to the rent-charge granted by the settlement of even date, and also against the possession of the lands of which the legal estate is vested in persons who represent the trustees of the first-mentioned settlement. The question then is, inasmuch as, by the first settlement of 1796, Lady Gresley professed to assign the South Sea annuities on the trusts of that settlement, and, afterwards, at the time when her right to those annuities had come into possession, obtained a transfer of them to herself, whether the Plaintiffs have not an equity, as against the other subjects of that settlement and the rent-charge created by the settlement of even date, to be reimbursed in respect of that abstraction of the annuities.

It is the settled practice in bankruptcy, where the tenant for life of a trust fund has improperly obtained possession of it and withdrawn it from the settlement, and afterwards becomes bankrupt, to direct, when proof is made in respect of the fund under the commission, that the trustees shall receive the interest of the dividends made on the sum proved, and apply it to make [186] good the full amount of the fund. One of the last cases was *Ex parte King*, in which an order was made by me, directing proof to be made for the amount of the sum abstracted; but there was no direction in the order that the interest of the dividends made on the sum proved should be paid to the trustees of the will, in order to make good the loss occasioned by the bankruptcy. There was an appeal from that order to the Lords Commissioners; and it was considered to be quite clear that the order was wrong; and it was rectified by directing that it should be part of the order that the trustees should receive and invest the interest of the dividends until the full amount of the sum proved should have been made up. The case of *Ex parte Mitford* (1 Bro. C. C. 398; and see 3 Mer. 105) went further; for there Lord Thurlow directed that the trustees of the settlement, to whom the bankrupt had not paid a sum of money which, by the settlement, he had covenanted to pay, should be at liberty to retain an annuity and the dividends of a sum of stock which were two of the subjects of the settlement, and to which the bankrupt was entitled for life, besides giving other directions which were tantamount to that direction to which I have alluded in *Ex parte King*. In *Ex parte Mitford*, therefore, the jurisdiction in bankruptcy extended the right of the trustees to other funds than those which were the subject of the abstraction; and Lord Thurlow clearly thought that those other funds to which the bankrupt was entitled, having been made subject to the trusts of the settlement, did, as far as the bankrupt had an interest in them, become liable to make good the fraud which, in one sense, the bankrupt had committed, by not paying the sum of money which he had covenanted to pay to the trustees.

[187] Now, the only difference between this case and *Ex parte Mitford* is that

there the persons who were applying to make the proof in bankruptcy had the legal dominion over the other fund which was the subject of the settlement. But here the trustees have no dominion over the rent-charge; and, with respect to Lady Gresley's own estates which were comprised in the first settlement, the trustees have merely the legal estate in them, but they have no possession; and they could not recover possession unless they brought an action of ejectment. Then the question will be whether, with respect to the rent-charge, there is not an equity on the part of those who claim under the first settlement of 1796, to say that Lady Gresley, and her son, who claims under her with notice of the fraud that she has committed, are not liable to make good the loss occasioned by that fraud, out of the rent-charge, as well as out of the rents to which she was entitled under the first settlement.

Now, if I were to hold otherwise, I should be holding, in effect, that it is competent to a person to derive a benefit under a deed, and, at the same time, to shrink from the performance of a duty imposed by that deed. Because, when Lady Gresley, by the first settlement of 1796, *granted, bargained and assigned* the South Sea annuities, those words, in a Court of Equity, were equivalent to a covenant on her part that, when the opportunity arrived, by the death of her mother and aunt, she would make those annuities subject to the trusts of the settlement; and it would be inconsistent with the rules of a Court of Equity if I were to say that that legal rent-charge was not liable to make good her default. If Lady Gresley were opposed to the relief which is prayed against her, and this transaction between [188] herself and her son had not taken place, I should have taken it to be quite clear, inasmuch as the deed under which she derived the rent-charge bore even date with that by which she assigned her reversionary interest in the South Sea annuities, and also recited and referred to it, and was part of the very transaction of the marriage contract, that the subject ought to be considered precisely in the same way as if Sir Nigel Gresley had made a settlement of his own Staffordshire estates by the very deed which contained the assignment of the South Sea annuities. The two deeds formed but one settlement.

Then if an equity would arise as against Lord Gresley, the question is whether, under the circumstances of this case, it does not exist as against Sir R. Gresley. The letter which he wrote to Mrs. Woodyatt shews that, at the time when he entered into the transaction with his mother, which terminated in his taking the deed of June 1830, he was aware of what she had done, because it contains words to this effect: "With regard to the South Sea stock to which you allude, and which amounted to £2609, I can find no account of it since the 1st of April 1812. I made all the inquiries possible when I made the arrangements with my mother, and found that it had, at some time which I could not precisely ascertain, been fraudulently sold out by my mother." Therefore he does confess that, at the time when he was dealing with his mother, he had made some inquiries as to what had become of the very fund, and that he discovered that it had been dealt with in the manner which he mentions. I cannot therefore but think that that equity which would have existed against the mother exists against the son. And the observation applies with much more force with respect to the estates in [189] Worcestershire and Herefordshire, than with respect to the rent-charge; because, with respect to them, the legal estate is in the trustees, and this Court might speedily put the trustees in possession of those estates, by directing them to bring an ejectment against Sir R. Gresley.

The only question is whether, there being an equity existing, this Court is not called on to interfere as soon as it can, in order to have the fund which Lady Gresley has abstracted restored; especially as the continuance of the fund depends on her life. In my opinion it would be a very improvident administration of the equity of this Court to say that, upon these facts, appearing as they do in the Plaintiff's affidavit, Sir R. Gresley shall be allowed to continue to receive the rents. My opinion, therefore, is that, although this case now stands only upon bill filed and affidavits, without an answer, I must grant the injunction; and the receiver is merely ancillary to the injunction.

[189] SPOULE v. PRIOR. July 30, Nov. 2, 1836.

Marshalling of Assets. Legatee.

A. agreed to purchase an estate, and died leaving the greater part of the purchase-money unpaid. The Court, at the suit of a legatee under A.'s will, ordered his assets to be marshalled, on account of the vendor's lien for the unpaid purchase-money.

The Plaintiff was a pecuniary legatee under the will of William Phelps, who, after making his will, agreed to purchase an estate in Gloucestershire, and died leaving the greater part of the purchase-money unpaid; and, [190] on his death, the estate descended to W. Law Phelps, his heir at law. The Defendants were the personal representative of William Phelps and the devisees of William Law Phelps.

The bill insisted that, if W. Phelps's personal estate should not be sufficient to pay the remainder of the purchase-money for the estate contracted for, and also the legacy to which the Plaintiff was entitled, the assets of William Phelps ought to be marshalled and the deficiency raised by sale or mortgage of the estate.

Mr. Wakefield and Mr. K. Parker appeared for the Plaintiff.

Mr. Knight and Mr. Bethell, for the Defendants the devisees of W. Law Phelps. The right which a vendor has to resort to the estate for payment of the purchase-money does not extend to third persons: the lien is given for the benefit of the vendor alone. This Court never marshals the assets of a testator, except where a party having a contract which entitles him to resort to whichever he pleases of two funds disappoints another who has a right to resort to only one of those funds. A vendor cannot at his election have recourse to his lien. It does not arise out of contract, but is given to him *in subsidium* merely, that is, in order to enable him to obtain payment if it cannot be obtained according to the contract. He cannot, as soon as the purchase-money is due, resort to the estate for payment of it. *Coppin v. Coppin* (2 P. W. 291), *Pollexfen v. Moore*.⁽¹⁾ The lien has never arisen where [191] the purchase-money has been forthcoming. Here the purchase-money is ready, and has been always forthcoming.

Mr. Jacob and Mr. Abraham, for the personal representative of William Phelps, cited *Headley v. Readhead* (Coop. 50), and *Hamilton v. Worley* (2 Ves. jun. 62; see 65).

THE VICE-CHANCELLOR. I shall reserve my judgment until I have had an opportunity of looking into the cases.

Nov. 2. THE VICE-CHANCELLOR [Sir L. Shadwell]. The only question that I have to decide in this case is whether the lien which a vendor has for the purchase-money subjects the assets of the purchaser to be marshalled on behalf of a legatee.

In *Coppin v. Coppin* (Ca. Cha. 28; S. C. 2 P. W. 291), which was decided by Lord King in 1725, the heir of a purchaser who had not paid the whole purchase-money, happened to be the unpaid vendor; and it seems to have been held that, as against general creditors, the vendor should be paid the residue of the purchase-money out of the purchaser's personal estate, and that there should be no marshalling of assets in their favour against him. But Lord King's reason for so deciding is not stated in either of the reports.

[192] Lord Hardwicke decided *Pollexfen v. Moore* (3 Atk. 272) in 1745. If the report in Atkins is right, he did express an opinion that the equity of the unpaid vendor would not extend to a third person: but it is clear from the decree given in Mr. Sanders's note, from the registrar's book, that he did not so decide. It may be true that what Sir E. Sugden states in pages 69 and 70 of the last edition of his

(1) 3 Atk. 272. See the observations on the two cases above cited in 2 Sugd. Vend. p. 67, *et seq.*; and 2 Myl. & Keen 645. See also *Trimmer v. Bayne*, 9 Ves. 209; *Mackreth v. Symmons*, 15 Ves. 329; *Selby v. Selby*, 4 Russ. 336; and *Wythe v. Henniker*, 2 Myl. & Keen, 635.

valuable work on vendors and purchasers was the reason for making the decree in opposition to the *dictum*; but whether it were so or not, it is certain that the decree does not support the opinion, though it may have been, for the reason supposed, not inconsistent with it.

Our early reports shew that much time elapsed before principles became settled; and eminent Judges, who acknowledged a general principle, seem to have been timid in deducing legitimate conclusions from it. In *Austen v. Halsey* (6 Ves. 475), which came before Lord Eldon in 1801, the general question was discussed, but not decided; for a decision upon it was not necessary, though we may fairly infer what his opinion was: and, in *Mackreth v. Symmons* (15 Ves. 339, 345), in 1808, Lord Eldon said that the decision in *Coppin v. Coppin* required a good deal of consideration, and that the case was anomalous. But, in *Trimmer v. Bayne* (9 Ves. 209), Sir W. Grant, in 1803, expressly decided that, as against the heir of the purchaser who had not paid his whole purchase-money, the assets should be marshalled in favour of legatees. In *Headley v. Readhead* (Coop. 50), in 1812, the same learned Judge decided upon the same principle as between the devisee [193] of the estate not paid for and the legatees of the devisor. And, in 1828, Sir John Leach, upon a review of all the cases, decided, in the case of *Selby v. Selby* (4 Russ. 336), that, as between the devisee of the estate not wholly paid for and the creditors of the devisor, the rule of marshalling should be applied.

In the present case the purchased estate not wholly paid for has descended. The weight of authority is abundantly in favour of holding that the lien of the vendor must be subjected to the ordinary rule of marshalling assets; and the decree in the present case must be framed upon that principle.

My decision, I admit, is contrary to the decision in *Coppin v. Coppin*, and to the *dictum* in *Pollexfen v. Moore*. But I must say of them, as Lord Eldon, in *Albriek v. Cooper* (8 Ves. 397), said of *Robinson v. Tonge*, they are not reconcileable with the general class of cases, and, besides that, they have been positively overruled.

[193] SPENCER v. THE LONDON AND BIRMINGHAM RAILWAY COMPANY.

August 4, 1836.

[S. C. 7 L. J. Ch. (N. S.) 281; 1 Rail. Cas. 159. See *Cook v. Mayor, &c., of Bath*, 1868, L. R. 6 Eq. 180; *Attorney-General v. Earl of Lonsdale*, 1868, L. R. 7 Eq. 390; *London Association of Shipowners and Brokers v. London and India Joint Docks Committee* [1892], 3 Ch. 270.]

Nuisance. Jurisdiction.

Where certain individuals suffer an injury from a public nuisance quite distinct from that done to the public at large, the Court will entertain a bill filed by those individuals to be relieved from the nuisance.

The bill stated that the Plaintiff, E. Ward, was possessed of a coach-house and stable, situate in Granby Mews, in the parish of St. Pancras, Middlesex, for the remainder of a term of 97 years, and that the Plaintiff, [194] J. Spencer, occupied the same as tenant thereof from year to year to the Plaintiff, E. Ward, at the yearly rent of £22, and carried on the business of a coach-master or hackneyman and livery and bait stable-keeper, and used the premises for the purposes of his business, and that he was induced to rent the same from their proximity to the Hampstead Road, and the advantage of the easy access which was therefrom to that road through Granby Street; and that he had derived great profit from the occupation of the premises in consequence of the convenience of the situation and the easy access therefrom to the Hampstead Road; that the only direct means of communication between Granby Mews and the Hampstead Road was through Granby Street, and such communication was of great use and convenience to Ward and the other inhabitants of Granby Street, some of whom were tenants of houses therein, in which Ward had a beneficial interest: and that the value of the coach-house and stables and other houses in

Granby Street, was very much increased by the direct communication through that street to the Hampstead Road, and, in particular, that the carriages and horses belonging to Spencer had frequent occasion to pass through Granby Street to and from the Hampstead Road; that, by the Act for making the railway, it was enacted that, in all cases wherein, in the exercise of any of the powers by the Act granted, any part of any carriage or horse road should be found necessary to be cut through, raised, sunk, taken or so much injured as to be impassable or inconvenient for passengers or carriages, or the persons entitled to the use thereof, the railway company should, at their own expense, before any road should be so cut through, raised, sunk, taken, or injured as aforesaid, cause another good and sufficient road (as the case might require) to be set out and [195] made instead thereof, as convenient for passengers and carriages as the road so to be cut through, raised, sunk, taken or injured as aforesaid, or as near thereto as might be: and it was further enacted that the company should, at their own costs and charges, within two years from the passing of the Act, make and for ever thereafter keep in repair a good substantial brick bridge over the railway authorized to be made in Granby Street, so as to leave such street of its then width and uninterrupted.

The bill further stated that, about April 1836, the railway company began to construct their railroad under Granby Street, and that, about the 1st of June 1836, they completely cut through and across the whole of that street, and entirely stopped up the carriage and horse road through it, and that, thereby, all access through it to the Hampstead Road for horses and carriages was wholly obstructed; and that the street and the horse and carriage road through the same were so much injured as to be wholly impassable for horses or carriages, and impassable or inconvenient for foot-passengers: that the railway company might have constructed the bridge so as to carry the railway under Granby Street without stopping the horse and carriage way through that street, and that, before cutting through or stopping up the road, they ought to have made, instead thereof, another good and sufficient road with a direct access for horses and carriages from Granby Street into the Hampstead Road, as convenient for passengers and carriages as the road through the street so cut through: that the railway company, before cutting through the street, had not caused any road, passage or means of communication whatever for horses and carriages or convenience for passengers to be set out or made instead [196] thereof, so as to preserve the communication between the said street and the Hampstead Road: that the company threatened and intended to proceed to extend the cutting across the street so as to make the same of double the width which the same then was, and to cut across the whole of the street to the depth of 15 feet and for a breadth of 40 feet: that, in consequence of the street being so stopped up and cut through, the Plaintiff Spencer had lost the direct communication for his carriages and horses with the Hampstead Road, and the only means of communication or access then left for carriages and horses from Granby Street to the Hampstead Road was by means of a very circuitous and dangerous unpaved road called Harrington Street; that, in consequence of the direct communication between the Hampstead Road and Granby Mews being stopped up, Spencer had lost nearly the whole of his business: that the railway company began to cut through Granby Street without any previous notice of their intention so to do, and Spencer's servants, on returning home at night, being unaware of the operation, his coach and horses were overturned in the cutting and very considerably injured, so that he had been obliged to expend considerable sums of money in repairing the damage thereby occasioned.

The bill prayed that it might be declared that the railway company were bound, pursuant to the provisions of the Act, before the horse and carriage road through Granby Street was cut through, stopped up and injured, to have caused another good and sufficient road to be set out and made instead thereof, as convenient for passengers and carriages as the road so cut through and stopped up, or as near thereto as might be, and that they were bound to make good the loss sustained by [197] the Plaintiffs, and especially by Spencer, by their neglecting so to do; and that the railway company might be decreed to make and set out a proper road or communication for horses and carriages and passengers along Granby Street, so as that convenient access through it for horses, carriages and passengers into the Hampstead Road might be made; and

that an account might be taken of all sums of money which Spencer had been obliged to expend by reason of the street having been cut through, and of all loss and damages sustained by the Plaintiffs or either of them by reason of the cutting through and stopping up of the horse and carriage road as aforesaid: and that the company might be decreed to pay to the Plaintiffs the amount which should be found due to them respectively on taking the account: and, in the meantime, that the company, their servants and agents, might be restrained from cutting through or injuring, and from continuing to cut through, stop up and injure the horse and carriage road leading through Granby Street to the Hampstead Road.

The Defendants demurred generally to the bill.

Mr. Wigram and Mr. Booth, in support of the demurrer, said that the nuisance complained of by the bill was a public nuisance, and therefore the relief prayed ought to have been sought by information and not by bill. *Bains v. Baker* (Amb. 158), *Attorney-General v. Cleaver* (18 Ves. 211), Mitf. Treat. 144.

Mr. Knight, Mr. Jacob and Mr. Stuart appeared in support of the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question is whether a case is not stated on which *some* relief might be granted.

[198] The power of the Court to grant that species of injunction which Lord Eldon granted, namely, restraining a party from allowing a thing to continue, and which has the effect of making him take some active measures, has been since recognized and acted on (see *Rankin v. Huskisson*, ante, vol. iv. p. 13); and I don't see why, if that species of negative injunction has been adopted, it should not be adopted here, so as to prevent the parties from continuing the excavation in its present state, and from making the excavation greater. The injunction asked for, as far as it restrains the Defendants from widening the excavation, is quite of the common sort: but, so far as it seeks to prevent its continuance, it is of a negative kind, but it has been adopted by Lord Eldon.

With respect to the nature of the grievance, all the inhabitants of Granby Mews, as it appears to me, suffer a species of injury quite distinct from that done to His Majesty's subjects in general. If the excavation were much widened it might prevent all ingress to and egress from Granby Mews by horses and carriages; and individuals residing in the mews might be wholly blocked up, by narrowing the isthmus to an extent which would prevent their entrance into the wider world beyond them. This is an injury different from that done by these works to individuals in general. The question is whether there is not some species of mischief done, or intended to be done, in respect of which these individuals have a right to apply. It is plain that Spencer might have recovered for the injury he suffered if he had brought an action. I do not mean to say that he may, therefore, recover in equity; but it does appear to me, in respect of what has been done, [199] and may be done, that these individuals have a special right quite distinct from that of the public at large. As I think, therefore, that some relief, though not all that is prayed by the bill, may be given. The consequence is that I must overrule the demurrer.(1)

[199] MARTIN v. FUST. August 5, 1836.

Practice. Injunction.

Pending a notice of motion for an injunction to stay an action, the Plaintiff amended his bill under an order obtained as of course.

Held, that he had waived the prior notice.

On the 12th of April 1836, and after answer, the Plaintiff served the Defendant with a notice of motion for an injunction to stay an action. Pending the notice, he amended his bill, under an order obtained, as of course, at the Rolls, on the 2d of June. The amendments, as it was alleged, strengthened the case for the injunction.

(1) The Defendants appealed, but before the appeal was heard the suit was compromised.

Mr. Wigram and Mr. Chandless now moved for the injunction.

Mr. Knight, Mr. Jacob and Mr. Parry appeared for the Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Plaintiff ought to have made a special application for leave to amend without prejudice to the notice of motion for the injunction; and, as he had amended his bill under an order of course, he had waived the prior notice.

[200] GOVER v. LUCAS. August 8, 1836.

Interrogatory. New Orders.

A party is not now at liberty to use the old last interrogatory, but he is not compellable to use the interrogatory set forth in Lord Brougham's 32d Order.

The Plaintiff had examined witnesses on interrogatories, the last of which was in the form commonly in use before the issuing of Lord Brougham's 32d Order.(1)

Mr. Jacob, for the Defendant, now moved that that interrogatory might be expunged and the deposition thereto suppressed. He referred to the 32d Order, which directs that the old last interrogatory should be altered in the manner there pointed out.

Mr. Knight and Mr. Wakefield, for the Plaintiff, contended that the order in question was illegal; as no Judge had a right to say that a party should not put a legal question to a witness without coupling another question with it.

THE VICE-CHANCELLOR said that the 32d Order did not compel a party to use the new interrogatory; but merely directed that, if a party did use a general interrogatory, it should not be so framed as to elicit evidence for one party only.

Motion granted with costs.

[201] BRICKWOOD v. HARVEY. August 6, 10, 1836.

Practice. Pro Confesso. Corporation.

Course of proceeding to take a bill *pro confesso* against a corporation.

The bill was filed against the Norwich and Lowestoff Canal Company (which had been incorporated by Act of Parliament), and also against the directors of the company. By the Act the service of any writ or notice on a director was declared to be good service on the company.

The Plaintiffs had accordingly served the *subpœna* issued against the company upon Mr. Brightwell, one of the directors; and, no appearance having been entered for the company, the Plaintiffs served him with a notice of motion that, unless an appearance should be entered for the company within five days after service of the order to be made on the motion, the Plaintiffs might be at liberty to enter an appearance for the company, or that such other order might be made as that the Plaintiffs might be enabled to proceed to take the bill *pro confesso* against the company.

The notice was addressed to Mr. Brightwell; and, upon the motion being made by the Solicitor-General and Mr. Koe, and opposed by Mr. Knight, on behalf of Brightwell, no one appearing for the company.

THE VICE-CHANCELLOR said that the notice was irregular; for although the Act made service on a director good service on the company, yet the notice ought to have been addressed to the company. His Honor, however, gave permission to the Plaintiffs to serve a new notice addressed to the company.

(1) See the orders of the 21st December 1833.

[202] *August 10.* The Plaintiffs having served Brightwell with a notice of motion addressed to the company,

THE SOLICITOR-GENERAL and Mr. Koe said that the 11 Geo. 4 and 1 Will. 4, c. 36, did not apply, and that *Salmon v. The Hamborough Company* (1 Ca. Ch. 204) was an exact authority, pointing out the course which parties ought to pursue in a case where otherwise they would be actually remediless: that the order made by the House of Lords in that case directed that the Court of Chancery should issue forth the usual process of that Court, and, *if cause be*, process of *distringas* thereupon against the corporation: that it appeared on the face of the proceedings in this cause that the Canal Company had no property, and therefore there was no cause for issuing a *distringas*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Dr. Salmon's case is no authority for the order now asked for. The meaning of the words "if cause be" is if the corporation, on being served with a *subpoena*, do not appear.

In this case a *subpoena* has issued, and, no appearance having been entered for the company, a *distringas* should now be issued; and if on the return of *nulla bona* the company should not enter an appearance, you may then proceed to take the bill *pro confesso* against them, in the manner pointed out in Dr. Salmon's case.

I must give Mr. Brightwell the costs of the first motion, and I can make no order upon the second motion.

[203] *March 26, 1838.* On this day the Plaintiffs' counsel moved that the Clerk in Court might attend with the record at the hearing of the cause, in order that the bill might be taken *pro confesso* against the company. They said that writs of *distringas* had been issued to the sheriffs of the counties through which the canal passed, and that they had all returned *nulla bona*; and that no appearance had been entered for the company.

THE VICE-CHANCELLOR made the order.

[203] WHALLEY v. PEPPER. *August 9, 1836.*

Practice. Undertaking to Speed. Dismissal.

Where a Plaintiff has failed to comply with an undertaking to speed given under the 16th Order, the Court will not relieve him from the consequences, unless the failure was caused by some inevitable accident.

A Defendant is not at liberty to give a notice of motion to dismiss until the whole time allowed for performing an undertaking to speed has expired; although performance has become impossible.

On the 21st of March last the Defendant moved to dismiss; upon which the Plaintiff undertook to speed, pursuant to the 16th Amended Order. By the terms of that undertaking the Plaintiff was bound to give rules to produce witnesses and pass publication before the end of Trinity term. The 13th of June was the last day of that term; and the Plaintiff not having given the rules to produce witnesses, the Defendant, on the 9th of June, served him with a second notice of motion to dismiss.

Mr. Seton, in support of the motion, said that the rules to produce witnesses and to pass publication were eight-day rules, and, consequently, the former ought to have been given sixteen days, at the least, before the end of the term: that, when the notice of the present motion was given, four days only of the term remained unexpired, and no rule to produce witnesses had been given; therefore it had become impossible for the Plaintiff to perform his undertaking: that the Court [204] would not relieve a Plaintiff who had not complied with an undertaking given under the 17th Order: *Walmsley v. Froude* (1 Russ. & Myl. 334): neither would it relieve him if he failed to comply with an undertaking given under the 16th Order.

Mr. Ayrton, for the Plaintiff.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This motion is made on the ground

that, at the time when the notice was served, it was impossible for the Plaintiff to comply with his undertaking, and that the Court will not relieve him from the consequences. There might have been, however, some inevitable accident, such as a fire, which would have induced the Court to assist the Plaintiff; and I think that the Defendant ought not to have given notice of this motion until the whole of the time allowed for performing the undertaking had expired.

Motion refused.

Mr. Ayrton then made a cross-motion for a new commission to examine witnesses. He said that the Plaintiff had intended to strike commissioners' names on the 16th of April, but was arrested on that day at the Defendant's suit, and detained several days in prison; that, on the 6th of June, he gave notice of a motion for leave to take out a new commission, but, by mistake, served the notice on the Defendant's solicitor instead of his Clerk in Court; and that, under these circumstances, the Court ought to make the order.

Mr. Seton, *contrà*, relied on *Walmsley v. Froude*.

THE VICE-CHANCELLOR refused the motion.

[205] ROWLEY v. ADAMS. August 10, 1836.

Practice. Impertinence. Insufficiency.

A Plaintiff took out two contemporaneous warrants, one for the Master to consider whether the Defendant's examination was impertinent, and the other whether it was insufficient. Held, that the former was not waived by the latter.

The Plaintiff had taken out, contemporaneously, two warrants,(1) one for the Master to consider whether the Defendant's examination, taken in the Master's office, was insufficient, and the other to consider whether it was impertinent; and the same day and hour were named in both warrants.

Mr. Knight, for the Defendant, now moved that the warrant for impertinence might be discharged. He said that an order for a reference for impertinence was waived by an order for a reference for insufficiency: *Pellew v. ———* (6 Ves. 456), and that warrants were now equivalent to orders of the Court.

Mr. Jacob, for the Plaintiff, said that if a party obtained an order for a reference for impertinence on one day, and an order for a reference for insufficiency on another day, the latter was a waiver of the former; that a warrant was not equivalent to an order of the Court, but to a notice of motion only; and, in this case, the two warrants were contemporaneous, and that it ap-[206]peared, from an affidavit made by the Plaintiff's solicitor, that the warrant for impertinence was intended to be first proceeded on, and that the other warrant was not to be acted upon unless the Master should overrule the objection for impertinence.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question is whether any solicitor, on being served with these two warrants, could reasonably have any doubt which would be first proceeded with. The taking out of the warrants in this form necessarily points out the course that would be pursued, namely, that the question of impertinence would be first considered, and then the question of insufficiency. No solicitor could have been misled; and therefore I shall refuse the motion with costs. (See the next case.)

(1) Lord Lyndhurst's 73d Order directs that if any party wishes to complain of any matter introduced into any state of facts, affidavit or other proceeding, before the Master, on the ground that it is scandalous or impertinent, or that any examination taken in the Master's office is insufficient, he shall be at liberty, without any order of reference by the Court, to take out a warrant for the Master to examine such matter, and that the Master shall have authority to expunge any such matter which he shall find to be scandalous or impertinent.

[206] BICKFORD v. SKEWES. *April 23, 1838.*

Waiver of Reference. Practice. Impertinence.

Defendant filed an affidavit in support of a motion. The Plaintiff filed an affidavit in opposition, which the Defendant referred for impertinence, and then filed further affidavits in support of his motion, but not in reply to, or in any manner noticing, any of the passages in the Plaintiff's affidavit, which were alleged to be impertinent. Held, that the reference was not waived.

Motion by Plaintiff to discharge an order referring, for impertinence, an affidavit which he had made in opposition to an application of which the Defendant had given notice. The motion was made on the ground that the Defendant, after obtaining the reference, had filed other affidavits in support of his application. Those affidavits, however, were not in reply to, nor did they in any manner notice, the contents of the affidavit referred for impertinence.

Mr. Knight Bruce and Mr. Roupell, for the Plaintiff, in support of the motion. [207] When a portion of the evidence for one party is referred for impertinence, it is not competent to the other party to go on with the evidence. All proceedings are stayed pending the reference; and if the party who obtained it proceeds with the evidence, he waives the reference. The case does not admit of the evidence being added to, until the Court knows what is the evidence on the other side. *Keeling v. Hoskins* (2 Russ. 319), *Pellew v. ———* (6 Ves. 456).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Plaintiff files an affidavit which relates to matter A. and also to matter B.: and the Defendant objects to matter A. as being impertinent, and files an affidavit in answer to matter B. How can the answer to matter B. be a waiver of the reference as to matter A., which is alleged to be impertinent? *Keeling v. Hoskins* has nothing whatever to do with the present case; for it was decided before the New Orders of 1828 were made; and then the party might have objected to the whole of the affidavit as impertinent. But the New Orders of 1828 (see the 11th Order) require the party to point out, specifically, what are the passages that he objects to as being impertinent: and, consequently, references for impertinence made since those orders came into operation are materially distinguishable from references made previously. And as it is not alleged that any of the further affidavits are an answer to any of the passages in the Plaintiff's affidavit which are alleged to be impertinent, the motion must be refused with costs.

Mr. Jacob appeared for the Defendant in opposition to the motion; but THE VICE-CHANCELLOR decided without hearing him.

[208] THE ATTORNEY-GENERAL v. KEMP. *May 4, 1838.*

Practice. Dismissal.

Two of the Defendants had answered the bill; but the other Defendants had not answered. Above eight months after the answer of the two first Defendants was filed they served a notice of motion to dismiss. On the next day the Plaintiff obtained, as of course, and served an order to amend. Held, that under the 26th Order of 1833 the order to amend was regularly obtained, and, therefore, the motion to dismiss was refused.

The answer of two of the Defendants was filed on the 27th of May 1837; and on the 5th of February 1838 (but before the other Defendants had answered the bill) the first-mentioned Defendants served the Attorney-General with notice of a motion to dismiss. On the following day the Attorney-General obtained by petition at the Rolls, and afterwards served, an order to amend the information.

Mr. Puller, in support of the motion, said that the 13th and 16th Orders of 1831 and the 26th Order of 1833 must all be construed together; and that, as the order

to amend had not been obtained within six weeks after the answer of the Defendants on whose behalf the motion was made, was to be deemed sufficient, it had been irregularly obtained, and must be treated as a nullity: and he referred to *De Geneve v. Hannam* (1 Russ. & Myl. 494), and *Gully v. Van Bolicote* (*ante*, vol. 5, p. 668), as being precisely in point.

Mr. Blunt, for the informant, said that a Plaintiff might obtain an order to amend at any time before the expiration of six weeks after the last of the answers was to be deemed sufficient: that in *De Geneve v. Hannam* the order to amend was irregularly obtained, but in this case it was regularly obtained, inasmuch as some of the Defendants had not put in their answers. He referred to *The King of Spain v. [209] Hullett* (*ante*, vol. 3, p. 338), *Davenport v. Manners* (*ante*, vol. 2, p. 514), and *Peacock v. Sievier* (*ante*, vol. 5, p. 553).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Although the 26th Order of 1833 prescribes the time before which a Defendant shall not be at liberty to serve a notice of motion to dismiss the bill for want of prosecution, yet it puts no limit on the time within which the Plaintiff might amend his bill; and, therefore, that order is out of the question.

It seems to me that the restriction imposed by the 13th Order of 1831 is of this nature, namely, that no order to amend shall be made after answer and before replication, unless such order be obtained within six weeks after the answer if there be only one Defendant, or after the last of the answers if there be more than one Defendant, is to be deemed sufficient; and, therefore, as I understand it, the order to amend in this case was regularly obtained; and consequently I must refuse the motion to dismiss.

I collect, from the report of *De Geneve v. Hannam*, that the only point which I had to consider when that case came before me was that the Plaintiff had not been able to get in the answer of some of the Defendants; and it stood over in order that an affidavit of that fact might be produced; and no affidavit being produced, the ground on which the motion to dismiss was resisted failed.

[210] FARQUHARSON v. BALFOUR. Nov. 5, 1836.

West India Estate. Consignee.

A consignee of a West India estate appointed by the Court is not entitled during the continuance of his office to be paid the balance due to him out of the compensation money awarded under the Act for the Abolition of Slavery.

The bill was filed to redeem a mortgage of an estate in Tobago in the West Indies, and for the appointment, in the meantime, of a receiver and manager of the estate, and a consignee of the produce. Under an order in the cause, made on the 25th of March 1824, John Bannatyne was appointed the consignee; and under another order made on the 7th of April 1827 he was removed, and A. Robertson was appointed in his place. Some of the Defendants had put in their answers to the bill; but no further proceedings had taken place in the suit, except that the consignee had annually passed his accounts before the Master, and a balance (which was continually increasing) was always found in his favour.

Under the Act for the Abolition of Slavery (3 & 4 Will. 4, c. 73) certain sums were awarded as a compensation for the services of the slaves on the estate; and a claim and counter claim to those sums having been made by the Defendant Ellice and the consignee respectively, the Commissioners appointed under the Act paid the sums into Court in trust in the cause.

The consignee then presented a petition, stating that the produce consigned to him had been totally insufficient for payment of the sums which he had advanced for supplies to the estate: that during the last nine years he had supplied clothing and other necessaries for the slaves, and stores and utensils for the cultivation [211] of the estate and the manufacture of the produce thereof, and that he had paid the salaries of the manager and the persons employed under him: that without such

advances the estate would have remained uncultivated, but, by means thereof, the negroes had been preserved and kept together, and, in consequence thereof, the compensation money had been obtained: that the Petitioner had been unable to make any arrangement with Ellice and the other parties to the suit as to the reimbursement of his advances: that the Petitioner's accounts had been duly passed before the Master up to the 31st of December 1835, and that a balance of £3092 was then reported due to him. The petition prayed that an account might be taken of what was due to the Petitioner from the foot of his last account, and that the amount which should be paid due to him might be paid out of the stock purchased with the compensation money.

Mr. Stuart, for the Petitioner. The claim of the consignee has priority over all mortgages, and is a lien, not only on the produce of the estate, but on the *corpus*. *Scott v. Nesbitt* (14 Ves. 438; see 444). That case is decisive of the point; for there it was held that even a party not regularly appointed consignee by the Court, who had furnished supplies, had a lien for repayment paramount to that of any other person interested on the estate: and Lord Eldon, in his judgment, expressly recognizes the right of lien of the consignee both on the *corpus* and on the produce, and refers to West India estates as being in a different situation from any others in this respect, that but for the consignees those estates could not be kept up.

[212] Mr. Jacob, for the Defendant Ellice, contended that a consignee had no lien either on the *corpus* or on the produce of the estate, and that as a receiver could not, so neither could a consignee come to the Court, as often as a balance was found in his favour, and ask to have part of the *corpus* of the estate sold to pay his balance.

Mr. Koe, Mr. G. Richards, Mr. Jemmett and Mr. Stinton appeared for other parties in opposition to the petition.

Mr. Stuart, in reply. *Scott v. Nesbitt* decides that the consignee's lien extends to the *corpus* of the estate.

With respect to the consignee coming to the Court *toties quoties*, it must be borne in mind that for nine years past he has been out of pocket many thousand pounds, which he has expended in keeping up the estate; and he applies now, because other parties are seeking to touch the *corpus*. If (as must be admitted) the claim of the consignee is paramount to that of the mortgagees, he is bound, if he means to support it, to come forward when other parties are claiming the *corpus*. The printed rules of the Commissioners sanction the claim of consignees by virtue of their lien; for they mention the claims of receivers, that is, consignees. As to the consignee applying for payment of his balance during the continuance of his office, it may be observed that although there is no authority for it, yet there is none against it, and the application is perfectly reasonable; for, if the balance was against him, an application would be made, *toties quoties*, to compel him to pay it into Court. Is it not therefore reasonable when the balance is in his favour and there is a fund in Court that he should be paid out of it?

[213] THE VICE-CHANCELLOR [Sir L. Shadwell]. It is clear that when a balance is found due to a consignee on a final settlement of accounts, he cannot be discharged until that balance is paid; and, if payment cannot be made without interfering with the inheritance or *corpus* of the estate, the Court would be justified in resorting to it for the purpose of doing justice to the consignee. But no case has been produced in which, pending the consigneeship, an order has been made that the balance found due to the consignee should be paid to him out of the *corpus* of the estate; and that circumstance operates strongly on my mind against granting this application. *Scott v. Nesbitt* was a case in which the claim was made by one tenant in common against his co-tenant.

It would be very inconvenient and productive of great injustice to incumbancers, as well as to the owners of the estate, if consignees were allowed to come to the Court, from time to time, as often as a balance was in their favour, and ask for payment of it out of the *corpus* of the estate; and, as no precedent can be found to justify such an application, this petition must be dismissed with costs.

[214] CAVE v. ROBERTS. Nov. 5, 1836.

Widow. Distribution.

Where an intestate leaves a widow, but no next of kin, the widow is not entitled to the whole of his personal estate, but one moiety belongs to her, and the other to the Crown.

The testator in this cause died leaving a widow, but no next of kin; and, some of his chattels being, in effect, undisposed of, the question, on the hearing of a petition presented by his widow, was whether those chattels belonged to the widow or to the Crown.

Mr. Wigram and Mr. Wilbraham, for the widow. The administration of intestates' effects belonged, originally, to the Ordinary. That was altered by the 31 Edward 3, c. 11, which directed the Ordinary to grant administration of the intestate's goods to his nearest and most lawful friends. Then, by the 21st Hen. 8, c. 5, the Ordinary was required to grant administration to the intestate's widow or next of kin, or to both of them at his election. When those statutes were passed no Statute of Distributions was in force; but the persons to whom administration was granted, that is the husband or the wife, as the case might be, was entitled to hold all the estate, after payment of the deceased's debts, for their own benefit. Then the Statute of Distributions was passed; which requires that the estates of intestates shall be disposed of as mentioned in that Act: and, by that Act, if there is a widow and next of kin, one moiety goes to the widow and the other moiety to the next of kin; but no obligations are imposed on administrators, except what are imposed by that statute: their rights, except so far as they are affected by the express enactments of that statute, are left as they were at common law. Blackstone says: "The right of the husband, not only to administer but also to enjoy, exclusively, the effects of his deceased wife depends still on the doctrine of the common law: the Statute of Frauds declaring only that the Statute of [215] Distributions does not extend to this case." (2 Comment. 515.) As the Statute of Distributions directs, merely, that where an intestate dies leaving a widow and also next of kin, one moiety of his estate shall go to the latter; it follows that, where he leaves no next of kin, the direction of the statute fails, and the common law right of the widow remains: and as the husband is entitled, by virtue of his common law right, to retain his wife's personal estate, so, where there are no next of kin of the husband, the wife is entitled, by virtue of her common law right, to retain his estate, subject only to the payment of his debts. [THE VICE-CHANCELLOR. Suppose a husband who is illegitimate dies without issue but leaving a widow, and administration to his effects is granted to A. B.: what would be the case then?] A. B. would be a trustee for the widow, that is, for the legal right independent of the statute. As, at law, the widow could not be compelled to account; so, since the statute, she cannot be compelled to account unless there are no next of kin.

The legal interest of the executors cannot come in question here; for the property was disposed of by the will, though the disposition has failed.

We submit that, as the law now stands, the widow of an intestate is entitled to her husband's estate, subject to distribution amongst his next of kin, but not further: and as equity, in all these cases, follows the law, the right of the widow is the same as if she had taken out administration to her husband.

Sir W. Horne, Mr. Knight, Mr. Sharpe and Mr. Elderton appeared for other parties in the cause, to oppose the petition.

[216] But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: I have always thought it to be clear that, in all cases where a person dies intestate leaving a widow, and there are no persons who answer the character of next of kin to him (as, for instance, where a husband who is illegitimate dies without issue), the widow takes one moiety of his personal estate, and the Crown is entitled to the other moiety; and as that has been the received opinion of the profession for a series of years, I shall not now overrule it.

[216] BELL v. TAYLOR. (1) Nov. 10, 1836.

Solicitor. Lien.

A Defendant was decreed to deliver up certain deeds to the Plaintiff. The deeds were in the possession of the Defendant's solicitor, who claimed a lien on them for costs; but the Court, on motion, ordered him to deliver them up, and to pay the costs of the motion.

By the decree in this cause (which was taken *pro confesso*) the Defendant, Taylor, had been ordered to deliver up to the Plaintiff certain deeds, papers, and writings. The Defendant was confined in the Fleet prison, upon an attachment for contempt. The deeds, &c., had been deposited by the Defendant with his attorney, Prest, for the purposes of the suit, and were admitted to be either in his possession or in that of Messrs. Taylor & Co. his town agents.

A motion was now made, on behalf of the Plaintiff, that Prest, or Taylor & Co. might be ordered to deliver up to the Plaintiff the deeds, &c., referred to in the decree.

Mr Knight and Mr. Forster appeared in support of the motion.

Mr. Cankrien, for Prest, contended that he had a lien on the documents for costs.

Mr. Sharpe, for Messrs. Taylor & Co., did not oppose the motion.

[217] THE VICE-CHANCELLOR ordered the deeds, &c., to be delivered up, observing that, as they were directed by the decree to be given up to the Plaintiff, they must be taken to have been his property from the first, and, consequently, no lien could have attached upon them: and His Honor ordered Prest to pay the costs of the motion.

[217] EVANS v. JACKSON. Nov. 15, 16, 1836.

[S. C. 6 L. J. Ch. (N. S.) 8. Distinguished, *In re Walker and Oakshott's Contract* [1901], 2 Ch. 387.]

Trust for Sale. Under-Lease.

An agreement by trustees of a will, to grant an under-lease of their testator's leasehold property, is, *prima facie*, inconsistent with a trust for sale of it. There may be, however, circumstances to justify the agreement; but the Court cannot enter into the consideration of those circumstances in a suit for specific performance between the trustees and the under-lessee, the *cestuis que trust* not being parties to it.

T. Oldham bequeathed a house at Brixton in Surrey, in which he resided at his death, and which he held under a lease, several years of which were then unexpired, to the Plaintiffs, in trust, absolutely, to sell and dispose thereof in the usual manner: and he declared trusts of the proceeds for the benefit of persons not parties to the suit, and appointed the Plaintiffs executors of his will. The Plaintiffs having endeavoured, but without success, to sell the house both by public auction and by private contract, agreed with the Defendant to grant him a lease of it, at an improved rent, for the remainder of the term except a few days. The agreement purported to be entered into by the Plaintiffs, not as trustees but as executors. The Defendant having refused to perform the agreement, on the ground that as the house was bequeathed to the Plaintiffs in trust to sell they could not under-let it, the bill was filed to compel a specific performance.

Mr. Knight and Mr. Chandless, for the Plaintiffs. The Plaintiffs entered into the agreement as executors; and, in that character, they had a right either to sell or to let the house. The attempt to sell was not an acceptance of the trust, but was incident to their character as executors.

(1) *Ex relatione.*

[218] Executors represent their testator, and are bound to dispose of his property in the best manner they can. Having failed in their attempts to sell, what are they to do? Are they to remain subject to the rent and covenants for the remainder of the term? [THE VICE-CHANCELLOR. Do you say that the Plaintiffs did not accept the trust, when the first act they did was to advertise the house for sale?] Supposing that they did accept the trust, yet cases frequently arise in which trustees are justified in departing from the language of the trust. Having tried in vain to sell, they execute their trust *cy pres*, by agreeing to grant a lease for the whole term, except a few days, at an increased rent: so that they have, in fact, sold the house; and they are to receive the purchase-money by instalments.

Mr. Jacob and Mr. James Russell appeared for the Defendant;

But THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The will contains, on the face of it, an express trust that the executors shall sell the house; and, *prima facie*, that is inconsistent with granting a lease. It is true that there might be circumstances to justify the executors in departing from the words of the trust. But the record is not so constructed as to enable me to enter into the consideration of those circumstances; for the *cestuis que trust* are not parties, and, in their absence, I cannot enter into the consideration of the particulars which might tend to shew that the executors were justified in agreeing to grant the lease: and, if I were to decree the Defendant to take the lease, I should subject him to the ordeal of a snit, by the *cestuis que trust*, who might file a bill to shew that the executors were not justified in granting the lease.

[219] Neither of the parties seems to have suspected that there was this objection, and I do not think that, after the matter had proceeded thus far, the executors were wrong in taking the opinion of the Court, and therefore it seems to me that all that I can do is to dismiss the bill without costs.(1)

[219] MUNCH v. COCKERELL. Nov. 14, 18, 1836.

[S. C. 9 Sim. 339; 5 My. & Cr. 178; 41 E. R. 338.]

Breach of Trust. Parties.

Where several trustees are implicated in a breach of trust, the *cestui que trust* is not at liberty to file a bill to recover the trust fund amongst some of them only, but must make all the trustees who are living, and the representatives of such of them as are dead, parties.

- A. being absolutely entitled to a trust fund under a settlement made by her father, assigned it, on her marriage, to trustees upon certain trusts, under which B., her only child, became absolutely entitled to the fund. The fund was never transferred to the trustees of the second settlement, but remained in a house of agency in India, in which the original trustees had deposited it. The house failed. B. filed a bill against the original trustees, to make them responsible for the loss of the fund. Held, that the trustees of the second settlement were not necessary parties.
- A. assigned a fund which was deposited in a house of agency in India to trustees, on certain trusts, under which his two daughters, B. and C., became entitled to the fund equally. A suit was afterwards instituted in which B.'s moiety of the fund was ordered to remain in Court, but C.'s moiety was ordered to be paid to her. The trustees, however, suffered the fund to continue in the house of agency until it failed. C. then filed a bill against the trustees, to make them responsible for her moiety of the fund. Held that, notwithstanding the decree in the prior suit, B. was a necessary party to the new suit.

By a settlement, dated the 7th of December 1778, William Barton, then of Calcutta, assigned to trustees 40,320 current rupees, in trust, immediately upon the [220] execution of the settlement, or as soon after as conveniently might be, to lay out the

(1) See *Keating v. Keating*, Lloyd & Goold's Rep. 133; *Drohan v. Drohan*, 1 Ball. & Beat. 185; *Magrane v. Archbold*, 1 Dow, 107; *Mucklow v. Fuller*, Jac. 198.

fund on some good and sufficient public or private security or securities, at the best and highest interest that could be obtained for the same, and, yearly, during the joint lives of William Barton and Harriet, his wife, to lay out the interest of those securities, and keep the same laid out in some good and sufficient public or private security or securities, at interest, and, after Barton's decease, to pay the interest to Harriet, his wife, for her life, and, after her decease, to divide the principal equally between their children, the shares of sons to be paid to them at 21, and the shares of daughters at that age or on marriage.

In April 1791 Harriet, one of the daughters of William and Harriet Barton, married J. F. Silberschildt; and, by the settlement on their marriage, dated the 8th of that month, she assigned her share of the 40,320 current rupees and the accumulations thereof to Archibald Paxton, Sir William Paxton and John le Gros, upon trust, as soon as conveniently might be after the decease of the survivor of her father and mother, to get in such share, and, as soon afterwards as conveniently might be, to convert the same into money and invest the same, in their names, in such of the public stocks or Parliamentary funds or other securities (private personal security only excepted), as Silberschildt and wife, or the survivor of them, or as Archibald Paxton, Sir William Paxton and John le Gros, or the survivors or survivor of them, after the decease of Silberschildt and wife, should think fit; and to stand possessed of such stocks, funds, or securities in trust for Silberschildt and wife for their lives, successively, and, after the decease of the survivor of them, in trust for their child or children at the usual periods.

[221] In September 1792 three of the trustees of the settlement of December 1778, being desirous of being discharged from the trusts, Barton, in pursuance of a power reserved to him for that purpose, appointed Sir Charles Cockerell, Henry Trail and William Logan trustees in their place, and the trust funds were assigned to them and to John Evelyn, the continuing trustee, upon the trusts of the settlement. At that time Trail and Logan were resident in India, and Evelyn and Sir Charles Cockerell were resident in England.

In and previously to 1792 Sir Charles Cockerell, H. Trail and Sir William Paxton carried on the business of mercantile agents in partnership together at Calcutta, under the firm of Paxton, Cockerell & Co. In 1795 Sir William Paxton retired, and John Palmer was admitted a partner in the firm. In April 1805 Sir Charles Cockerell retired, and in 1809 Trail retired, and from that time till January 1830 Palmer continued to carry on the business either alone or in partnership with other persons.

The funds comprised in the settlement of December 1778 were laid out on bonds or certificates of the East Indian Government, and in May 1793 those bonds or certificates were deposited by John Ryder (one of the trustees of that settlement who had retired), in the hands of Paxton, Cockerell & Co. In 1794 Sir Charles Cockerell arrived at Calcutta from England, and the bonds or certificates, or other bonds, certificates or securities of the Indian Government which had been received in exchange for them, then remained in the hands of Paxton, Cockerell & Co.

Mrs. Silberschildt and Elizabeth Barton, who afterwards married William le Gros, were the only children of William and Harriet Barton. William Barton died in April 1799, and shortly after his death his widow married Thomas Butler Eyles.

[222] Sir C. Cockerell remained in Calcutta until March 1800. He then finally quitted India and returned to England. At that time the trust fund consisted of certain bonds and promissory notes which were remaining in the hands of Paxton, Cockerell & Co.; and the same were transferable by the mere indorsement of any of the partners in the firm; and it was then, or at any time, in the power of the trustees to cause such bonds and promissory notes to be indorsed and made payable to themselves; and, if they had done so, the partners in the house of Paxton, Cockerell & Co. would, according to the course of proceeding observed by the officers of the Indian Government, have been prevented from selling or disposing of the same, or receiving the monies thereby secured, without the concurrence of the trustees; but Paxton, Cockerell & Co. would not have been precluded from receiving the interest thereon, or from receiving from the Indian Government, in lieu of the old bonds or notes when paid off, new bonds or notes made payable to the trustees. The trustees, however, never caused the securities to be indorsed and made payable to themselves.

Previously to 1800 Sir C. Cockerell and Trail entered into partnership with Archibald Paxton and Sir William Paxton, in the business of East India agents and bankers in London: and they, or the survivors of them, had ever since carried on that business in London, in partnership together, first under the firm of Paxtons, Cockerell & Co., and afterwards under the successive firms of Paxtons, Cockerell, Trail & Co., Paxton, Cockerell, Trail & Co., and Cockerell, Trail & Co. These successive firms were, from the time of the first formation of the firm of Paxtons, Cockerell & Co. down to January 1830, when Palmer & Co. stopped payment, the agents and mercantile correspondents in England of the successive firms at Calcutta, of which the last was the firm of [223] Messrs. Palmer & Co.; and during the whole of that time the successive firms at Calcutta, and particularly the firm of Palmer & Co., were the agents and mercantile correspondents in India of the successive firms in London; and the whole of the trust funds and the accumulations thereof continued in the hands and under the control and management of the successive firms at Calcutta, from the year 1793 until Palmer & Co. stopped payment. The bonds and notes in which the trust monies were invested were from time to time paid off; and the produce was again laid out in the purchase of other East India Company's bonds and notes in India; and from William Barton's death until Palmer & Co. stopped payment the successive firms at Calcutta, and particularly the firm of Palmer & Co., remitted the interest of the trust funds to the successive firms in London; and Palmer & Co., from time to time, transmitted to the successive firms in London statements of accounts relating to the trust funds, which were headed as follows:—"Dr. Trustees of Mrs. Eyles and children, in account with Messrs. Palmer & Co., Cr," or "Dr. Trust for Mrs. Eyles and children, in account with Messrs. Palmer & Co., Cr."

Mr. and Mrs. Silberschildt had five children. In February 1802 Mr. and Mrs. Eyles filed their bill in the Court of Chancery in England against John Evelyn, Sir Charles Cockerell, Henry Trail, William Logan, and William le Gros and Elizabeth, his wife, and against William Beaufoy le Gros, their son, and against Mr. and Mrs. Silberschildt and their children, praying that the trusts of the settlement of December 1778 might be carried into execution, and that an account might be taken of the trust property. The cause was heard in January 1804, when inquiries were directed as to the trust funds, and as to the children of Mr. and Mrs. Barton, Mr. and [224] Mrs. Silberschildt, and Mr. and Mrs. Le Gros. In March 1805 Mrs. Eyles died. In March 1809 the Master made his report in pursuance of the decree, and, in June of the same year, the cause was heard for further directions, when it was declared that Thomas Butler Eyles, in right of his late wife Harriet Eyles, was entitled to the interest of the trust funds which accrued between the death of William Barton and the death of Harriet Eyles; and that, upon the death of William Barton, Mrs. Le Gros became entitled to a moiety of the trust funds, subject to the life interest of Mrs. Eyles, and that the remaining moiety of the principal of the trust funds did, upon the decease of William Barton (subject to the life interest of Mrs. Eyles), vest, under the settlement of April 1791, in Archibald Paxton and Sir William Paxton (John le Gros being then dead) upon the trusts of that settlement; and it was ordered that the interest which had accrued upon the trust monies since the death of Mrs. Eyles should be paid to William le Gros and J. F. Silberschildt, in equal moieties, and that Mrs. Le Gros's moiety of the principal of the trust monies should be subject to the further order of the Court, without prejudice to a claim which her son, William Beaufoy le Gros, had made thereto,⁽¹⁾ and that the remaining moiety should be transferred and paid over to Archibald Paxton and Sir William Paxton, upon the trusts of the settlement of April 1791.

Two only of the children of Mr. and Mrs. Silberschildt lived to attain vested interests in a moiety [225] of the trust monies under the settlement of April 1791, that is to say, Harriet Elizabeth, who married H. F. Munch, and Mary Elizabeth Silberschildt. H. F. Munch died in Mr. Silberschildt's lifetime. Mr. Silberschildt survived his wife, and died in 1827.

(1) It did not appear that any settlement was made of Mrs. Le Gros's moiety of the trust funds, or how the claim of W. B. Le Gros arose.

William Logan died in 1809. John Evelyn did not go to India after 1792, and died in 1826; and although he, as well as the other trustees, executed the settlement of December 1778, he did not, from the year 1792, take any part or in any manner interfere in the management of the trust funds or in the execution of the trusts of that settlement. Archibald Paxton and John le Gros died in Sir William Paxton's lifetime; and Sir William died in February 1824, having appointed three of the Defendants his executors.

Palmer & Co., some years before they stopped payment, became embarrassed in their circumstances, and sold the bonds or notes of the India Company in which the trust funds were invested, and applied the proceeds to their own use. On their stopping payment, proceedings, in the nature of a commission of bankrupt, were taken against them in India; and they had never made good, and, in fact, were unable to make good, any part of the trust funds. Until the news of their failure arrived in this country, neither Mrs. Munch or Mary Elizabeth Silberschildt, her sister, had any suspicion that they were in embarrassed circumstances; but Sir Charles Cockerell and Trail had been long aware of that circumstance.

In January 1830 Mary Elizabeth Silberschildt died, having appointed Mrs. Munch her executrix and universal legatee.

[226] The bill was filed by Mrs. Munch against Sir Charles Cockerell, Henry Trail and Sir William Paxton's executors; and, after stating as above, it charged that all the members of the firm of Palmer & Co. were resident in India; and that, in all the transactions and proceedings in which Cockerell, Trail & Co. acted or were concerned relative to the trust funds, they acted as the agents and on behalf of Evelyn, Cockerell & Trail, and also as the agents and on the behalf of Sir William Paxton's executors; that it was usual for persons in this country having, in the East Indies, notes or securities of the Government there, to cause the same to be deposited with the Accountant-General and Sub-Treasurer of the Government, for the purpose of avoiding the risk of leaving the same in the hands of private individuals or mercantile firms; and that, when such notes or securities were so deposited, such deposit had the effect of preventing the same from being transferred, assigned or disposed of, or the monies thereby secured from being received by any person without the authority of the persons to whom the same belonged; that Sir C. Cockerell and Trail might, at any time, have caused the notes or securities on which the trust funds were invested to be so deposited with the Accountant-General and Sub-Treasurer; and that, if the same had been so done, Palmer & Co. would have been precluded from selling, pledging, assigning or disposing of the same, or receiving the monies thereby secured.

The bill prayed that the Defendants might be declared to be liable to pay and make good to the Plaintiff her own and her sister's shares of the trust funds, with the interest thereon; and might be decreed to pay the amount of such shares and interest to the Plaintiff, and, if necessary, that an account might [227] be taken for the purpose of ascertaining the amount thereof.

Mr. Knight and Mr. G. Richards, for the Plaintiff.

Mr. Jacob and Mr. Cockerell, for Sir C. Cockerell, and Mr. Wigram and Mr. Sharpe, for the representatives of Mr. Trail, who died pending the suit. The suit is defective with respect to parties: for, first, the representatives of Evelyn and Logan are omitted.

Secondly, the representatives of Archibald Paxton, who was one of the trustees of the settlement of April 1791, ought to have been made parties.

And, thirdly, so ought the family of Mr. and Mrs. Le Gros.

First. The reason alleged for omitting the representatives of Evelyn and Logan is that those gentlemen did not act in the execution of the trusts of the settlement of December 1778. The bill states that both of them executed the deed, but it alleges that Evelyn did not act after 1792. As he took upon himself the office of trustee, he was bound to discharge the duties of that office until the end of the period: and, if he chose to abandon the trust, he is answerable for the acts of those to whom he abandoned it. If Sir Charles Cockerell and Mr. Trail are liable, Evelyn is still more so, for he did not take the same care of the trust funds as they did. Logan lived up to 1809, and there is nothing to shew that he did not act up to that time. The decree of 1809 imposed on all the four trustees the duty of handing over

a moiety of the trust funds to Archibald and Sir [228] W. Paxton, and if there is any liability, it is because they did not do what that decree directed.

Secondly. The representatives of Sir William Paxton are made parties, but the representatives of Archibald Paxton are omitted. Under the decree of 1809 the Paxton's had a right to have one moiety of the fund transferred to them. The trusts of the settlement of December 1778 had then terminated, and the time had arrived for handing over a moiety of the trust funds to Mrs. Silberschildt's trustees. They were the persons to whom she was to look. They suffered the funds to remain in the hands of Palmer & Co.; and they were primarily liable to her. It is important, therefore, to Sir C. Cockerell and Mr. Trail, that the representatives of A. Paxton should be parties to the suit. But the representatives of John le Gros ought not to be made parties, as he was dead at the date of the decree.

Thirdly. The family of Mrs. Le Gros ought to be made parties. The fund remained undivided up to the failure of Palmer & Co.; and it still remains undivided. The same question exists between the family of Mrs. Le Gros and the Defendants as exists between Mrs. Silberschildt's family and the Defendants. The prayer of the bill involves an account of Mrs. Le Gros's share of the fund. It is impossible for the Court to decree payment of one-half of a fund, until it knows what the whole amount is. That amount has not been yet ascertained, and, unless the Le Gros family are made parties, they may file another bill against the Defendants for the purpose of having the accounts that must be directed in this suit, in order to ascertain the amount of the fund, taken over again. *Goodson v. Ellisson* (3 Russ. 583; see 593 and 594).

[229] Mr. J. F. Hall appeared for Sir William Paxton's personal representatives.

THE VICE-CHANCELLOR. I think that the personal representatives of Archibald Paxton are not necessary parties.

The question is whether those whose duty it was to protect the whole fund under the original settlement have duly discharged the trusts of that settlement. Subsequent to that settlement, another settlement was made of the share of a child of the marriage, who became entitled to a moiety of the fund. If the *cestuis que trust* under that subsequent settlement come into Court, they represent themselves and their trustees; and, therefore, I am of opinion that the representatives of Archibald Paxton are not necessary parties.

Mr. Knight and Mr. G. Richards. With respect to the objection that the representatives of Evelyn and Logan ought to have been made parties, it is settled, by authority, that a breach of trust creates a joint and several debt; but the *cestui que trust* is not bound to bring before the Court all the parties who have participated in the breach of trust; he may do so if he think fit; but it is not necessary. That point was expressly decided in *Walker v. Symonds* (3 Swans. 1; see 75). If, therefore, it were clear that Evelyn and Logan had committed a breach of trust, we are not bound to bring their personal representatives before the Court.

The remaining question is as to the necessity of having the parties entitled to Mrs. Le Gros's moiety before [230] the Court. It is a general rule that a trust fund is not to be administered piecemeal; but that rule does not apply where the fund has been divided. That division was effected by the decree of 1809; for it ordered that the interest which had accrued on the trust monies since the death of Mrs. Eyles should be paid to William le Gros and J. F. Silberschildt in equal moieties, and that Mrs. Le Gros's moiety of the principal should be subject to the further order of the Court, without prejudice to the claim of W. Beaufoy le Gros, and that the remaining moiety should be paid over to Archibald Paxton and Sir William Paxton, upon the trusts of the settlement of April 1791. The time for dividing the fund under the original settlement had arrived; and the decree of 1809 completely apportioned the two moieties between the parties entitled to them. *Smith v. Snow* (3 Madd. 10). Moreover, if the Le Gros's were made parties Defendants, the Court could not give them any relief at the hearing of the cause. And it does not follow that they would be as successful as we may be in making out a case of breach of trust against Sir C. Cockerell and Trail. We are proceeding against those gentlemen for a breach of trust committed against us.

Mr. Jacob, in reply. All the rules and principles of pleading require that the

representatives of Evelyn and Logan should be made parties. *Walker v. Symonds* is distinguishable from the present case; for there Lord Eldon was addressing himself to a case in which an arrangement had been made between the defaulting trustees with the sanction of Mrs. Walker, by which the trust fund was treated as the sole debt of Nicholas Donnithorne.

[231] THE VICE-CHANCELLOR. It appears to me to be plain that the Le Gros's ought to be made parties.

In this case there is a trust fund, one moiety of which belongs to A., and the other moiety belongs to B.; and a suit has been instituted by A., in which the allegation is that the whole fund has been improperly dealt with by the trustees. As it is not represented that B. has been satisfied in respect of his share, it follows that, unless B. is made a party to the suit, the Defendants will be subject to a second suit, as to what constitutes misfeasance as to the whole fund. The whole matter must be settled in one suit; and, therefore, if one of the parties interested in the fund is not a party to the suit, the Court will not give any relief as to the fund.

With respect to the other objection, the inclination of my opinion is that the representatives of Evelyn and Logan ought to be made parties; but, before I give any decided opinion on that point, I will read over the report of *Walker v. Symonds*.

Nov. 18. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have read through the report of *Walker v. Symonds*. Now that case itself affords one instance of what was thought at least to be the rule in the profession; because the representatives of Donnithorne and Griffith, the two deceased trustees, were made parties, along with the surviving trustee; and I observe that Lord Eldon nowhere lays down the general proposition that, if there be three trustees who have committed default, the suit may, at the option of the Plaintiff, be brought [232] against one only. He says no such thing; but what he does say is, that when three trustees are involved in one common breach of trust, the *cestui que trust* suffering from that breach, and proving that the transaction was neither authorized nor adopted by him, may proceed against any or all of the trustees (3 Swanst. 75); but his Lordship does not tell us whether, when he uses the words "may proceed," he means that they should apply to proceedings by suit, or to proceedings on a decree which has been obtained in a suit. There is a difference between bringing the suit, originally, against all that were defaulters, and then, when a decree has been obtained, proceeding on the decree against one of them only, and proceeding, originally, in framing the suit against one defaulter only. The language of Lord Eldon is so general on the point that I do not take it to be a general authority for the proposition that, where several trustees have made default, the suit may, at the option of the Plaintiff (unless there be special circumstances in the case), be brought, originally, against one only. It may constantly happen that there has been default in some trustees, affecting portions of the trust fund; but, if there be other trustees that represent the fund, it is quite clear that that which is the fruit of the suit must be restored as part of the fund, and must be handed over to the other trustees.

Besides, it seems to me that this proposition which is stated to have fallen from Lord Eldon was laid down, not with reference to anything which took place in the course of discussion prior to the pronouncing of the judgment, but when a discussion arose as to the form of the decree, after the substance of the judgment had [233] been pronounced; and it seems to have been a very special case; because Donnithorne, who was the principal defaulting trustee, died first; and it appears that Isaac Harris, who was his representative, had, by a sort of composition deed, amalgamated his own assets, together with those of his father, so as to form a general fund for the relief of his father's creditors; and Lord Eldon thought that it would be exceedingly difficult for the Plaintiff, Mrs. Walker, to proceed against the assets of Nicholas Donnithorne, without abandoning her claim against the other two; and she could not very well go on against the other two, without abandoning her claim against the assets of Nicholas Donnithorne; and, with reference to a state of circumstances so very singular as those in that case, his Lordship did assert the general proposition which is attributed to him in the report; and he did, in point of fact, do this: he dismissed the bill as against Isaac Harris, without costs, and allowed the Plaintiff to go on against the

other two trustees, taking care that it should be inserted, in the decree, that all demands which Mrs. Walker might have under the trust deed, or against the assets of Donnithorne, as assets, the surviving trustees would be entitled to enforce for their own benefit. (See 3 Swan. 89.) That was entirely upon the special circumstances of the case.

The case of *Wilkinson v. Parry* (4 Russ. 272) furnishes another instance of what was the opinion of the party who prepared the bill in that case: for not only was Nicholson, who was the defaulting trustee, made a party, but Sherwin also was made a party. In that case, the Master of the Rolls did not say that it was competent to the Plaintiffs, at their own option, to proceed against [234] Nicholson only, but that, if Sherwin had been made a party, no relief could have been had against him. The bill was filed against Nicholson and Parry; and the objection was that Sherwin was not a party; but the Master of the Rolls said that, if Sherwin had been made a party the bill must have been dismissed as against him. The circumstances of that case were as follows: Nicholson and Parry were originally trustees, and Nicholson became desirous of retiring from the trust, and Sherwin was appointed a trustee in his place, and executed the deed; but before he acted he intimated a wish to be discharged from the trusteeship; and then a deed was actually prepared, appointing Parry to be sole trustee; but that deed was not executed by Sherwin. But what was the special circumstance in that case? Sherwin was a trustee, and he never had acted; and the Master of the Rolls, by saying that the bill must be dismissed as against him, took that view of the case. That case is no authority whatever for stating that, where complaint might lawfully be made against one of the trustees, it is not necessary to make the others, against whom no complaint has been made, parties to the bill. It shews only that, where a person had the character of trustee, but *de facto*, was not a trustee, it was not necessary to make him a party; and inasmuch as the bill was filed not against Nicholson only, but against Nicholson and Parry, it is one example, amongst many others, of the necessity of making all the trustees parties.

In the report of the case of *Walker v. Symonds*, instances are given, in the notes, to prove a proposition which, I should have thought, hardly required proof, namely, that certain acts mentioned in the notes may be considered as defaults for which the trustee may be [235] liable. But in the very first of those cases, the case of *Bradwell v. Catchpole*, Mayhew had appeared, but had never answered, nor could he be found to be served with the process of the commission of rebellion; and as he had not been served with a *subpoena* to hear judgment, there could be no decree against him, but the process of contempt having been carried on against him to the utmost extent, the other Defendants could not object for want of parties. That admits that, but for that circumstance, the objection might have been made.

I see that Mr. Russell, in his report of *Wilkinson v. Parry*, states what the general rule is. He says: "Yet cases of breaches of trust seem to have been an exception; and it has been held that a *cestui que trust* may proceed against the surviving trustees alone, without bringing before the Court the representatives of the deceased trustee who were involved in the same acts of misconduct." Mr. Russell refers to the case of *Ex parte Angle* (Barnard. 423; S. C. 2 Atk. 162), and also to the decision of Lord Eldon in *Walker v. Symonds*, on which I have commented. But it does not appear to me that *Ex parte Angle* justifies the general proposition that it is competent to the Plaintiff, at his option, to select only some of the trustees: it justifies the position that Mr. Russell lays down, namely, that it has been *so held*, because it was so held in *Ex parte Angle*; but we must look at the circumstances of that case. The proceeding in *Ex parte Angle* was founded on the statute 4 Ann. c. 14, which regulated the way in which proceedings should be had where, upon the petition of persons who had suffered by fire and other calamities, undertakers were authorized to collect money for the benefit of the sufferers; and, in that case, it appeared that there were originally 17 managers, and seven were dead; and it was submitted, on the part of the survivors, that the representatives of the managers who were dead ought to be brought before the Court: but Lord Hardwicke said it was not necessary to bring those representatives before the Court, and that an order for accounting ought to be made against the survivors.

If you look at the fourth sect. of the Act, you will see that it directs that the

undertakers shall, within two months, account before one of the Masters of the Court of Chancery; and that the Master shall have power, by the common methods of the Court, to examine into all frauds committed by the undertakers and their agents, or any other person concerned for or acting under them, and report the same to the Court; which report, being confirmed by the Court, it shall be in the power of the Lord Chancellor to impose such fine and costs on every such offender as the nature of the case shall require. That, of course, implies that it was in the discretion of the Judge to impose such fine and such costs on each or any of the parties as the Court thought proper; and of necessity it gives the Court the jurisdiction to proceed against some and omit others; because it is useless to say that the proceeding shall be against all, when it is in the power of the Court to impose fines and costs upon such only as the Court should think right.

It appears to me, therefore, that this section of the Act did entirely justify Lord Hardwicke in saying that it was not necessary to bring the representatives of the [237] deceased parties before the Court. Besides, it seems that under the Act the Court might proceed in a summary way, and might dispense with the appearance of some of the offenders. The Act, indeed, imposed certain forfeitures, and a forfeiture might have been recovered from the representatives of those who were dead; but it might have been thought inconvenient by that learned Lord that any action should be directed against the representatives of those who were dead; and, therefore, he determined to impose the fines and costs on those only who were alive, and to enforce payment of them by the process of the Court.

It seems to me, therefore, that the position laid down by Lord Eldon in *Walker v. Symonds* does not support the general proposition contended for; and the whole practice of the profession is, I believe, against it; and, therefore, my opinion is that in this particular case the representatives of Evelyn and Logan ought to be made parties.

[238] WOODROFFE v. TITTERTON. Nov. 25, 1836.

New Orders. Power of Master to Examine Witnesses.

If a reference as to title is made on motion, the Master, under Lord Lyndhurst's 51st Order, has the same power to examine witnesses as he would have had if the reference had been made by decree.

This was a suit for specific performance.

Mr. Loftus Wigram, for the Plaintiff, now moved for a reference to the Master to inquire whether a good title could be made to the premises agreed to be sold.

Mr. Purvis, for the Defendant, said that he could not consent to the motion unless the Master had the same power to examine witnesses as we would have had if the reference had been made under a decree.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I apprehend that, under the 51st Order of 1828, the Master is bound to settle what course he will adopt, and that implies that he can examine witnesses.

His Honor made the common order of reference.

[238] BARTLE v. WILKIN. Dec. 3, 1836.

[Followed, *Smith v. Chichester*, 1842, 2 Dr. & War. 403.]

Costs. Foreclosure.

A sum due on mortgage was settled on a marriage. The husband afterwards obtained a decree of foreclosure in a suit in which the mortgagor and the trustee of the settlement were Defendants. The trustee's costs were ordered to be paid by the Plaintiff and added to the mortgage debt.

Elizabeth, the wife of Thomas Bartle, lent, before her marriage, £300 to Wilkin on mortgage of a copyhold estate; and, on her marriage, a settlement was made of

that sum. Bartle and wife and the other [239] *cestuis que trust* under the settlement filed a bill of foreclosure against Wilkin and the trustee of the settlement, and obtained a decree of foreclosure.

The question was whether the costs of the trustee were to be paid by the Plaintiffs.

Mr. Wigram, for the Plaintiffs, referred to *Wetherell v. Collins* (3 Madd. 255).

Mr. Wakefield, for the Defendant Wilkin, referred to *Barry v. Wrey* (3 Russ. 465).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that Sir T. Plumer's reasoning in *Wetherell v. Collins* applied to a foreclosure as well as a redemption; that, in *Barry v. Wrey*, the legal estate had been assigned after decree, and therefore that case did not apply; and His Honor directed the trustee's costs to be paid by the Plaintiffs and added to the mortgage debt.

[240] WEBBER v. BOLITHO. Dec. 3, 1836.

Dismissal. New Orders.

A party who consents to dispense with the 17th Order of 1831, in some particulars, is not to be considered as giving up the benefit of it altogether, but is entitled to enforce such of its requisitions as he has not dispensed with.

On the 5th of May 1834 the Plaintiff replied to the answer and served a *subpoena* to rejoin; but, having failed to sue out a commission to examine witnesses, the Defendant sued out a commission to examine his witnesses. Publication was from time to time enlarged by consent up to the first day of Easter term 1836. The Plaintiff having refused to consent to a further enlargement, the Defendant applied to one of the Masters, under 3 & 4 Will. 4, c. 94, and obtained an order to enlarge publication until the 1st day of Trinity term 1836, the Plaintiff being at liberty to set down the cause for hearing in the meantime. The Plaintiff having failed to set down the cause, the Defendant now moved to dismiss.

Mr. Jacob appeared in support of the motion.

Mr. Bethell, *contrà*, said that the steps to be taken in a cause were clearly pointed out by the 17th Order of 1831; but where, by arrangement between the parties, the cause had been taken out of the prescribed course of proceeding, the Plaintiff was not at liberty to avail himself of that order.

THE VICE-CHANCELLOR [Sir L. Shadwell]. A party who consents to dispense with some of the requisitions of the 17th Order is not to be considered as giving up the benefit of the order altogether. The case is within the order, except so far as the consent of the parties has taken it out of the order.

[241] As the Plaintiff in this case may have been taken by surprise, I shall not now order the bill to be dismissed; but I shall direct that he do pay the costs of the motion, and set down his cause within a week; and in default of his so setting it down, that the bill do stand dismissed, without further order.

[241] WALLIS v. TAYLOR. Dec. 8, 1836.

[S. C. 6 L. J. Ch. (N. S.) 68.]

Will. Construction. Executors and Administrators.

Testatrix gave a sum of stock to trustees for the separate use of her daughter for life, and, after her death, in trust for her executors or administrators, for their own use and benefit absolutely. The daughter, who was married but lived separate from her husband, made a will by which she appointed the stock to A. and B., her executors, in trust, subject to the payment of her debts, &c., for her nephews and nieces. The will was not proved, but the husband took out administration to his wife. Held, that the wife had no power to dispose of the stock, and that the husband was entitled to it.

Elizabeth Stanley, widow, by her will, dated the 11th day of May 1807, gave and bequeathed all the principal monies, stocks or funds that should be found standing in her name at the Bank of England in the three per cent. consolidated Bank annuities, to her executors thereafter named, upon trust, as to one moiety thereof, for her daughter Hannah, the wife of Thomas Forrest, in manner therein mentioned, and as to the other moiety or half part of the said principal monies in the three per cent. consolidated Bank annuities, upon trust to permit and suffer her daughter Sophia, then the wife of William Mitchell, to receive and take the interest, dividends and profits thereof, for her life, to and for her own use and benefit, free and independent of the control, debts or engagements of her then present or any future husband; and she thereby directed that her daughter's receipt alone should be a good and sufficient discharge from the same; and, from and after the decease of her daughter Sophia, upon [242] trust to assign and transfer the last-mentioned moiety of the principal monies three per cent. annuities, unto the executors or administrators of her said daughter Sophia, to and for his, her or their use and benefit absolutely for ever; and the testatrix appointed two of the Defendants executors of her will.

The testatrix died in November 1809. At her death she was possessed of £2200 three per cent. consols.

William Mitchell died in November 1824; and in February 1826 his widow married the Plaintiff. In December 1835 Mrs. Wallis died. For some years before her death she and her husband lived separate from each other.

Mrs. Wallis made a will which, after reciting the will of her mother, and that she was entitled under it to £1100 three per cent. consols, proceeded as follows:—"I, the said Sophia Wallis, under the right of disposal I have by my said mother's will, do hereby direct that the executors of my said mother's will shall, immediately after my decease, transfer the said £1100 three per cent. consolidated Bank annuities unto my friends Thomas Ashley, Richard Hallett and Thomas Forrest, whom I appoint executors of this my will; and I direct that my said executors shall thenceforth stand possessed of the said £1100 three per cent. consolidated Bank annuities upon trust, in the first place, to pay, satisfy and discharge my debts, funeral and testamentary expenses, and then upon trust to pay to W. M. Mackenzie and Sophia Mackenzie the sum of £95 each, and to transfer the residue of the said £1100 three per cent. consolidated Bank annuities unto and equally amongst my nephews and niece, Thomas Forrest, W. A. Forrest and Sophia [243] Jane Forrest, for their own absolute use and benefit." This will was never proved; but in January 1836 the Plaintiff took out administration to his late wife.

The bill charged that the will made by Mrs. Wallis was invalid, and prayed that the trustees of her mother's will might be decreed to transfer the £1100 stock to the Plaintiff, and to pay to him the dividends that had accrued thereon since his wife's death.

Mr. Stuart, for the Plaintiff, contended that, under Mrs. Stanley's will, the Plaintiff, as the administrator of his late wife, was absolutely entitled to the stock for his own benefit, and cited *Sanders v. Franks* (2 Madd. 147).

Mr. Turner, for the trustees of Mrs. Stanley's will, said that all they required was full and complete indemnity in disposing of the stock; that two questions arose on Mrs. Stanley's will; one was whether, as she had given the stock to her daughter for her separate use for life, and, after her death, to her executors or administrators, *for their own use and benefit*, that did not give the daughter a power to name the persons who were to take, as they were to take beneficially; that the other question was, what was the meaning of the words "executors or administrators:" that those words had been frequently held to mean next of kin; but the next of kin of Mrs. Wallis were not parties to the suit.

Mr. Walker, for Mrs. Wallis's executors. It is plain that Mrs. Stanley did not intend that her daughter's husband should take any interest in the fund, [244] as she gave it to her for her separate use. The question is whether the daughter had a power to appoint the fund. The fund is given to the executors of the daughter; that implies that the testatrix intended her to have a power of nominating the executors, and, therefore, it ought to go to the executors nominated by her, and not to her husband. But if not, then it is clear that her next of kin are entitled to it. *Bulmer*

v. *Jay* (*ante*, vol. 4, p. 48, S. C.; 3 Myl. & Keen, 197), *Palin v. Hills* (1 Myl. & Keen, 470), *Baines v. Otley* (*Ibid.* 465). The testatrix could not have had the executors or administrators, though she might have had the next of kin of her daughter in her contemplation. Mrs. Wallis was married at the date of the will; and, if she had had children by her first husband, they, according to the construction contended for by the Plaintiff, would not take any part of the fund, but the whole would go to her second husband.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Suppose that Mrs. Stanley did, in fact, intend that the executors or administrators of her daughter should take the fund for their own benefit, could she have used more apt and proper words to express her intention?

In the case of *Palin v. Hills* Lord Brougham, C., recognizes that a testator may provide that the executors of a person may take for their own benefit: for his Lordship says:—"The question is in what way, by what means, through what kind of substitution, is the testator to accomplish his purpose of preventing a lapse? He may have done it either by providing that the legatee's executor or administrator should take (in which case [245] there must be express words to indicate the intention of preventing a lapse) or by providing that the residuary legatee or next of kin of the legatee should take, either by giving it over in the dark to whomsoever the legatee had made or should make his executor, or the Ordinary should make his administrator, and whom he could know nothing of."

It is clear that the testatrix did not intend that her daughter should have the power of appointing the *corpus* of the fund, for she has limited it to her for her life only; and, as she has given it to the executors or administrators of her daughter, for their own use and benefit, I can only suppose that she did mean what she has expressed, namely, that the executors or administrators of her daughter should take for their own benefit.

Declare that the daughter had no power to appoint the fund, and that the Plaintiff is entitled to it as her administrator.

[246] THE GOVERNOR AND COMPANY OF THE BANK OF SCOTLAND v. KER.
Dec. 21, 1836.

Plea. Practice. Corporation.

The Plaintiffs sued as a body corporate by the name of The Governor and Company of the Bank of Scotland; but it did not appear whether they were incorporated by an English or by a Scotch charter. The Defendant pleaded that the Plaintiffs never were incorporated by any King or Queen of England, and were disabled by law from suing by the name of The Governor and Company, &c. Held, that as the plea was not exclusively a denial of what would appear by the production of an English record, it ought to have been filed on oath.

The Plaintiffs sued as a corporation, but did not state how they were incorporated.

The Defendant, T. C. Ker, put in the following plea to the bill:—"That the said Complainants, styling themselves The Governor and Company, of the Bank of Scotland, are not incorporated, and never were incorporated by, or by the assent of His present Majesty, or any of his predecessors Kings and Queens of England, and that the said Complainants, styling themselves The Governor and Company of the Bank of Scotland, are disabled by the laws of the realm to sue by the name of The Governor and Company of the Bank of Scotland in this honourable Court."

A motion was now made on behalf of the Plaintiffs that the plea might be taken off the file, because it had been put in without oath.

Mr. Jacob and Mr. Ellison, in support of the motion. The first part of the plea alleges merely that the Plaintiffs are not an English corporation. This is, in fact, no plea at all; as a foreign corporation may sue as such in the Courts of this country.

The second part of the plea must be taken to mean something further. It alleges

that the Plaintiffs are disabled by law from suing. That must mean that they [247] are precluded from suing for some other reason than that mentioned in the first part of the plea. That allegation, therefore, ought to have been verified by oath. A plea denying the existence of a record, with the addition of something else, cannot be filed without oath. *Aubrey v. Aspinall* (Jac. 441).

Mr. Knight and Mr. Bird, for the Defendant. The question is not whether the plea is a good plea, but whether it ought to have been put in on oath. It is, in fact, a plea in disability of the person of the Plaintiff which need not be put in on oath. (See Mitf. Treat. 3d edit. 243.) *Aubrey v. Aspinall* was a case of fraud: the plea alleged a direct falsehood.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The plea is not exclusively a negation of that which will appear by the production of an English record; for it might appear that the Plaintiffs were incorporated by a Scotch charter which must be proved. Therefore, the plea may involve the necessity of doing something more than producing a mere English record.

Motion granted.

[248] GUTHRIE v. BOUCHER. Dec. 22, 1836.

Bankrupt. Construction of 6 Geo. 4, c. 16, s. 127.

The 6 Geo. 4, c. 16, s. 127, enacts that where a person who has obtained his certificate shall again become bankrupt, and *have obtained* or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce sufficient to pay his creditors 15s. in the pound, his future effects shall vest in his assignees. Held that that enactment applies only to bankruptcies happening *after* the passing of the Act.

John Cumberlege the elder, was twice declared a bankrupt. The first commission issued in November 1815, and the second in October 1818. The creditors who proved under the second commission did not receive 15s. in the pound; but long before the passing of the Act to amend the laws relating to bankrupts, 6 Geo. 4, c. 16, Cumberlege obtained his certificate under the second, as he had done before under the first commission.

In 1833 certain persons, who claimed to be creditors of Cumberlege, attached by the process of the Lord Mayor's Court a sum of £700 in the Plaintiff's hands, being the proceeds of certain goods which, in the preceding year, Cumberlege had purchased at Penang and consigned to the Plaintiff. The Plaintiff thereupon filed a bill of interpleader against the persons who had issued the attachments, and also against the assignees under the second commission.⁽¹⁾

[249] The cause now came on to be heard.

Mr. Stuart, for the Plaintiff.

Mr. Jacob and Mr. Turner, for the assignees under the second commission, said that the 127th section of the Bankrupt Act was intended to have a retrospective operation, and to apply to certificates obtained prior to the passing of the Act as well as afterwards; and that the words "shall have obtained" were used in opposition to

(1) The 6 Geo. 4, c. 16, s. 127, is as follows: "And be it further enacted that if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any Insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission fifteen shillings in the pound, such certificate shall only protect his person from arrest and imprisonment, but his future estate and effects (except his tools of trade and necessary household furniture and the wearing apparel of himself, his wife and children) shall vest in the assignees under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing of the commission."

the words "shall hereafter obtain." *Ex parte Lane* (Mont. 12), *Ex parte Welsh* (*Ibid.* 276), *Elston v. Braddick* (2 Crompt. & Mees. 435), *Fowler v. Coster* (10 Barn. & Cres. 427).

Mr. G. Richards, Mr. Torriano and Mr. Maclean, for the other Defendants, relied on *Carew v. Edwards* (4 Barn. & Adol. 351), and said that *Ex parte Lane* did not apply; as, in that case, the third commission issued in 1828, which was after the passing of the Act; and that in *Elston v. Braddick* and *Fowler v. Coster* the bankrupt obtained his certificate after the passing of the Act.

THE VICE-CHANCELLOR [Sir L. Shadwell]. There is no difficulty in this case.

There is no inconsistency between the decisions in the Court of Exchequer and the Court of King's Bench. In the case in the King's Bench both the bankruptcies [250] happened before the passing of the Act, and the Court held that the statute did not apply: but, in the case before the Court of Exchequer, one of the bankruptcies happened before and the other after the passing of the Act; and, in that case, the Court held that the statute did apply. Both decisions are right and consistent with each other.

In order to make the statute apply, there must have been a bankruptcy after the passing of the Act. [His Honor here read the 127th sect. of the Act.] I admit that there is a surplusage of words in that section. But it appears to me that the person who drew the Act when he used the words "shall have obtained" carried his mind forward to a certificate to be obtained under the Act which he was preparing.

In the present case there was no bankruptcy subsequent to the passing of the Act; and the consequence is that there can be no vesting in the assignees.

[251] DAVENPORT *v.* WHITMORE. Jan. 23, 1837.

Practice.

The Court will not enlarge the time for obtaining the Master's report on exceptions to an answer in an injunction cause, except under special circumstances, such as the illness of the Master to whom the exceptions are referred.

The Plaintiff had obtained the common injunction for want of answer. The answer was afterwards filed and the Plaintiff excepted to it for insufficiency, but was unable to obtain the order of reference to the Master until Saturday the 21st instant. On this day (Monday the 23d) the four days allowed for obtaining the report would expire, and 2 o'clock was the earliest time that the Master could fix for hearing the exceptions.

Under these circumstances Sir W. Horne and Mr. Rogers, for the Plaintiff, moved that the time prescribed for obtaining the report might be enlarged. They cited Smith's Pract. 474.

Mr. G. Richards, for the Defendant. There is no authority for the application. The rule is that if the report is not obtained within four days the injunction goes; but the Plaintiff may move to revive it on the Master allowing the exceptions.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the Court may interfere in special cases and alter the usual course of its practice; as, for instance, where the Master is prevented by illness from attending to the duties of his office. But I do not recollect any application like the present being made to the Court; and I do not think that there are any special circumstances in this case which will justify my interference. No evil will arise from my refusing the appli-[252]-cation; for, although the injunction will be dissolved if the report is not obtained within the prescribed time, yet, if the Master allows the exceptions, the injunction may be revived as a matter of course. The object of the rule which is now sought to be relaxed was to prevent unnecessary delay on the part of Plaintiffs: and the Chancery Commissioners thought that it was a wholesome rule and ought to remain unaltered.

My opinion is that I ought not to interpose. I do not mean to say that I might not interfere in a proper case; but I do not think that this is such a case.

Jan. 24. On this day the Plaintiff's counsel renewed their motion, supported by an affidavit stating that Master Martin (to whom the reference had been made) was prevented by indisposition from attending to business.

Mr. G. Richards said that the Plaintiff's solicitor had requested the Defendant's solicitor to consent to the time being enlarged, which the latter declined, and at the same time informed the Plaintiff's solicitor that Master Brougham would take the reference.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In extraordinary cases, such as the illness of a Master, the Court must depart from its ordinary rules: and, under the special circumstances of this case, I think it right to make the order.

My order is that the injunction be revived: that the exceptions be referred to Master Brougham; and that the Plaintiff do obtain his report within four days, or that the injunction be dissolved.

[253] SPACKMAN v. TIMBRELL. Dec. 7, 8, 1836; Jan. 10, 1837.

[See *Pimm v. Insall*, 1849, 1 Mac. & G. 457; 41 E. R. 1341; *Kinderley v. Jervis*, 1856, 22 Beav. 21; 52 E. R. 1015 (with note).]

Assets. Debtor and Creditor. Purchaser. Heir. Devisee. Executor.

A., who was a trader at his death and indebted by specialty and simple contract, devised freehold estates to his son in fee. The son, on his marriage, settled the estates on his wife and children, and afterwards died. Held, that the 3 & 4 W. & M. c. 14, and the 47 Geo. 3, c. 74, sess. 2, do not charge the real assets descended or devised, with the ancestor's debts; but make the heir or devisee personally liable to the value of the assets; and, therefore, that the son's widow and children were entitled to hold the estates discharged from the debts of the father.

A testator bequeathed leaseholds to his son, and appointed him and another person his executors. Three years after the testator's death, the son settled the leaseholds on his marriage. Held, that as against the son's wife and children, the property was not liable to the testator's creditors.

Thomas Timbrell, by his will, dated the 14th of February 1820, gave certain freehold and leasehold estates to his son Thomas Timbrell, to hold the freehold estates to him, his heirs and assigns, and the leaseholds to him, his executors, administrators and assigns, subject to the payment of £3000, within four years after the testator's decease, with interest to each of the testator's three daughters: and he gave the residue of his real and personal estates to his son Thomas Timbrell, and Charles Spackman, their heirs, executors, &c., in trust to sell and get in the same respectively: and, after paying all his debts and legacies, he gave the money to be produced from his residuary real and personal estates unto all his children equally; and he appointed his son Thomas Timbrell and Charles Spackman his executors.

The testator died shortly after the date of his will. At his death he was a trader within the meaning of the bankrupt laws, and was indebted both by specialty and simple contract.

Thomas Timbrell, the son, by his marriage settlement (which was dated in January 1823, and recited his father's will) in consideration of the intended marriage and of a sum of money covenanted to be paid by the father of his intended wife, to the trustees of the settlement, conveyed the freehold estates devised to him as before mentioned, together with some other estates of which he was seised in fee, to trustees, for 1000 years, [254] in trust to raise the three legacies of £3000, and, subject thereto, to the use of himself and his intended wife for their lives successively, with remainder to their children as tenants in common in fee: and he assigned the leasehold estates (subject to the charges thereon), to trustees, upon trusts corresponding with the uses declared of the freehold estates: and he covenanted for the title to the

estates, as against his own acts and the acts of his father; and, in the covenant against incumbrances, his father's debts were included.

The bill, which was filed in June 1830, prayed that the trusts of the will might be carried into execution, and that the testator's real and personal estates might be applied in payment of his debts and legacies.

Thomas Timbrell, the son, became a bankrupt and died pending the suit. A decree was afterwards made by which the testator's estates were directed to be sold for payment of his debts. The widow and children of T. Timbrell, the son, presented a petition of appeal from that decree, in which they submitted that inasmuch as the estates specifically devised to T. Timbrell, the son, were comprised in the settlement which was made previously to and in consideration of his marriage, and under which they were purchasers for a good and valuable consideration, they were entitled to those estates in preference to such of the testator's creditors as had not a specific charge thereon prior to the settlement.

Mr. Wigram and Mr. Morley, for the Petitioners. The question in this cause arises under the following circumstances:—Thomas Timbrell, the father, devised certain of his estates to his son in fee: the father was a trader at the time of his death, and, of course, the estates would be subject to his debts: but, three years [255] after the father's death, the son, on his marriage, settled the estates on his wife and children: and the question is whether the estates remain subject to the father's debts, or whether the parties entitled under the settlement take the estates discharged from the debts. This question depends upon the 3 & 4 W. & M. c. 14, and 47 Geo. 3, sess. 2, c. 74. The former of those Acts does not give the creditor any *specific lien* on the estates of his debtor, but only makes the heir or devisee *personally* liable, to the amount of the assets descended or devised. It does not enable the creditor to pursue the land in the hands of an alienee. The 47th Geo. 3 enacts that where a trader dies seised of estates which he shall not have charged with his debts, those estates shall be assets, to be administered in Courts of Equity, for payment of his debts as well on simple contract as on specialty, and his heir or devisee shall be liable to all the same suits in equity, at the suit of any of his creditors, whether by simple contract or by specialty, as they were, before the passing of the Act, liable to at the suit of creditors by specialty. This Act, therefore, leaves the case of simple contract creditors just the same as that of specialty creditors was before. At law the right is against the *person* of the heir or devisee; and so it is in equity. In equity, as at law, the land is safe in the hands of the alienee, unless a case of fraud is made out, and then the creditor may pursue the land in the hands of the alienee. The fraud, however, must not be a fraud on the part of the alienor only, but must be concocted between the alienor and the alienee: and, unless such a case of fraud is made out, the right of the alienee is the same in equity as at law. In this case, three years after the death of the father, and when no suit was depending, a settlement was made by the heir on his marriage: and, if that settlement is liable to be defeated by creditors, no [256] heir of a trader can make a settlement of his property. The parties who take under a marriage settlement are purchasers for a valuable, not a good consideration merely; and all the consequences of their being such purchasers have always been followed up. Under the 13th Eliz. c. 5, and 27th Eliz. c. 4, and also under the bankrupt laws, the consideration of marriage has been always held to be as good as a sale for value. Besides, in this case, there is not only the consideration of marriage, but there is also an actual valuable consideration moving from the father of the lady.

George v. Milbanke (9 Ves. 190), *Mathews v. Jones* (2 Anst. 506), *Kinaston v. Clark* (2 Atk. 204), *Brown v. Carter* (5 Ves. 862), *Kirk v. Clark* (Prec. Ch. 275), *Partridge v. Gopp* (Amb. 596).

Sir W. Horne and Mr. G. Richards, for the creditors of the testator. The question is whether the alienee is to be in a better situation than the person from whom he took the land. Where a person purchases from the heir or devisee, for valuable consideration and without notice of the charges on the land, he is protected by 3 & 4 W. & M. c. 14: but a purchaser with notice of the charges on the property stands in the same situation as the party from whom he purchases. Where no money passes, it is impossible for the purchaser to suppose that the estate is parted with for the purpose of paying debts. In *Mathews v. Jones*, it is assumed by the counsel that

the parties claiming under the settlement had no notice of the debts. The principle is clearly pointed out in *Watkins v. Cheek* (2 Sim. & Stu. 205). There Sir John Leach, V.-C., says: "But, if the nature of the transaction affords [257] intrinsic evidence that the executor, in the mortgage or sale, is not acting in the execution of his duty, but is committing a breach of trust, as where the consideration of the mortgage or sale is a personal debt due from the executor to the mortgagee or purchaser, there such mortgagee or purchaser, being a party to the breach of trust, does not hold the property discharged from the trusts, but equally subject to the payment of debts and legacies as it would have been in the hands of the executor. The same principle is applicable to real estate." Here the settlement recites the will and the devise for payment of debts: and Thomas Timbrell covenants that the lands shall be held and enjoyed free from his father's debts: therefore, the debts must be presumed to be unpaid until the contrary is proved. There is no pecuniary consideration moving to Thomas Timbrell, from the parties claiming under the settlement, by which the debts could be paid. *Green v. Lowes* (3 Bro. C. C. 217).

Mr. Knight, Mr. Jacob, Mr. Wilbraham, Mr. Simons, Mr. Stinton, Mr. Willcock, Mr. Reynolds and Mr. Saunders appeared for other parties.

Mr. Wigram, in reply. Before the 3 & 4 W. & M. c. 14 was passed, if the heir aliened the land before action brought, he could not be made answerable to the creditor for the value of it: he could plead *riens per descent* at the time of the writ brought. That was remedied by the 5th sect. of the Act, which enacts that where the heir shall be liable to pay the debt of his ancestor in regard of any lands descending to him, and shall sell, aliene or make over the same before any action brought or process sued out against him, he shall be answerable for such debt to [258] the value of the land so by him sold, aliened or made over. The statute therefore made the heir liable, although he aliened; but it gave no remedy against the land. It does not follow the land in the hands of the alienee, but it makes the heir liable for the value. It must be observed, too, that in that section of the Act the words used are "aliene and make over" as well as "sell." The 47th Geo. 3 merely gives to simple contract creditors the same remedy as specialty creditors had under the statute of Will. & Mary. It gives no new remedy against the heir: it does not fetter him either in the enjoyment or in the disposition of his property.

There is nothing particularly pointed in the covenants for title contained in the settlement. Those covenants are in the usual form. The word "debts" is inserted in every covenant against incumbrances.

Jan. 10, 1837. THE VICE-CHANCELLOR [Sir L. Shadwell]. Thomas Timbrell, the father, was a debtor by covenant, and was also a trader at the time of his death; and, by his will, he devised to his eldest son, in fee, certain freehold tenements. After the testator's death, the son, on his marriage, settled those tenements, together with others, on his wife and children: and the question is whether, in a suit to administer the real and personal assets of the testator, the tenements devised can, as against the wife and children of the son, be sold to satisfy the debt of the father.

I am clearly of opinion they cannot. The law is correctly laid down by Lord C. B. Macdonald in giving the judgment of the Court in *Mathews v. Jones* (2 Anstr. 515). [259] His Lordship says: "It has, indeed, been attempted to raise another question upon the construction of the statute of William and Mary, to shew that, as against creditors, a devise is wholly void, and, therefore, different from the case of lands descended. It is clear that no such distinction exists. Before that statute the only remedy of a creditor was against the heir, to the amount of the assets descended: a devise effectually defeated his claim. The statute, therefore, extends the remedy against the devisee: but in this case, as well as in that of the heir, it is clearly the intent that the land should not be charged in the hands of a purchaser: and, accordingly, in both cases, the heir or devisee continue personally answerable for the debt after they have parted with the estate, in respect of which they became chargeable." The common law and the statutes 3 & 4 W. & M. c. 14, and 47th Geo. 3, sess. 2, c. 74, do not charge the real assets descended or devised with the debts of the ancestor, but make the heir or devisee liable, personally, to answer for the value of the assets.

In *Buckley v. Nightingale* (1 Str. 665) it was held that if the heir who had taken assets by descent pleads in an action of debt by a specialty creditor of his ancestor that he has paid specialty debts to the value of the assets descended, the plea is good on demurrer: and the decision in *Horn v. Horn* (2 Sim. & Stu. 448) must have proceeded on that ground.

It is clearly settled that a charge for payment of debts takes the case out of the statute of 3 & 4 W. & M., and makes equitable assets. *Bailey v. Ekins* (7 Ves. 319), *Shiphard v. Lutwidge* (8 Ves. 26). And it is impossible to say that a conveyance in consideration of marriage, for the benefit of the wife and children of the settlor, does not make them purchasers for valuable consideration of all the interest conveyed to them. But, by the conveyance, the heir becomes personally liable to the creditors of his ancestor for the value of the assets which he has conveyed.

Feb. 11, 1837. It having been arranged that the question, whether the leasehold estates were liable to the demands of the creditors, should not be discussed until the Court had decided as to the freeholds, that question now came on to be argued.

In the settlement the leasehold part of the estates was described as a close or paddock of pasture ground, containing six score luggs, and lately thrown into and then forming part of one of the freehold closes, and which close or paddock was, by the will of Thomas Timbrell, the father, bequeathed to Thomas Timbrell, the son.

Mr. Wigram and Mr. Morley referred to *Macleod v. Drummond* (17 Ves. 152), and *Nugent v. Gifford* (1 Atk. 462), and said that although a person dealing with the executor and specific legatee might be liable to the demands of creditors, if they prosecuted their claim in due time, yet in this case, as the creditors did not file their bill until seven years after the execution of the settlement, they were barred of all remedy by their own laches: that the circumstance of three years having elapsed between the death of the testator and the execution of the settlement, during which time the son was suffered to deal with the property as he [261] thought fit, was sufficient to make every one consider him, not as executor, but as specific legatee: that the leasehold part of the premises was laid into one of the freehold fields; and that the marriage consideration protected it equally with the freeholds, unless fraud and collusion could be shewn.

Sir William Horne and Mr. G. Richards said that C. Spackman was an executor of the will, as well as T. Timbrell; but he was not a party to the settlement, nor did it appear that he had ever assented to the bequest of the leaseholds: that *Macleod v. Drummond* proved merely that an executor had power to dispose of his testator's personal estate, and that the purchaser would hold it against the creditors, unless fraud or collusion were shewn; that the reason was that an executor might be under the necessity of selling the property for the purpose of paying his testator's debts; but in this case the presumption that the leaseholds were disposed of for that purpose could not arise, as no money was paid.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The settlement begins with reciting that Thomas Timbrell, the son, was seised of the manor and other hereditaments thereafter granted and released, for an estate in fee-simple in possession; and then, when you come to the operative part, it says: "All that close or paddock forming part of the said freehold close hereinbefore granted and released, called Adcroft; and which close or paddock, with its appurtenances, was, by the said will of the said testator, Thomas Timbrell, bequeathed by him to the said Thomas Timbrell, the son:" so that the description of the property in the settlement indicates that the son was in possession of the freehold [262] and the leasehold, in one and the same character, that is, as owner. I must, therefore, conclude that there was an assent to the bequest of the leaseholds.

Then, three years after the death of the father, the son makes a settlement, both of the leaseholds and of the freeholds, for valuable consideration; and, there being nothing to impeach the fairness of the transaction, it seems to me that this case falls within the principle of those cases which are so ably commented upon by Lord Eldon, C., in *Macleod v. Drummond*.

[262] DAVIES v. CLOUGH. Nov. 29, 30, 1836; Jan. 10, 1837.

[S. C. 6 L. J. Ch. (N. S.) 113; 1 Jur. 5. See *In re John Holmes*, 1877, 25 W. R. 604.]

Solicitor and Client. Injunction.

A., a solicitor, had been employed by B. to negotiate and conclude an agreement on her behalf. Disputes then arose between them as to A.'s bills of costs, which B. procured to be taxed and reduced. A suit was subsequently commenced by C. against B., the object of which was to set aside the agreement, and in which A. and D., who had lately become his partner, were solicitors for C. The Court restrained A. & D. from acting as the solicitors of C. in the suit, and restrained A. from communicating to C. any information relating to the agreement that had come to his knowledge, confidentially, as the solicitor of B.

In 1808 a family arrangement was made between Roger Clough and R. Butler Clough, his son, under which R. B. Clough became entitled to an annuity of £500 a year, charged upon an estate to which he was entitled in remainder expectant on his father's death: and R. B. Clough was empowered to charge the estate, on his marriage, with a jointure of £350 a year. In the same year R. B. Clough married the Defendant, Amelia Maria Clough, having previously exercised his power of jointuring in her favour.

[263] In 1817 R. Clough, who was a partner in a bank, became bankrupt. His assignees having agreed to sell a portion of the estate, claims were made by R. B. Clough, in respect of his annuity, and by his widow, in respect of her jointure. The assignees were afterwards allowed to complete the sale, on relinquishing their claim to the remainder of the estate; but in 1830, and before the claims of R. B. Clough and his wife were finally settled, the former died, having appointed his wife his executrix.

On R. B. Clough's death the portion of the estate remaining unsold descended to his only child Amelia, the wife of the Defendant Walter Powell Jones. On the 9th of August 1831 an agreement was made between Mrs. Clough, Mr. and Mrs. Powell Jones and the assignees of R. Clough, which was afterwards varied by an agreement of the 7th of October 1832. The effect of the agreement so varied was that Walter Powell Jones should pay £3160 to Mrs. Clough, and that she should relinquish her jointure, and the arrears of her late husband's annuity, amounting to £6750.

H. Jones, who had acted as the solicitor of the Clough family from the year 1815, was employed by Mrs. Clough as her solicitor in negotiating and concluding the before-mentioned agreement. In December 1832 he received from Mrs. Clough £350, being the amount of certain costs which he alleged to be due to him from her late husband. Shortly afterwards he made a further demand upon her of the like nature, and, on her resisting it, he brought an action against her in the Court of King's Bench. Mrs. Clough then obtained an order for taxing his bills of costs. The Master found that H. Jones had been overpaid, and [264] ordered him to refund part of the £350, and pay the costs of taxation. H. Jones then obtained an order to review the taxation. The Master, however, came to the same conclusion as before, and ordered H. Jones to pay the costs of the retaxation.

In 1834 H. Jones filed a creditor's bill against Mrs. Clough, as the personal representative of her late husband. In May 1835 the bill was dismissed for want of prosecution.

In August 1835 the bill in this cause (which also was a creditor's bill) was filed against Mrs. Clough and Mr. and Mrs. Powell Jones: alleging that the assets of R. B. Clough consisted, amongst other things, of the arrears of his annuity, amounting to £6750. Mrs. Clough put in her answer, in which she denied that she had received anything in respect of the annuity. In April 1836 the bill was amended, and a detailed statement of the transactions before mentioned was introduced into it. The amended bill insisted that the £3160 was paid to Mrs. Clough, in part satisfaction of

the arrears of her late husband's annuity, and prayed that that sum might be declared to belong to his estate.

H. Jones and one Fay, who had been his clerk but was now his partner, were the solicitors for the Plaintiffs in this suit; and a motion, supported by affidavits, was now made, on behalf of Mrs. Clough, that the Plaintiffs might be restrained from employing Messrs. Jones & Fay as their solicitors in this suit, or as their attorneys and solicitors in any other suit in equity or action at law, commenced or to be commenced by the Plaintiffs, against Mrs. Clough as executrix of R. Butler Clough, in respect of any property alleged to be [265] part of his estate, the title to which was attempted to be established upon the construction of any agreement or other transaction which came to the knowledge of Jones & Fay, as attorneys and solicitors to R. B. Clough, or of Mrs. Clough since his decease, or which came to the knowledge of Fay as clerk to Jones, during the time that Jones was concerned for R. B. Clough or Mrs. Clough, as such attorney or solicitor; and also to restrain them from acting as solicitors and attorneys for the Plaintiffs in any such suits or actions, and from communicating to them, their counsel, Clerks in Court, solicitors, attorneys or agents, any information relating to the matters in dispute in such suits or actions which had come to the knowledge of Jones & Fay as such solicitors and attorneys as aforesaid, or which had come to the knowledge of Fay as clerk to Jones while concerned for R. B. Clough or Mrs. Clough as such attorney or solicitor.

Mr. Knight and Mr. Shadwell, in support of the motion, said that the bill contained matter relating to family arrangements which had come to the knowledge of H. Jones whilst he was acting as the solicitor of Mrs. Clough; that, in disclosing to the Plaintiffs what had so come to his knowledge, he had committed a gross breach of professional confidence; that he had instigated the Plaintiffs to institute the suit, in order to be revenged upon Mrs. Clough for having taxed his bills; and that he had agreed to indemnify the Plaintiffs from the costs of the suit, so that it was, in fact, his suit. *Cholmondeley v. Clinton* (19 Ves. 261), *Beer v. Ward* (Jac. 77), *Robinson v. Mullett* (4 Price, 353).

[266] Mr. Jacob and Mr. Koe, for the Plaintiffs, said that the motion was founded on the erroneous assumption that Mr. Jones was under an obligation of secrecy, not only as the solicitor of Mrs. Clough, but also as the solicitor of her late husband; but that it had never yet been decided that the right to enforce secrecy would pass from a deceased client to his personal representative; that the matters as to which secrecy was now sought to be imposed had been disclosed in the course of the proceedings in the bankruptcy of Roger Clough and in the taxation of Jones's bills of costs, or, in other words, they had been made known to the whole world. *Johnson v. Marriott* (2 Crompt. & Mees. 183), *Grissell v. Peto* (9 Bing. 1), *Bricheno v. Thorp* (Jac. 300).

Mr. Temple and Mr. G. Richards, for H. Jones.

Mr. B. Anderdon, for Mr. Fay, said that Fay was clerk to Mr. Jones until 1829; that he then left Jones and did not return until 1834, when he was taken into partnership; that all the transactions to which the suit related took place prior to 1834, and he had never been consulted either by Mrs. Clough or by R. B. Clough, and consequently that the injunction ought not to be extended to him.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It appears, from the affidavits filed by Mrs. Clough, that Mr. H. Jones was confidentially employed by her in the negotiation of the agreement by virtue of which the £3160 was paid to her. It is true that the notice of motion goes to restrain him from making any communication of matters which he learnt as solicitor of R. B. Clough; but it is not at all necessary to consider whether I ought to interfere as to anything that Jones did or learnt as the solicitor of R. B. Clough. The question to be considered is whether he ought to be permitted to act as the solicitor of the Plaintiffs in this suit, the object of which is to set aside that very transaction which was brought to maturity by himself, when he was acting as the solicitor of Mrs. Clough.

I have not been able to find any authority exactly in point, and must, therefore, proceed upon some general principle. The cases, however, appear to afford this general principle, namely, that all Courts may exercise an authority over their own officers as to the propriety of their behaviour; for applications have been repeatedly made to restrain solicitors who had acted on one side from acting on the other, and

those applications have failed or succeeded upon their own particular grounds, but never because the Court had no jurisdiction.

The question therefore is whether the circumstances of this case furnish a ground for interference. For my own part, I cannot consider anything to be a greater breach of professional duty than for a solicitor, first of all, as the solicitor of one party, to carry on a negotiation for the benefit of that party and have it completed, and, afterwards, to act as the solicitor for other parties in order, by his own personal knowledge of the transaction, to destroy that which he had done for his former client; and that, not because he was discharged by his former client, but because he made an exorbitant demand which was resisted and ultimately defeated; so that he virtually discharged himself. Such conduct appears to [268] me to be such a flagrant breach of that duty which a solicitor owes to his client that the Court is bound to interfere.

There is another circumstance in this case which ought to be observed upon. The bill is filed by two persons named Davies, who have put forth a statement of their right to retain Mr. Jones; and, upon an insinuation being made by the Defendant that Mr. Jones had not been retained by the Plaintiffs, an affidavit was made containing a statement of the most comprehensive retainer in writing by a client of a solicitor that I have ever seen. It furnishes the solicitor with every species of right to wage war with all mankind on behalf of his client. But, notwithstanding, I am satisfied that the observation made by Mr. Knight is perfectly correct, namely, that though, in point of form, the Plaintiffs may have retained Jones, yet, in point of substance, he has retained them. They, no doubt, are his creatures for the purposes of this suit, which, as I understand the affidavits, is nothing more than a malevolent effusion of spite, because Mrs. Clough not only required Mr. Jones's bills to be taxed, but succeeded in having them very much reduced on the taxation.

Nothing, however, appears in this case to affect the character of Mr. Fay; because he left the office of Mr. Jones (where he was clerk) in 1829, and came to London, and did not return and enter into partnership until a late period. But it is to be observed that if two solicitors are in partnership, and are carrying on a suit as partners, if it is right to restrain one of them, the other, of necessity, cannot carry it on; because the act of one partner is in law the act of both. Therefore, [269] if it is right to restrain Jones, it follows, as a necessary consequence, that Fay must be restrained also.

Then it was said that no further information remained to be disclosed, as the affidavits in the King's Bench had detailed the whole transaction. In my opinion, however, this is an erroneous view of the case; for, though those affidavits did disclose a good deal of the case, they did not disclose the whole of it.

It seems to me, therefore, that I have a sufficient case before me to make it my duty to direct that the Plaintiffs should be restrained from employing Mr. H. Jones and Mr. Fay as their solicitors *in the present* suit; and I think it ought to be part of the order that Jones should be restrained from communicating to the Plaintiffs or either of them any information relating to the agreements of 1831 and 1832 which came to his knowledge, confidentially, as the solicitor of Mrs. Clough.

I also think it right to direct that the Plaintiffs shall pay the costs of the motion; because, although it may be true that they themselves know very little about the matter, yet they must be taken to know the circumstances of their own cause; and if, as there is great reason to believe, they are the mere puppets of Mr. Jones, and are indemnified by him against the consequences of this suit, those costs will fall upon the party who ought to pay them.(1)

(1) Affirmed by the Lord Chancellor in Feb. 1837.

[270] SIMES v. DUFF. June 13, 1838.

Practice. Injunction.

The Plaintiff obtained the common injunction on the Master reporting the answer insufficient. He then obtained an order to amend without prejudice to the injunction, and for Defendant to answer the amendments and exceptions at the same time. Afterwards he obtained an order to extend the injunction to stay trial. Held, that that order was regular, although the Plaintiff had amended his bill after obtaining the common injunction.

On the 9th of May the Plaintiff obtained the common injunction, the Master having reported the answer insufficient. On the 12th of May the Plaintiff obtained an order to amend without prejudice to the injunction, and that the Defendants might answer the amendments and exceptions at the same time. On the 30th the bill was amended. On the 8th of June the Plaintiff obtained, on the usual affidavit, an order to extend the injunction to stay trial.

Mr. Jacob and Mr. Younge, for the Defendants, now moved to discharge the last-mentioned order. They said that, as the Plaintiff had amended his bill after the injunction was obtained, he was not entitled to extend it to stay trial. *Brown v. Reina* (3 Youn. & Jerv. 389), *Mellor v. Cresswell* (2 Myl. & Keen, 616).

Mr. Knight Bruce and Mr. Tripp, for the Plaintiff, said that the order to extend the common injunction was purely of course; and they referred to *Martin v. Mortlock* (before Lord Eldon, 13th July 1815; 1 Newl. Pract. 3d edit. 356; Reg. Lib. B. fol. 1584), and said that that case was not cited before the Lord Chief Baron and the Master of the Rolls when they made the orders in *Brown v. Reina* and *Mellor v. Cresswell*; that Mr. Newland's statement of the case appeared to be quite correct; that there the order for the common injunction was obtained on the [271] 22d of June 1815; the order referring the answer for insufficiency on the 3d July; the order to amend and for the Defendant to answer the amendments and exceptions at the same time on the 10th of that month; and the order to extend the injunction on the 13th.

THE VICE-CHANCELLOR [Sir L. Shadwell]. If this passage from Mr. Newland's work, and the order which has been produced from Reg. Lib., had been cited to the Master of the Rolls when he made the order in *Mellor v. Cresswell*, instead of the case in the Exchequer (the practice of which Court does not bind this Court), my opinion is that His Honor would have made an order contrary to that which he did make.

The order now sought to be discharged is consistent with the established practice of the Court: and I do not find that there was any proposal made by the Chancery Commissioners to alter the practice in this respect.

My opinion is that the order is right, and that this motion ought to be refused with costs.

[272] SAMPSON v. SMITH. June 15, 1838.

[See *London Association of Shipowners and Brokers v. London and India Joint Docks Committee* [1892], 3 Ch. 271.]

Nuisance. Attorney-General. Parties.

Where an individual sustains special damage from a nuisance, he may file a bill to restrain it without making the Attorney-General a party.

The bill stated that the Plaintiff was in the occupation of the dwelling-house, shop and premises, No. 2, on the east side of Princes Street, Leicester Square; in which shop he had daily exposed for sale a large and valuable stock of clothes, cloth and other articles, and had also valuable furniture and effects in his house: that the

Defendants were in the occupation of a messuage, manufactory and premises on the west side of Princes Street near to the Plaintiff's house and shop, and in or upon which they carried on the trade or business of engineers: that in the latter end of December last, the Defendants commenced erecting and had since erected and completed upon their premises a steam-engine, for the purpose of carrying on their trade or business, and had ever since used and still continued to use the steam-engine for that purpose: that up to March last, no material injury or nuisance was occasioned thereby, but, in and subsequent to that month, a large body of smoke had almost daily issued from the engine: that the Defendants had not erected any new chimney for the steam-engine, but had used an old chimney on their premises for the purposes thereof: that the top of the brick-work of the chimney was not so high as the roofs of the adjoining houses, and was very much lower than the tops of the chimnies of such houses: that the only addition made to the top of the chimney was a metallic pipe of about five feet long, the top of which was about three feet below the tops of the chimnies of the adjoining houses: that the body of smoke which issued from the chimney was very great, [273] and the same, and the blacks and soot mingled therewith, descended in such dense bodies into the street, that the shop and house of the Plaintiff was filled therewith, and his goods and furniture were very much injured, and the health and comfort of himself and his family were prejudiced and impaired thereby: that the Plaintiff had applied to the Defendants to discontinue the use of the steam-engine, or to use the same in such manner as not to be productive of injury to the Plaintiff; and the Defendants had at various times, in and since the month of March last, promised the Plaintiff and other persons that the evil complained of should be remedied: but that they had failed to comply with such promises; and the evil had rather increased than diminished for the last few weeks, until the same had become a grievous nuisance to the Plaintiff and also to the other inhabitants of Princes Street and the neighbourhood, insomuch that the Plaintiff, in May last, instructed his solicitor to take the necessary steps for obtaining immediate relief from the nuisance; and his solicitor, thereupon, wrote a letter to the Defendants in the following words:—"Gentlemen,—I am directed, by several clients residing in Coventry Street and the neighbourhood, to apply to you on the subject of the nuisance and injury caused to them and others by the smoke of your steam-engine, and to inform you that unless I have an immediate and satisfactory communication from you respecting its instant abatement, proceedings will, without further notice, be adopted." That neither the Plaintiff nor his solicitor had ever received any answer to the letter, and that the nuisance remained unabated.

The bill prayed that the Defendants might be decreed to abate the nuisance, and that they might be restrained [274] from continuing to use the steam-engine, or from using it in such manner as to occasion nuisance and injury to the Plaintiff.

The Defendant demurred generally to the bill, and also, *ore tenus*, for want of parties.

Mr. Jacob and Mr. Willcock, for the Defendants. The only ground upon which the Plaintiff can maintain his suit is that he has stated one of those public nuisances which this Court will prevent: but if it be a public nuisance, this Court will not interfere unless an indictment or some other proceeding at law is pending, in which the question, whether it is a nuisance or not, will be tried. Moreover, in cases of public nuisances, an information ought to be filed by the Attorney-General. At all events, if an individual can institute such a suit, the Attorney-General ought to be a party to it. The case of *The Attorney-General v. Cleaver* (18 Ves. 211), embodies the principal part of the law upon this subject.

The bill admits that the operations on the Defendants' premises, which it complains of, are carried on for the purposes of their trade, and that trade has been carried on for five years. [THE VICE-CHANCELLOR. The Defendants are carrying on their trade in a new mode.] It is admitted, however, that the steam-engine is used for the purposes of trade; and in such cases the Court interferes with great caution, and requires the matter to be first investigated in a Court of law. *Duke of Grafton v. Hilliard* (Amb. (Blunt's edit.) 159, note), *Anon.* (3 Atk. 750), *Earl of Ripon v. Hobart* (3 Myl. & Keen, 169), *Weller v. Smeaton* (1 Cox, 102).

[275] This case is not like *Crowler v. Tinkler* (19 Ves. 617). There Lord Eldon,

C., thought that Crowder had a distinct case from the public at large. His Lordship says: "I incline to think that an injunction may be granted in this case, upon the head, not of nuisance, but of danger to property."

The bill states that our steam-engine is a nuisance, not only to the Plaintiff, but also to the other inhabitants of Princes Street and the neighbourhood: and the solicitor's letter is written on behalf of several clients residing in Coventry Street and the neighbourhood: so that, if we get a decision in our favour in this cause, the inhabitant of the next house may file another bill against us, and so on. The question ought to be concluded once for all: and the only way in which the public can be represented is by having the Attorney-General a party. The bill prays that the nuisance may be abated; but this Court never makes an order to that effect.

THE VICE-CHANCELLOR. I think that it does sufficiently appear that there is a nuisance newly created to the Plaintiff: but the bill alleges so much about a general nuisance that I entertain some doubt whether the Attorney-General ought not to be a party.

Mr. Knight Bruce and Mr. Dixon, for the Plaintiff. Every individual may maintain an action or file a bill in respect of a public nuisance, provided he sustains any particular damage from it. As for instance, if a hole be dug in a public highway (which is a public nuisance) and a man drives into it in the dark, he may [276] maintain an action or file a bill in respect of the injury that he receives; but if he drives by it, he cannot either maintain an action or file a bill. The public and the private right have nothing to do with each other. Supposing that the nuisance complained of in this bill is a public nuisance—it is a private one also: and we do not apply for relief in respect of the public nuisance. The bill is cautiously framed, so as to allege a particular damage and injury to the Plaintiff's property, and to his health and comfort. Every individual who sustains an injury from a public nuisance may sue in respect of it: but where the subject of complaint is merely a public wrong, an information must be filed by the Attorney-General. *The King v. Dewsnap* (16 East, 194). The case of *Spencer v. The London and Birmingham Railway Company* (ante, p. 193) is exactly the same as this: there the act complained of was a public nuisance, but the Plaintiff had suffered special damage from it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. On the best consideration that I can give this question, I am of opinion that the objection for want of parties is not sustainable.

It appears to me that if the case were the converse of what it is, and a person had done that with respect to which the only question was whether it was a public nuisance or not, and he had filed a bill alleging that he was threatened with divers actions by different individuals, then it might be right to make the Attorney-General a Defendant, in order that the question might be set at rest in that suit. But here the Plaintiff represents that something has been done which is highly inju-[277]-rious to himself and also to certain other individuals; which averment it was not necessary for him to make. In a case so constituted I do not see, if the Attorney-General were a party, that I could make a decree which would bind the question between the Defendant and the public; and, unless having the Attorney-General a party would enable me to make a decree which would bind the public through the Attorney-General, it appears to me that it is not necessary to make him a party; and, therefore, the demurrer *ore tenus*, as well as the demurrer on the record, ought to be overruled.

[277] CANHAM v. VINCENT. June 15, 1838.

Practice. Revivor.

Where a sole Plaintiff dies, the Defendant cannot move that his personal representatives may revive within a given time, or that the bill may be dismissed.

The object of the bill was to have the trusts of a term for securing an annuity charged upon the estates of the Defendant, Sir Francis Vincent, carried into

execution. The defence made by the Defendant's answer was that the annuity was void on the ground of usury.

In November 1837 the Plaintiff, *who was the sole Plaintiff*, died, and his will was proved in December following.

Mr. Lloyd, for the Defendant Vincent, now moved that the Plaintiff's executors might revive the suit within a certain time, or that the bill might be dismissed. He cited *Adamson v. Hall* (Turn. & Russ. 258), *Wheeler v. Malins* (4 Madd. 171), *Porter v. Cox* (5 Madd. 80), and *The Bishop of Win[278]-chester v. Paine* (11 Ves. ; see pp. 200 and 201): which last case, he said, shewed the inconvenience that would arise from not granting the application: as if at any time, however distant, the suit should be revived and prosecuted, a purchaser of the estates during the abatement would be bound by the decree.

Mr. Knight Bruce opposed the motion on behalf of the Plaintiff's executors.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that no case had been cited in which an application similar to the present had been granted after opposition; and refused the motion.(1)

[279] PRICE v. DEWHURST. Jan. 24, 25, 27, 28, May 6, 1837.

[S. C. affirmed, 4 My. & Cr. 76; 41 E. R. 30 (with note). In addition to cases in note, 41 E. R. 30, see *Pemberton v. Hughes* [1899], 1 Ch. 781.]

Will. Domicile. Foreign Judgment.

In and before 1805 A. and his wife, who were British-born subjects, were domiciled and naturalized in the Danish island of St. Croix. In 1805 they came to England, and were domiciled there at their deaths. In 1807 they made a joint will, by which they bequeathed a sum belonging to them jointly and which was invested on a mortgage in St. Croix, amongst their children and grandchildren, and appointed their son and the husband of one of their deceased daughters (both of whom were Danish subjects domiciled in St. Croix) their executors. In 1814 A. made a separate will, by which he gave the mortgage money to his wife. A. died in 1819. In 1822 the wife made a will, by which she gave the money to two of her daughters. She died in the same year. The separate wills were proved in the Prerogative Court of Canterbury. Afterwards the joint will was proved, in St. Croix, by the executors named in it. Held, that the legatees under Mrs. Seaton's will, and not the legatees under the joint will, were entitled to the mortgage money. The judgment of a foreign Court, consisting of persons interested in the property in dispute, will be disregarded in the Courts of this country.

Henry Seaton and Catherine, his wife, both British-born subjects, were, in and for several years before 1805, resident in the Danish island of St. Croix, in the West Indies, where H. Seaton became a naturalized Danish subject. In 1805 they quitted that island and settled in this country, where they resided permanently until their deaths. Previously to leaving St. Croix, they invested a legacy of 60,000 pieces of eight, Danish West India currency (equivalent to £13,500 sterling), which had been bequeathed to them by Mrs. Seaton's brother, on a mortgage of a plantation in St. Croix belonging to one Peter Markoe. By the terms of the security, interest on the sum secured was made payable in London. On the 19th of January 1807 Mr. and Mrs. Seaton made a joint will, pursuant to the Danish law, which was as follows:— "We, the undersigned Henry Seaton and Catherine Seaton, late of the Danish island of St. Croix, in the West Indies, and now residing in the City of London, jointly and severally [280] make this our last will and testament, in manner following and revoking all others. First, we give the Danish and English churches in the town

(1) In *Burnell v. The Duke of Wellington*, reported *ante*, vol. 6, p. 461, an order was made on a motion by the executor of a deceased Defendant, that the Plaintiff should revive, or the bill be dismissed.

of Christiansted, in the said island, 25 pieces of eight to each of them, and, after the death of either of us, the survivor of us shall then hold and enjoy, for his or her natural life, the interest and use arising on all property or money belonging to us jointly in the said island of St. Croix, or wherever otherwise it may be; and, after the death of both of us, we do hereby direct the whole of our property shall be divided into four equal parts, namely, one share to our son, Henry Seaton, one share to our daughter, Mary Hennessy, one share to our daughter, Ann Akers Seaton (who afterwards married the Plaintiff, Dr. Price), and the remaining fourth part to our three grandchildren, Henry Dewhurst, Edward Dewhurst and Catherine Dewhurst, the descendants of our daughter, Elizabeth Dewhurst deceased, share and share alike; and, further, we do jointly constitute and appoint Henry Seaton, jun., Edward Dewhurst and Christopher Hennessy, in conjunction with the survivor of us, to act as executors, administrators, guardians, dealing masters, incassators and curators of this our last will." In February 1807 this instrument was confirmed by the King of Denmark, on the application of Mr. and Mrs. Seaton.

On the 5th of April 1814 Mr. Seaton made a sole will in the following words:—

"This is the last will and testament of me, Henry Seaton, late of St. Croix, in the West Indies, but now of Montague Street, in the county of Middlesex, Esquire. I give, devise and bequeath the lease of my house in Montague Street aforesaid, with all the furniture and effects therein, the money belonging to me in the public [281] funds and due on mortgage of an estate in St. Croix aforesaid, with all and singular my estate and effects of every nature and description and wheresoever the same may be, unto my dear wife, Catherine Seaton, her executors and administrators absolutely, and appoint her sole executrix of this my will, hereby revoking all former wills."

The testator died on the 29th July 1819, and his wife proved his will in the Prerogative Court of the Archbishop of Canterbury.

The interest on the 60,000 pieces of eight was paid by Markoe to Mr. Seaton during his life, and, after his death, to his widow.

On the 2d of July 1822 Mrs. Seaton made her will in the following words:—"I, Catherine Seaton, of Manchester Street, Manchester Square, in the county of Middlesex, widow, do hereby revoke all wills by me at any time heretofore made, and do declare this paper writing to be my last will and testament. I give, devise and bequeath all my real and personal estate, goods, chattels and effects, whatsoever and wheresoever and of what nature soever or kind, unto my daughter, Mary Frank Hennessy, widow, and Ann Akers Price, wife of John Price, Esq., M.D., in equal shares and proportions, their heirs, executors, administrators and assigns respectively, according to the nature and quality of the same respectively; and I hereby appoint my said daughter, Mary Frank Hennessy, sole executrix of this my will." By a codicil, dated the 1st of November 1822, Mrs. Seaton appointed her daughter, Ann Akers Price, joint executrix of her will with Mary Frank Hennessy.

[282] Mrs. Seaton died shortly after the date of her codicil, leaving three children, namely, Henry Seaton the younger, Ann Akers Price and Mary Frank Hennessy, and three grandchildren, namely, Henry Dewhurst, since deceased, Edward Dewhurst and Catherine Dewhurst, who were the children of Edward Dewhurst the elder, by the testatrix's late daughter, Elizabeth Dewhurst. On the 21st of November 1822 Mrs. Hennessy and Mrs. Price proved their late mother's will and codicil in the Prerogative Court of the Archbishop of Canterbury.

Edward Dewhurst, the elder, was born in England; but he had resided in St. Croix for more than 40 years, and had become a naturalized Danish subject: and all his children were born in St. Croix.

Christopher Hennessy, one of the executors named in the joint will, died in Mrs. Seaton's lifetime. Henry Seaton the younger, as well as Edward Dewhurst the elder, were, at Mr. Seaton's death, and had been for several years prior thereto, domiciled in St. Croix, and, having the joint will in their possession, they, in August 1823, caused it to be registered in the proper office in that island, and obtained the authority of a court there called "The Court of Dealing," to carry it into effect. On the 5th of September 1826 the same two persons who, some time before, had formed themselves into "An Executor's Court of Dealing," caused a citation to be published in the *St. Croix Gazette*, in the following words:—"The collective absent

heirs of Henry and Catherine Seaton are hereby summoned, pursuant to the enactments of the 5th of July 1822, within a year and a day's notice, to attend a meeting for a division of the [283] estate, which will be held by the undersigned executors and joint heirs on the first Thursday in March 1828, in this town of Frederiksted of St. Croix, with the view of proceeding to a final division and allotment of the property of the estate amongst the collective heirs." Signed Edward Dewhurst and Henry Seaton.

The nature of the courts called "The Court of Dealing" and "An Executor's Court of Dealing," appeared from the following evidence in the cause.

A Danish advocate practising in St. Croix deposed as follows: "That the Court of Dealing is the proper tribunal for deciding upon the validity of a disposition by will of anything left by a deceased person, and, consequently, also of money secured upon mortgage of land. This court is authorized to take the whole property left, of any and every denomination, under administration, to realise and otherwise dispose of the same in order to pay and liquidate the debts of the deceased, and to divide the property between his or her heirs, either agreeable to a will made in a legal form, or agreeable to common law. If a person or persons, however, by his or their will duly confirmed by His Majesty the King, or otherwise, conformable to or not in opposition with the existing laws and ordinances, appoints or constitutes one or more of his or their friends or relations to be his or their executors and dealing masters, administrators and assigns, incassator and guardian to minors, such person or persons constitute a court or tribunal which, properly, may be called an Executor's Court of Dealing, as they have within themselves the same jurisdiction and authority as the Dealing Court above mentioned, and their decisions or decrees can only in case of dispute be appealed to the King's High Court in [284] Copenhagen, which is the Supreme Court and a Court of Appeal for the kingdom of Denmark and all the Danish dominions, and is the proper Court of Appeal from a decision of executors in the island of St. Croix."

Two advocates of the High Court at Copenhagen were examined upon the same subject; they deposed as follows: "The Dealing Court in St. Croix is competent to decide disputes as to the validity of testamentary dispositions, to cause to be carried into effect the wills occurring there, and to cause to be distributed, according to law, the property belonging to the estates of deceased persons in general and the monies secured by a mortgage on land; besides this ordinary dealing court, the administration of individual dealings is frequently intrusted to extraordinary dealing masters or executors, in which case such persons are authorized by a Royal confirmation indorsed on the testator's will that nominates them, or by some other Royal appointment; and the jurisdiction and authority of the extraordinary dealing masters and executors thus authorized have, in the case of individual estates, the same extent that the ordinary dealing court has in general; but, with regard to moveable property, the above-mentioned power of the ordinary dealing court and the extraordinary dealing masters or executors can, in conformity with the law, exist only in the case where the person or persons whose property in consequence of death falls under dealing have had their fixed abode and home in St. Croix. Where this is not the case, the authorities there that are invested with dealing jurisdiction may, on application from the proper persons concerned, seal up, make inventory of, collect and transmit the moveable effects found in St. Croix to the place where the defunct proprietor resided, but they have nothing to do [285] with the distribution, nor can they pronounce any decision as to the manner of appointment. With regard to monies secured on mortgage of land within the Danish colonies, they are looked upon, by the Danish law, as moveable goods, and, consequently, what has been said of moveable property in general holds good with respect to such monies."

In October 1826 one Erickson, a lawyer in St. Croix, who had been appointed by Edward Dewhurst the elder and Henry Seaton the younger, *curator bonorum* of the testator and testatrix, wrote a letter to Dr. Price, the husband of Mrs. Price, in the following words: "Sir,—At the request of the executors in the dealing of the deceased Henry and Catherine Seaton, I beg leave to enclose you herewith a *Gazette* of this island, containing a citation to the absent heirs to appear in a session which will be held here on the first Thursday in the month of March 1828, for the purpose

of dividing the property between the respective heirs. As you have no attorney here, it was found necessary, through the medium of the *Gazette*, thus to give you warning of the intended division of the property, and, conformable to the dictates of the law, to fix the period for your appearance, either personally or by representative, within one year and six weeks from the date of the last publication. It follows, however, as a matter of course, that if you appoint a legal representative to appear for you at an earlier period, there is no necessity for awaiting the time stipulated in the citation, but the dealing may be closed as soon as your power of attorney arrives; and, as it must be desirable, by all the parties concerned, that this event should take place forthwith, I need not suggest to you the expediency of having your power sent out as soon as possible. In making [286] this communication to you I think it a duty incumbent on me, as *curator bonorum* in the dealing, to inform you of the obstacles which, by the laws of this country, present themselves against your claim to a share in the property, in consequence of your reiterate refusal of accounting for that which you have, by virtue of the last will of Mrs. Seaton, received in England."

The letter then stated the effect of the joint will, and proceeded thus:—"This will, founded on principles of equity and justice, has not, by any joint act of the parties who executed it, ever been annulled. The subsequent separate acts of each of them can, certainly, not invalidate or set aside what was jointly agreed to. Independent, however, of this material objection to the subsequent wills of Henry and Catherine Seaton, the laws of the country afford a still more ample one against their validity; because they expressly prohibit the indulgence of parental partiality, by decreeing that no parents shall have power to give to any one of their children in particular, but all must have equal shares alike."

In consequence of this letter, Dr. and Mrs. Price appointed Dr. Stephens, a resident in St. Croix, to be their attorney in that island. Dr. Stephens accordingly employed Mr. Attorney Hansen to attend the Executors' Court of Dealing on behalf of Dr. and Mrs. Price. Mr. Hansen attended three meetings of the court held in March 1828. Mr. Erickson also was present as *curator bonorum* and as the legal adviser of the executors in case of dispute between the claimants. At the first meeting the joint will and copies of the separate wills were produced. But Mr. Dewhurst and Mr. H. Seaton the younger refused to pay [287] any attention to those copies, alleging that they were not satisfied that they were correct, or, if correct, that the originals were valid according to the laws of England. At the second meeting Mr. Hansen requested that three months might be allowed him in order to obtain the necessary information from England on those points. The executors, however, refused his request; whereupon he protested against their competency to dispose of the property, on the ground that the joint will was revoked by the separate wills, the validity of which was to be determined, not by the Danish, but by the English laws, as Mr. and Mrs. Seaton were English subjects resident in England. At the third meeting Mr. Dewhurst and Mr. H. Seaton the younger resolved that the separate wills were of no importance, as, supposing the copies of them to be correct, they were, both in form and tenor, invalid according to the Danish laws; that the property in St. Croix ought to be distributed according to the joint will and the laws of Denmark; and therefore that it ought to be divided amongst the parties entitled thereto under the joint will, with the exception of Dr. and Mrs. Price, who were not entitled to share therein, because they had refused to account for Mrs. Seaton's property received by them in England. And, accordingly, they allotted one share of the money due on the mortgage to Edward Dewhurst the elder, in right of his deceased son, Henry Dewhurst, another share to Edward Dewhurst the younger, another to Catherine Dewhurst, and the two remaining shares to Henry Seaton the younger, one in his own right, and the other as the personal representative in St. Croix of his deceased sister, Mrs. Hennessy. Dr. Stephens appealed from this decision to the High Court at Copenhagen; and the executors instituted a counter appeal; but no one appeared in support of the appeal; and the decision was affirmed.

[288] The Plaintiffs in this suit were Dr. and Mrs. Price, the latter of whom took out letters of administration in this country to her deceased sister Mrs. Hennessy. The Defendants were Henry Seaton the younger and Edward Dewhurst the elder,

and his surviving children. The bill insisted that the joint will was revoked by the separate wills, and that the Plaintiffs were entitled to a moiety of the mortgage money under Mrs. Seaton's will.

Edward Dewhurst the elder (who had come to this country on business), stated, in his answer, that Mr. and Mrs. Seaton resided for 22 years and upwards in St. Croix; that Mr. Seaton became and continued, until his death, a subject, by naturalization, of the King of Denmark; that, according to the law of Denmark, the mortgage money was the joint property of Mr. and Mrs. Seaton, and they, in accordance with that law, made the joint will, which was confirmed by the King of Denmark on their application, and that the same was not revocable by the separate act of either of the parties; that he, the Defendant, and Henry Seaton the younger, as the surviving executors appointed by the joint will, were the legal personal representatives of Mr. and Mrs. Seaton according to the laws of Denmark; that no direct notice of or communication respecting Mr. Seaton's separate will was ever given or made either to the Defendant or to H. Seaton the younger, until it was produced before the Executors' Court of Dealing; that, though the Defendant was born in England, he had resided for the last 40 years in St. Croix, and had become a Danish subject by naturalization; and his three children were born there, and were also Danish subjects; that the Defendant and Henry Seaton the younger, acting as the executors of the joint will, had caused the Plaintiffs to be cited, in the manner required by the Danish laws, to appear before [289] the Court of Dealing; and, in consequence thereof, the Plaintiffs appointed Dr. Stephens, their attorney, to act on their behalf, and to take such proceedings in the Executors' Court of Dealing, and otherwise, as to him should seem proper; that Dr. Stephens did accordingly take part and interfere in the said proceedings, and did, on behalf of the Plaintiffs, urge the want of jurisdiction in the court to adjudicate upon the matters in question, and protest against the right of the Defendant and Henry Seaton the younger, as such executors as aforesaid, to have Mrs. Seaton's property administered according to the joint will, on the ground that she and her husband were born British subjects, and were domiciled in England at the times of making their wills and of their decease, and that their personal estate, wheresoever situate, ought to be administered according to the law of England, and that their joint will had been revoked by their subsequent separate wills, which had been proved in England; that, in the course of the proceedings in the Executors' Court of Dealing, the Defendant and Henry Seaton the younger did, according to the usual course of proceeding in such cases, submit to the court their personal accounts of their receipts and payments on account of the estate of the testator and testatrix, and those accounts were regularly approved of, passed and audited before and by the court. And the Defendant submitted that the Plaintiffs were not entitled to the relief sought by their bill, inasmuch as the Court of Chancery in England had no jurisdiction in respect of the matters therein contained, and as the same had been adjudicated and determined upon by the Courts of Denmark, which alone had cognizance thereof.

Mr. Knight and Mr. Bethell, for the Plaintiffs. By the law of nations, which is superior to any local [290] law, the succession to the personal estate of a person who dies intestate is regulated by the law of the country in which he was domiciled at his death; and, if the deceased has left more than one will, the question which was his last will and what construction ought to be put upon it must be decided by the same law. It is true that, for the purpose of collecting property of the deceased in a foreign country, administration may be granted by the Courts of that country; but that administration is ancillary only to the original administration, and the foreign administrator is a trustee for the persons who are declared to be the representatives of the deceased by the Judge of the domicile.

Mr. and Mrs. Seaton were domiciled in this country long before their deaths. In 1807 they made a joint will, upon which the title of the Defendants entirely depends. In 1814 Mr. Seaton made a separate will. He died in 1819. In 1822 Mrs. Seaton made a separate will, and died in the same year. Both those wills were proved in the Prerogative Court, which is the Court of exclusive jurisdiction; and, therefore, the separate wills must prevail over the joint will, which, by the law of this country, Mr. Seaton had power to revoke.

The Defendants say that they formed themselves into a court called an Executors' Court of Dealing, and cited the Plaintiffs to attend it; that the Plaintiffs appeared by their attorney, but refused to bring in, for distribution, the property of Mrs. Seaton which they had possessed in this country, and thereupon the Defendants adjudicated the whole benefit of the mortgage to themselves, and excluded the Plaintiffs from participating in it. That which the Defendants call an Executors' Court of Dealing was no court of justice at all; it was a mere domestic assembly, consisting of [291] parties who decided in their own favour. When a foreign judgment is set up, it is not sufficient to say that it is *res judicata*; but the Court must be shewn to be a Court of competent jurisdiction: if not, the judgment is a mere nullity. Here we set out with the judgment of the only competent Court, namely, the Prerogative Court; and, therefore, the jurisdiction of the Court of Dealing was void, *ab initio*. The Defendants have examined certain foreign advocates as to the constitution and jurisdiction of this alleged court. One of them at least seems not to be very well acquainted with the law of nations; for he has entirely lost sight of the distinction between real and personal property. Where real estate is the subject of litigation, the right to it is decided according to the *lex loci rei sitæ*; but where personal estate is the matter in contest that law does not apply, but the rights of the parties must be decided according to the law of the country in which the deceased possessor was domiciled at his death.

The Defendants say that the Plaintiffs submitted to the jurisdiction of the Dealing Court; but, so far is that from being the fact, that Hansen, who appeared for them, expressly protested against it. Besides, whenever the judgment of a foreign Court can be shewn to be contrary to the *jus gentium*, it must be regarded as a nullity. *Stanley v. Bernes* (3 Hagg. Ecc. Rep. 373), *Pipon v. Pipon* (Amb. 25), *Thorne v. Watkins* (2 Vez. 35), *Burn v. Cole* (Amb. 415), *Sill v. Worswick* (1 H. Black. 665), *Wolff v. Orholm* (6 Mau. & Sel. 92), *Bruce v. Bruce* (2 Bos. & Pull. 229, note; and 6 Bro. P. C. 566), *Anstruther v. Chalmers* (*ante*, vol. 2, p. 1), *Hog v. Lashley* (6 Bro. P. C. 577), *Buchanan v. [292] Rucker* (9 East, 192), *Neal v. Cottingham* (1 H. Black. 132, n.), *Hunter v. Potts* (4 T. R. 182), *Lord Cranstown v. Johnston* (3 Ves. 170), *Curling v. Thornton*. (1)

Mr. Jacob and Mr. Sharpe, for all the Defendants except Henry Seaton the younger, who was out of the jurisdiction. Under Mrs. Seaton's will the Plaintiffs are entitled to one-half of the mortgage money in their own right, and to the other half as the personal representatives of Mrs. Hennessy; but, by their bill, they ask to have one-half only paid to them. Such a suit cannot be maintained: they must ask at once for all that they are entitled to.

The joint will was admitted to probate in the General Dealing Court at St. Croix, which was the proper tribunal for that purpose. The executors then formed themselves into an extraordinary Court of Dealing, as they were authorized to do by the laws of Denmark. They were not judges in their own case, but were only doing what every executor in this country does, namely, carrying the will, by which they were appointed executors, into effect. The court so constituted was a competent tribunal; and the Plaintiffs, by appearing before it, admitted it to be so. When the executors decided against them, they appealed to the High Court at Copenhagen, where the decision was affirmed. The judgment of that Court is conclusive, and cannot be called in question in any of the Courts of this country. *Martin [293] v. Nicolls* (*ante*, vol. 3, p. 458), *Tarleton v. Tarleton* (4 M. & S. 20), *Becquet v. MacCarthy* (2 Barn. & Adol. 951), *Houlditch v. Lord Donegal* (8 Bli. N. S. 301).

The Plaintiffs have attempted to prove that Mr. and Mrs. Seaton were domiciled in England at their deaths. The evidence in support of that fact is weak: but, assuming it to be satisfactorily proved, it by no means follows that their assets in St. Croix ought to be administered according to the laws of England. It is true that, by the comity of nations, the decision of the Court of Probate in the country of the domicile will be adopted by the Court of Probate in a foreign country: but the course of administering assets differs in different countries; and every State requires

(1) 2 Addams, 6; see also 2 Swans. 297, note. Robertson on Personal Succession, 309, *et seq.* Story on the Conflict of Laws, 30, 312, 313, 315, 419, 420, 492, 493.

the assets of the deceased, found within its own territories, to be administered according to its own laws.

The Plaintiffs ought, before the joint will was proved, to have sent out to St. Croix an exemplification of the probate of the separate will, and to have obtained an auxiliary probate or administration from the proper Court there: or they ought, after the joint will had been proved, to have applied to the Court in St. Croix to revoke the probate and to admit to proof the separate will. In support of that application the arguments which have been addressed to this Court might have been addressed with great propriety to the Court in St. Croix. The Plaintiffs, however, did not think fit to take any of those steps; but they now ask this Court to compel a Danish executor to dispose of property in the Danish dominions, not according to the laws of Denmark, but according to the laws of England. Was it ever [294] before contended that, where two wills have been proved in different countries, this Court, which is not a Court of Probate, is to decide which is the valid will? If two Ecclesiastical Courts in this country differ, this Court cannot decide between them. You cannot sue a foreign executor in England to make him dispose of the deceased's property, in a manner different from that directed by the will under which he is executor: but, as long as the foreign probate remains in force, it must govern the disposition of the property to which it applies. (Story, 419, *et seq.*)

In *The Attorney-General v. Dimond* (1 Crom. & Jer. 356) the decision was that the probate extended only to property in the province of Canterbury, and did not touch the French property. In *Thorne v. Watkins* Lord Hardwicke says that, if a man dies in this country and administration is taken out to him here, and part of his personal estate is in France, Holland or the plantations, it cannot be recovered by virtue of the administration taken out here, but the administrator must invest himself with some right from the proper Courts in that country; and, in *Pipon v. Pipon*, the same learned Judge makes an observation to the same effect. *Lawson v. Kello* (Robertson on Personal Succession, 253), *Larper v. Sindry* (1 Haggard, 382), *Currie v. Bircham*. (1)

Mr. Knight, in reply. It is clearly proved that Mr. and Mrs. Seaton were domiciled in England. Mr. Seaton, in his will, describes [295] himself as late of St. Croix, but now of Montague Street, in the county of Middlesex. He and his wife came to this country in 1805, and remained there until their deaths. He died in 1819 and she in 1822. It was not a mere temporary residence in this country: for, after 1815 at least, there was nothing to prevent their returning to St. Croix had they intended so to do. In that year St. Croix, which had been captured by the English during the war, was restored to Denmark.

Mrs. Seaton's will was proved in the Prerogative Court as early as November 1822. What took place in St. Croix analogous to a probate of the joint will did not take place until August 1823: it was a proceeding purely *ex parte*, and not a litigated probate. The subject-matter in dispute was a debt, which has no locality; and the title to it was completely vested in Mrs. Seaton when living. The possessors of the later probate never took any measures to have the former probate recalled: they ought to have come here and said that the testator and testatrix were domiciled Danes. Therefore, the argument of the Defendants applies against themselves; for, according to their argument, there was a Danish will, against which the English will ought not to have stood for a moment. It is extremely doubtful whether the power of attorney gave Dr. Stephens any right to appeal: but, supposing that it did, the original decision acquired no validity or force by its being confirmed on appeal. I agree with the Defendants' counsel that the proceedings in the Executors' Court of Dealing were not for the purpose of deciding any rights, but merely for the purpose of distributing the property under the joint will. It appears, too, by the evidence of the advocates in the High Court at Copenhagen, that all the proceedings in St. Croix took place under the notion [296] that Mr. and Mrs. Seaton were domiciled in St. Croix at their deaths. The advocates say that the power of the ordinary dealing courts and the extraordinary dealing masters or executors exists only where the persons whose property, in consequence of death, falls under dealing, have had their

(1) 1 Dowl. & Ryl. 35. See Robertson, 287, *et seq.*, where several of the cases cited above, together with others, are stated and observed upon.

fixed abode and home in St. Croix ; and, where that is not the case, the authorities there that are invested with dealing jurisdiction may seal up, make inventory of, collect and transmit the moveable effects found in St. Croix, to the place where the defunct proprietor resided ; but they have nothing to do with the distribution, nor can they pronounce any decision as to the manner of apportionment. The consequence is that everything that the Dealing Court has done is invalid.

The Courts of this country always assume the right of inquiring into the propriety of the law on which a foreign judgment is founded. *Becquet v. MacCarthy, Wolff v. Orholm, Buchanan v. Rucker* ; and, if the judgment is against natural justice, they will not act upon it. (See Story, 289.) *Martin v. Nicolls* decided, only, that a foreign judgment ought to be considered as right, until the contrary was shewn. It is part of the law of nations that the right of succession to personal estate must be regulated by the law of the deceased's domicile : and, if a foreign Court has decided to the contrary, it is a decision that cannot be regarded. The Courts in St. Croix have, in fact, decided nothing ; but they are said to have decided that the subsequent will of an Englishman cannot revoke a prior will.

If Markoe were in this country, the Plaintiffs would not want the Danish probate ; they might sue him for the money on the English probate, which was prior to the Danish probate : a subsequent probate cannot re-[297]-voke a prior one. Suppose that a testator has left two wills of different dates, and that the prior will has been proved in the province of York, and the subsequent one in the province of Canterbury, could not this Court adjudicate on the right to the property in a suit to which the executors under both wills were parties ?

The cases of *Larpent v. Sindry, Currie v. Bircham*, and *In the Matter of the Goods of Lieutenant-Colonel Read* (1 Hagg. 474), support every principle which I have endeavoured to bring under the attention of the Court.

THE VICE-CHANCELLOR. This cause involves a question of great importance, and I shall take time to consider it before I deliver my judgment.

May 6. THE VICE-CHANCELLOR [Sir L. Shadwell]. This case came before me under the following circumstances :—

Mr. Henry Seaton the elder married a lady of the name of Catherine Newton ; and a question has been made in the cause whether they were British-born subjects, and whether they were domiciled British subjects at the times of their deaths. But I think that both those facts have been satisfactorily proved by the evidence in the cause.

In 1805 they left the island of St. Croix, where they had resided for several years, and came to England. In the year 1807, when the habits and feelings that they acquired in St. Croix may be supposed still to have had some operation on their minds, they made a joint will [298] which was capable of taking effect in a country where the Danish law was administered. But, after that will was made, namely, on the 5th of April 1814, Mr. Seaton made a sole will, by which he appointed his wife his sole executrix and residuary legatee. He died on the 29th of July 1819, and Mrs. Seaton proved his will in the Prerogative Court of Canterbury.

The will of Mrs. Seaton's brother had given her a sum of 60,000 pieces of eight, which, shortly after the death of her brother, was invested on a mortgage of a Danish plantation in the island of St. Croix, which was made to Mr. Seaton by a gentleman named Peter Markoe. There is evidence to shew that, after the death of Mr. Seaton, the interest upon the mortgage was paid, as it ought to have been, to Mrs. Seaton during her life. She made her will in July 1822 : and, by that will, she gave all her real and personal estate to two of her daughters, Mrs. Mary Frank Hennessy and Mrs. Ann Akers Price ; and she made Mrs. Frank Hennessy her sole executrix. But on the 1st of November 1822 she made a codicil by which she made Mrs. Price the joint executrix with Mrs. Hennessy. Mrs. Seaton died in November 1822 ; and, on the 21st of that month, her will and codicil were proved in the Prerogative Court of Canterbury by her two daughters.

Mr. Seaton and his wife had four children, namely, a son, Henry, and three daughters, Mrs. Hennessy and Mrs. Price, and another daughter, Elizabeth, who married the Defendant, Edward Dewhurst. Mrs. Dewhurst died before the joint will was made. The effect of the joint will was to give one-fourth of the personal property

of the husband and wife to each of the living children, and the remaining one-fourth among the three children [299] of the deceased child, Mrs. Dewhurst. Mrs. Hennessy died after she had proved her mother's will: and administration has been taken out to her in this country by Mrs. Price. After the probate had been granted of Mrs. Seaton's will, some steps were taken in the island of St. Croix, which were equivalent to the proof of the joint will: and also some further proceedings took place there in respect to that will, which really constitute the question in the cause.

Now I take it to be quite clear that if there had been nothing more than this, namely, probate first of all granted of the husband's will by the Prerogative Court here, by which will his wife was made executrix and residuary legatee, and then probate had been granted, in this country, of the wife's will, any other probate that might have been granted in any other country would, by the law of this country, be only subservient to the probate granted here.

I have nothing whatever to do, as I apprehend, with foreign law. I am to administer the English law; and I apprehend it is now clearly established by a great variety of cases which it is not necessary to go through in detail, such as *Bruce v. Bruce*, *Hog v. Lashley* and *Kilpatrick v. Kilpatrick* (which are all mentioned in 6th Brown's Parliamentary Cases, pp. 566, 572 and 577), *Pipon v. Pipon* and *Burn v. Cole*, and several others, that the rule of law is this, that where a person dies intestate, his personal estate is to be administered according to the law of the country in which he was domiciled at the time of his death, whether he was a British subject or not; and the question whether he died intestate or not must be determined by the law of the same country. That has been most distinctly proved to be the rule by the case of *Stanley v. Bernes*. [300] In that case a British subject had become a domiciled Portuguese, and left several testamentary papers, some of them executed in the form required by the law of Portugal and others not executed in that form, but which would have been according to the English law. The question whether those papers ought to be admitted to proof came first before Sir John Nicholl; and he held that probate must be granted of all of them. From that decision there was an appeal to the Court of Delegates; and the Judges of that Court held, with the greatest propriety, as I think, that, by the law of this country, probate could be granted of those testamentary papers only which were valid according to the law of Portugal.

When a will has been admitted to proof the question has arisen, how far that will shall be construed according to the law of England, as opposed to the law of the country in which the party was domiciled or said to be domiciled at his decease. That question arose in *Thornton v. Curling*. (See *post*, 310.) I have been furnished with a copy of the shorthand writer's notes of what took place on that occasion. There a bill was filed by the legitimate child of Colonel Thornton, stating that probate of Colonel Thornton's will had been granted in this country, but representing also (and there was a very long detail of circumstances to shew that such was the fact) that Colonel Thornton, though a British-born subject, was a domiciled Frenchman at the time of his death. And passages from the French law were quoted in order to shew that, by the French law, no will could be made to that effect of that which had been proved, inasmuch as it went to defeat any claim to the testator's personal property in his legitimate child. A motion for a *receit*-[301]-ver of the testator's personal estate was made before Lord Eldon, and I appeared for the Plaintiff in support of that motion. His Lordship seemed to think that, for the purpose of the motion at least, he was completely bound by the English probate, and that, as the Prerogative Court here had admitted the will to proof, *prima facie*, he must construe it just as he would construe an English will; and I perceive that he says, in speaking of the argument that was addressed to him by the Plaintiff's counsel: "The counsel put himself into this difficulty on one ground: he stated that this is not to be considered as a will. Now, I say, I cannot hold that if the Ecclesiastical Court has given probate to Dr. Curling, the executor. It is another matter if the cause was now in hearing. I may read this as a will because there is the probate: but I should be perfectly at liberty if the law of England is such that I ought to apply the law of France in distributing the property, I should be perfectly at liberty then to say this is a will as far as it appointed Curling executor, but it is a will that has not operation: and, if Mr. Shadwell's principles are right, it is a will that has not operation; and, therefore,

it is exactly the same thing as if the executor was trustee for the next of kin." There Lord Eldon left the matter in some degree of doubt; and I understood that there were afterwards proceedings had in France, in which it was held that the will that had been proved in England was void; and I believe the parties afterwards came to some compromise, and so nothing further was known of that case.

In *Anstruther v. Chalmers* the case was this: A native of Scotland domiciled in England, having personal property only, executed, during a visit to Scotland, and deposited there a will prepared in the Scotch form, and [302] died in England; and it was held that the will was to be construed according to the English law. The effect of that decision was that, inasmuch as the residuary legatee died in the lifetime of the testator, there was a trust for the next of kin.

But it appears to me that in this case there is not so much of question how the will shall be construed; because here an instrument has been admitted to probate by the Prerogative Court of this country, which, upon the face of it, is the will of an English person; therefore there is no method whatever of construing that will but by applying English law to it.

But then another question arises, namely, whether, in consequence of some proceedings that took place in the island of St. Croix—proceedings in the nature of a judicial decision—there has not been such an operation as will prevent this Court from applying the rule of English law to the personal property of the deceased?

Now it seems to me that it is not necessary to enter into that question which was, to a certain extent, decided by myself in *Martin v. Nicolls*, how far it is competent to Courts of this country to allow a dispute with respect to judgments of a foreign country. I observe that Lord Brougham is made to say, in the report of *Houlditch v. Lord Donegal*, that he did not approve of the decision in *Martin v. Nicolls*, and that he thought, generally, that any foreign judgment was examinable. I shall not enter into that question; but this I apprehend I am at liberty to do, namely, to see whether a judgment obtained abroad has been fraudulently obtained or not; and I apprehend that if the Court finds that [303] certain proceedings abroad have been fraudulent, then it is at liberty to deal with the parties it finds before it and the subject it has to administer, just in the same manner as if the foreign judgment had never taken place.

In reference to that point, I directed a search to be made in the registrar's book, in order to see what information could be derived from it, in regard to the proceedings that took place in *Blake v. Smith*, in the years 1809 and 1810; and the short statement of that case is this: On the 25th of June 1800, Smith, Martinez and Blake entered into articles of partnership for carrying on in London, for 10 years from the 25th of June, the business of wine merchants, and for buying and selling any other merchandize. On the 1st of August 1806 Smith, Martinez and Blake entered into articles of co-partnership with Lopez and C. and W. Downy, for carrying on, for six years, the business of port wine merchants, in Portugal, under the firm of Martinez, Lopez & Co.; and, by those articles, it was provided that, if any individual in either partnership wished to retire, he should give two months' notice; but, if either partnership wished to retire, two years' notice should be given. Smith and Martinez tried to exclude Blake from the London partnership; and, in January 1809, he filed a bill for an injunction. On the 24th of January an injunction was granted on the footing of the English articles of partnership. That partnership would expire on the 24th of June 1810; but the partnership of the two houses would not expire till the 1st of August 1812. On the 7th of February 1810 a supplemental bill was filed by Blake, stating, amongst other things, that a decree had been fraudulently obtained by the [304] Defendants in Portugal for dissolving the house of Martinez, Lopez & Co. Then a notice of motion was given, on the 21st of February 1810, for a more extended injunction; and a cross-notice of motion to dissolve was given by the Defendants on the 23d of February; and how it happened I do not know, nor does it very distinctly appear, for I have not got the affidavits, but it did happen that, on the 13th of March 1810, both motions were refused; and, on the 21st of May, the Defendants filed their answer. On the 21st of June 1810, in consequence of some new attempt that was made by the Defendants against the Plaintiff, the Plaintiff gave a new notice of motion to extend the injunction, and he filed an affidavit. That

affidavit, as I recollect, merely verified the fact of some new attempt tending to dissolve the partnership. The Chancellor proposed to the Defendants to try certain issues for determining whether the house of Martinez, Lopez & Co. still subsisted in contemplation of law, which they refused to try; and, on the 4th of July, which was after the London partnership had expired, the Lord Chancellor granted an injunction to restrain the Defendants from dealing in port wine otherwise than in partnership with the Plaintiff. Therefore he held that the articles of co-partnership of the 1st of August 1806 might be dealt with and carried into execution by a Court in this country, as against the Defendants here, notwithstanding there was a decree in Portugal to dissolve the partnership. Thus the Court, by means of the injunction, set aside the judgment of a foreign Court; and the ground on which the Court proceeded was that the foreign judgment had been obtained by fraud. Now I take that to be quite consistent with the principles on which this Court acts; and it is of no consequence where the judgment is given, if it appears to have been obtained by fraud; in every such case the Court will consider it as a nullity.

Then the question is whether the proceedings that have taken place in what is called the Executor's Court of Dealing in the island of St. Croix can be considered to be fair and just; or whether, on the contrary, they do not, on the face of them, carry conviction that they were fraudulent?

It seems that Mr. Henry Seaton, the son, and Mr. Dewhurst, having obtained a Danish probate of the joint will, imagined that they were entitled, according to the Danish law, to hold an Executor's Court of Dealing; and Danish lawyers have been examined as to the nature and jurisdiction of that court; and they do not differ much in their opinions upon the subject. [His Honor here read the evidence given by the advocates practising in St. Croix and in the High Court at Copenhagen.] As I understand the language of the advocate in St. Croix, he is speaking of a case where, by a testamentary instrument, certain persons have been appointed inassators and guardians for other persons; and he says that they may form themselves into a court for administering the property for the benefit of those persons; but I do not find it asserted, anywhere, that a court can be so constituted as to enable the inassators and guardians to determine questions for themselves. There is no such thing alleged; and, if it were alleged, the question is whether it is not contrary to the common course of justice that anything should be called a judgment, or be allowed to have any effect, where the persons to decide are the interested persons, and [306] where those persons are found to decide in their own favour.

It appears, with respect to these proceedings, that, on the 6th of March 1828, Mr. Dewhurst and Mr. H. Seaton met, and that they formed the court, and were attended by Mr. Erickson (a person whom they had employed), and by Mr. Attorney Hansen, who appeared on behalf of Dr. and Mrs. Price. At this meeting the joint will and certain copies of the separate wills were produced; and Mr. Hansen, on behalf of Dr. and Mrs. Price, called upon Mr. Dewhurst and Mr. H. Seaton to say whether they admitted the separate wills to be the wills of Mr. and Mrs. Seaton and to be legal according to the laws of England, as, otherwise, he must request the dealing in the estate to be postponed, in order to procure the necessary information from England on those two points. Mr. Dewhurst and Mr. H. Seaton then said that they were unable to determine as to the correctness of the copies, inasmuch as the same were not authenticated by any public functionary in England; nor could they undertake to decide whether the separate wills and the dispositions thereby made were admissible and in accordance with the laws of England. Mr. Hansen then requested that the further proceedings of the meeting might be postponed for a week, which was conceded.

The parties met again on the 13th of March 1828. Mr. Hansen then requested that the proceedings of the court might be postponed for three months, in order that he might procure information from England as to the legality of the separate wills. Mr. Dewhurst and Mr. H. Seaton refused to postpone the proceedings, [307] observing that the final division of the property had then been postponed for several years; that the summons served had been effected solely with the view of affording Dr. Price an opportunity of attending to his interest at the final division of the property, but had not been issued to proceed against Dr. Price on the question of

the competency of the executors to administer the estate,(1) or as to the validity of the dispositions last made on the part of Henry and Catherine Seaton; as, in those respects, Dr. Price had been long acquainted with the views of the joint heirs with him, and, as respected the objections urged by them as to his right to participate in the inheritance in St. Croix, and, consequently, it had rested entirely optional with him, in case he found it accordant with his interest, long since to have procured elucidation respecting the authenticity or validity of both the wills referred to by him, and their legality with reference to the laws of England: the executors, therefore, as adult heirs under a will which had been executed in due legal form, considered themselves fully entitled to divide amongst themselves, and that there did not exist any reason to grant the extension required by Mr. Attorney Hansen. Hansen then put in a plea, in which he protested against the competency of Mr. Dewhurst and Mr. H. Seaton to act in the administration of the property, on the ground that the joint will was revoked by the separate wills, the legality of which was to be determined, not according to the Danish, but according to the English laws, inasmuch as Mr. and Mrs. Seaton were English subjects, and resided in England. On the 24th of March 1828 another [308] meeting took place; and Mr. Dewhurst and Mr. H. Seaton then decided that the authenticity of the copies of the separate wills and the validity of those wills according to the English laws were matters of no importance, those instruments being, both in form and tenor, contrary to the Danish laws, and that the property in St. Croix ought to be disposed of in accordance with the joint will and the laws of Denmark. And, accordingly, they adjudged that Dr. and Mrs. Price were not entitled to any share of the money due on the mortgage, because they had refused to refund what they had received in England, and that the debt, after making certain deductions, should be divided between themselves and the other parties interested under the joint will, in certain proportions which, for aught I know, may be right according to the Danish law.

That is the course of proceeding which is set up in opposition to the law of this country, which directs that the personal property of every person who dies leaving a will, which has been admitted to proof, shall be administered according to that will. It would be idle to say that any regard or attention ought to be paid to such a proceeding as this. I apprehend that, wherever it is manifest that justice has been disregarded, and that the parties are merely making use of legal proceedings as a matter of form, for the purpose of doing that which is contrary to all notions of justice, namely, of deciding for themselves and in their own favour, the Court is bound to treat their decision as a matter that is of no value and no substance. And my opinion is that I am at liberty to deal with Mr. Dewhurst and the other parties that I find upon this record, and with the property, if they have received any by force of the [309] judgment, just in the same manner as if they were here possessing assets of this testatrix.

It appears to me, therefore, that I am at liberty to declare that this foreign judgment, so far as it has tended to give any interest to Mr. Dewhurst or any of the other Defendants, is fraudulent and void; and that, so far as they have received or may receive any part of the personal property of Mrs. Seaton, they are accountable for it to her executrix.

This case has been so unfairly conducted on the part of the Defendants that I shall give the costs, as against the Defendants, up to the hearing.

Declare that the proceedings and decision in the Executors' Court of Dealing are void, and that the mortgage money passed by the separate wills of Mr. and Mrs. Seaton, and that the same is now vested in the Plaintiff, Mrs. Price, the personal representative of Mrs. Seaton.

(1) There seems to be some inaccuracy in the translation of this part of the proceedings of the Executors' Court of Dealing.

[310] THORNTON v. CURLING.(1) July 21, 22, 1824.

Will. Domicile.

If a British subject domiciled in a foreign country, by his will appoints A. his executor, but makes a disposition of his personal property which, though valid by the laws of England, is invalid by the laws of that foreign country, the Court of Chancery is at liberty, notwithstanding probate may have been granted to A. in this country to hold that the will has no operation beyond appointing A. the executor.

In the year 1815 Colonel Thornton, a gentleman of considerable landed property in Yorkshire, went to France with the view of ultimately fixing his residence there. In the course of that and the next year, he removed to France his furniture, plate, pictures, horses and several other articles. In October 1816 he appeared before the mayor of the fifth *arrondissement* of Paris and declared his intention of permanently residing in France. In January 1817 he obtained from the King of France a Royal *ordonnance*, admitting him to the enjoyment of all civil rights. In the course of the same year he purchased an estate called Pont le Roi, in the department of St. Aube, and took a lease for 15 years of the Royal domain of Chambord, near Blois, and then assumed the title of Marquis de Pont. In August of that year he addressed a memorial to the King of France, soliciting his naturalization and admission to all the rights, civil and political, of a French subject.

Colonel Thornton was married, and had one legitimate child, but he had been long separated from his wife. In October 1818 he came to England on business; and he then made a will in the English form, and in which he described himself as of his residence in Yorkshire, and of Pont le Roi and Chambord in France; and he thereby [311] provided for a lady with whom he lived, and for his illegitimate child by her (who were the principal objects of his bounty), but made no provision either for his wife or for his legitimate child, except by giving the latter a legacy of £100. Colonel Thornton shortly after making his will returned to France. On the 10th of May 1823 he died in Paris. In the course of that year the Prerogative Court of Canterbury, after an unsuccessful opposition on the part of his widow, granted probate of his will to Dr. Curling, one of the executors named in it. (See 2 Addams, 6; and Robertson on Succession, 287.)

The Plaintiff in the present suit was the testator's legitimate child, an infant, by his mother and next friend; and the Defendants were Dr. Curling, Colonel Thornton's illegitimate daughter, and the lady with whom he had lived. The bill, after stating as above, prayed that Dr. Curling might be restrained from getting in any part of the deceased's outstanding personal estate, whether in France or England, and that a receiver might be appointed to get in the same.

Mr. Shadwell and Mr. Newland, for the Plaintiff, now moved for an injunction and receiver according to the prayer of the bill.

If a British subject is domiciled in a foreign country at his death, the succession to his personal property, wheresoever it may be, is governed by the law of that country: so also, if he has made a will, the disposition which he has made of his personal property must be regulated by the same law: therefore, if the disposition is invalid according to the law of the deceased's domicile, [312] it must be held to be invalid in this Court, and that notwithstanding his will has been admitted to probate in this country. It is clear that Colonel Thornton was domiciled in France at his death. Now, by the civil code of that country, a testator who leaves a widow and a legitimate child cannot dispose of his property in favour of an illegitimate child, more especially where that illegitimate child is the offspring of an adulterous intercourse. The consequence is that, according to the French law, Colonel Thornton's will is wholly invalid as against his widow and legitimate child for whom he has made

(1) The above report is taken from a copy of the shorthand notes referred to in the preceding case, in the possession of Mr. Hertslet, of Norfolk Street, Strand.

scarcely any provision, and, indeed, it has been decided so to be by the Judge of the Civil Tribunal of the First Resort for the Department of the Seine, in a litigation which recently took place between Dr. Curling and the widow. If then the will is invalid according to the law of France, it must be held to be invalid in this Court, so far at least as it professes to dispose of the deceased's personal property; and Dr. Curling who, by the act of probate, has acquired the legal dominion over the property, must be considered as a trustee for the Plaintiff. It is the province of this Court to decide as to the effect of the dispositions in a will; and the sentence of a Court of Probate cannot control this Court in deciding on questions properly within its cognizance.

[THE LORD CHANCELLOR. I have no authority to say that an instrument of which the Ecclesiastical Court has granted probate is not a will. The Ecclesiastical Court has not only granted probate of this instrument, but it has determined also that Dr. Curling should have the probate of it; and, therefore, I must consider him as being in possession of the property under an authority that I cannot control, except for misconduct. Supposing [313] it should turn out that none of the bequests can have any effect, and that there is an intestacy as to all the personal estate, still he has got the office of executor.]

We do not go to the extent of saying that there is no will. We submit that it was necessary for the Ecclesiastical Court to grant either probate or administration to some person in order to get in the personal estate.

[THE LORD CHANCELLOR. If the Ecclesiastical Court has thought proper to grant probate of this will, I cannot contradict them; and it is quite a new thing to apply to this Court to appoint a receiver upon the ground that the Ecclesiastical Court has clothed A. B. with the character of executor in order that the personal estate may be taken care of, and that I am to remove him on the ground that the will is no will at all. I cannot decide that. I do not know on what ground the Ecclesiastical Court has granted probate. It is enough for me that, having granted probate, I am concluded from examining the question whether there is a will or not, or whether Dr. Curling is executor or not.]

We admit that Dr. Curling is executor; all that we contend for is that, notwithstanding the will, he is a trustee of the property for the persons entitled to it according to the French law. Sir John Nicholl, who granted the probate, considered that his opinion would not control the question which is now submitted to your Lordship.

[THE LORD CHANCELLOR. I do not think that it will finally control the question: for, although if the Ecclesiastical Court has granted probate of the will, I must take it to be a will; yet what part of the [314] contents of that will is effectual, and in what way the Court shall determine on the property, is quite a different thing. There are many cases in which a man is appointed executor, and yet the property goes (notwithstanding the contents of the will) as if there was an intestacy; as, for instance, if legacies which exhaust the whole of the property are given to persons who cannot take them, the person so appointed is still executor, although he must distribute the property exactly as if the deceased had died intestate. If this cause were now being heard, and if the law of England be such that I ought to apply the law of France in distributing the property, I should be perfectly at liberty then to say that this instrument is a will so far as it appoints Curling executor, but that it has no other operation, and, therefore, the case is exactly the same as if the executor were a trustee for the next of kin: but I will not decide so important a question as that on a motion. If you mean to say that Dr. Curling intends to distribute the property in a way that this Court will not finally sanction, then I must have an affidavit of that fact.]

It is not necessary to resort to affidavits on that point, for Dr. Curling in his answer says expressly that, if he is permitted to receive the personal estate, he will apply it according to the directions of the will.

THE LORD CHANCELLOR [Cottenham]. After what has passed, Dr. Curling will be very careful how he disposes of the property. If he disposes of it under the notion that the directions of this will are all effectual, and they turn out not to be so, he will be answerable for the property. If you could shew that Dr. Curling had

property of the testator in his hands, [315] and were to move to have that property paid into Court, that is a proceeding which seems to be open enough. What constitutes a man's domicile at his death, and, supposing it to be established that he was domiciled in a foreign country, what is the effect of his will having regard to the law of that country, are questions much too difficult and important to be decided on a motion.

THE SOLICITOR-GENERAL, Mr. Horne and Mr. Heald appeared for the Defendants.

[315] VANDERGUCHT v. DE BLAQUIERE. July 10, 11, 1838.

[S. C. 5 My. & Cr. 229 ; 41 E. R. 358 (with note).]

Alimony.

A married woman, divorced from her husband and entitled to alimony under the sentence of the Ecclesiastical Court, accepted a bill of exchange for articles of dress supplied to her by the drawer, and made it payable at her banker's to whom her alimony was paid. Held that she did not thereby charge her alimony.

In 1819 Lady Harriet de Blaquiére, who had lived separate from her husband, General de Blaquiére, ever since June 1814, instituted a suit against her husband, in the Consistory Court of London, for a divorce by reason of adultery. On the 16th of May 1820 the Court pronounced for the divorce, and allotted to Lady Harriet £380 a year for alimony, payable quarterly. In June 1835, Lady Harriet being indebted to the Plaintiff in £225 for articles of dress and millinery supplied to her by the Plaintiff's wife in 1829 and the four following years, the Plaintiff drew upon her a bill of exchange for that sum, which she, at his request, accepted, and made it payable at her banker's.

In December 1837 the bill in this suit was filed, stating that £300 a year was payable to Lady Harriet, for her separate use, under articles of separation between her and her husband, and that in addition thereto £80 a year was payable to her, under the sentence of the Consistory Court of London, for her sole and separate use, maintenance and benefit: that Lady Harriet promised and undertook to pay the £225 to the Plaintiff out of her separate income and maintenance, and to charge the same therewith, and for that purpose she agreed to accept the bill of exchange, which had been dishonoured: that arrears of the £300 and £80 were then due from General de Blaquiére, and certain sums that had arisen from those yearly sums were then in the hands of Lady Harriet's bankers. The bill prayed for a declaration that the £225 and the interest accrued thereon were a charge on the yearly sums of £300 and £80 and the arrears thereof, and that the £225 and interest might be paid out of the arrears and growing and future payments thereof; and that General de Blaquiére might be restrained from paying to Lady Harriet, and that she might be restrained from receiving those yearly sums or the arrears thereof.

On the 12th of February 1838 the Plaintiff obtained the injunction on affidavit and notice, no one having appeared for Lady Harriet. She afterwards put in her answer, in which she said that the £380 a year was allotted to her for alimony as before mentioned, and that it constituted the whole of her income: that alimony was a creature of the Ecclesiastical Court, and was subject to the jurisdiction of that Court only: that it was not separate estate, but was a provision for the support and maintenance of the wife, from day to day, subject in respect to its amount, continuance and mode of payment, to the discretion of the Ecclesiastical Court: that the wife had, in fact, no property therein, and that it was liable at any time to be varied and reduced at the discretion of the Judge of the Court; that, in case it should fall in arrear, the right of the wife to recover the arrears depended entirely on the discretion of the [317] Court: that her husband had allowed the £380 a year to fall considerably in arrear, and actions were brought against him for debts contracted by her for necessaries supplied to her whilst it was in arrear, and he was compelled to pay such debts, and, although the amount thereof was considerably less than the

arrears, the Ecclesiastical Court, in May 1830, refused to compel her husband to pay up the arrears: that she did not promise to pay the £225 out of her separate income and maintenance, but out of property which she was in expectation of receiving from a near relation, and that she never promised or intended to charge her alimony therewith.

Mr. Jacob and Mr. Lloyd, for Lady Harriet de Blaquiere, now moved to dissolve the injunction. The whole of the £380 is payable to Lady Harriet for alimony, under the sentence of the Ecclesiastical Court. *De Blaquiere v. De Blaquiere* (3 Hagg. Eccles. Rep. 322; and 3 Phillim. 258), *Wilson v. Wilson* (3 Hagg. 329, note). Alimony stands on a different footing from separate estate; it is given solely for the maintenance of the wife, and to relieve the husband from the obligation of maintaining her. She may give away property settled to her separate use, and call upon her husband to maintain her; but if she gives away her alimony, she cannot call on her husband to maintain her. The allowance of alimony does not relieve the wife from the disabilities of coverture: it does not give her the capacity to contract respecting it, any more than an allowance by a father to a minor son gives the son a capacity to contract respecting his allowance. But a married woman [318] has a power of contracting with reference to her separate estate. *Stuart v. Lord Kirkwall* (3 Madd. 387), *Murray v. Barlee* (ante, vol. 4, p. 82; and 3 Myl. & Keen, 209). [THE VICE-CHANCELLOR. Is there any instance of a bill in equity being filed to compel payment of alimony?] There have been cases in this Court in which decrees have been made for alimony; but those decrees were made during the Rebellion, when the existence of the Ecclesiastical Courts was suspended. *Anon.* (2 Show, P. C. 282), *Owen's case* (Litt. Rep. 78; see 1 Madd. Prin. & Pract. 3d edit. 494, note (x)). In *Head v. Head* Lord Hardwicke says: "I do not find that this Court ever made a decree for establishing a perpetual separation betwixt husband and wife, or to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even upon this, unwillingly." The only cases in which this Court decrees maintenance to the wife are where there is an agreement for separate property, or where the husband has deserted his wife, and there is a trust fund to which the Court can resort. Alimony is merely the creature of the Ecclesiastical Court; and therefore this Court will ascribe to it those incidents and qualities only that the Ecclesiastical Court attributes to it. The case of *Street v. Street*, (Turn. & Russ. 322) shews that this Court, when it has to deal with alimony, considers it in the same light as the Ecclesiastical Court does. If that be so, we have to consider some of the incidents of alimony, as that subject is dealt with in the Ecclesiastical Court. The answer contains several allegations respecting it, which are inconsistent with the notion that the decree of the Ecclesiastical Court confers property: such as that alimony is liable to be re-[319]-duced with reference to new circumstances, and that, in certain cases, the Court will not decree payment of the arrears. Suppose that the bill of exchange were given with reference to the amount of the alimony at the time, and that the alimony should be afterwards reduced; if this Court should decree payment of the bill, it might deprive the wife of the necessaries of life, and thereby defeat the sole purpose for which the alimony was granted.

Moreover, the bill of exchange in this case was given without reference to the alimony, and for necessaries supplied to the wife in 1829, at which time the alimony was in arrear, and, consequently, her husband was liable for the articles supplied. *Hunt v. De Blaquiere* (5 Bing. 550).

Mr. Knight Bruce and Mr. James Parker, for the Plaintiff. Where the wife has a separate maintenance, the husband, so long as he pays it, is not liable for necessaries supplied to her. The wife cannot be sued at law, and, if she cannot be sued in equity, she might be reduced to the greatest inconvenience and distress if she could not charge her allowance.

If the question now under consideration is new and important, the decision of it ought to be deferred until the hearing, and, in the meantime, the fund ought to be secured; for the maintenance is liable to cease, not only by the death of Lady Harriet, but on a reconciliation taking place between her and her husband. So also, if General de Blaquiere should become *lapsus facultati*-[320]-bus, or if Lady Harriet were to become possessed of property from any other source, the Ecclesiastical Court would,

on the application of the general, either reduce the maintenance or order it to cease altogether. The fund, then, being exposed to danger, the Court ought, according to its usual course, to secure it; for, otherwise, there may be nothing to resort to in case the Court should, at the hearing, give the Plaintiff the relief he asks.

It is clear that Lady Harriet intended the bill of exchange to be a charge on her separate maintenance, for she made it payable at her bankers to whom her allowance is paid. But we contend, on the authority of *Kenge v. Delavall* (1 Vern. 326), and *Murray v. Burlee*, that, independently of the bill of exchange, the creditor would have had a right to come against the separate maintenance.

No authority has been cited as to the distinction between alimony and separate estate. The Ecclesiastical Court considers them both as standing on the same footing.

If the wife has separate property, the Ecclesiastical Court will not decree her alimony: therefore the one is merely a substitute for the other. Although the Ecclesiastical Court may either reduce alimony or make it cease altogether, yet, as long as it remains, it must have all the incidents of property. *Wilson v. Wilson* (2 Haggard's Consist. Rep. 203), *Chamberlain v. Hewson* (1 Salk. 115). In *Hunt v. De Blaquiére*, Park, J., says: "No distinction can be drawn between maintenance under a separation deed [321] and maintenance by virtue of a decree for alimony." (5 Bing. 560.) *Shaftoe v. Shaftoe* (7 Ves. 171), *Dawson v. Dawson* (*Ibid.* 173), and *Oldham v. Oldham* (*Ibid.* 410), shew that this Court considers arrears of alimony in the light of an equitable debt, and, on that principle, it grants the writ of *ne exeat*. In *Street v. Street* Lord Eldon refused the writ, because the alimony was granted *pendente lite* and not by final decree. If a married woman saves part of her alimony, there can be no doubt that she might make a will and dispose of it. The argument on the other side, however, goes the length of contending that she could not dispose of her savings.

Alimony is not, exclusively, a subject of ecclesiastical cognizance; for the writ *de estoveriis habendis* lies for the recovery of it. In *Stones v. Cooke*,⁽¹⁾ your [322] Honor overruled a demurrer to a bill, praying for an account and payment of the arrears of alimony.

Mr. Wilbraham, for General de Blaquiére.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The cases that have been cited in the course of the argument do not furnish any authority to shew that this Court has ever exercised any jurisdiction with respect to alimony, except in granting the writ of *ne exeat regno*. The interference of the Court in granting that writ has arisen from the peculiar circumstance that the Eccle-[323]-siastical Court cannot compel the husband to find bail. And if the husband makes it appear that he does not intend to leave the kingdom, the Court will not grant the writ, although he may not intend to pay what is due from him. If then the course has been not to interfere, as against the husband, except in one particular case, how can it be said that there is any similitude between alimony and property to which a married woman is entitled for her separate

(1) *Ante*, vol. 7, p. 22. This decision was reserved by Lord Lyndhurst, C., on the 1st April 1835. The reporter has been furnished with the following note of his Lordship's judgment.

This was a bill filed by the executors of a wife against her husband for an account and payment of the arrears of alimony. A demurrer has been put in, and the question is whether such a bill can be sustained.

Alimony is the proper and exclusive subject for discussion in the Ecclesiastical Court. It is the province of that Court to determine what ought to be its amount, for how long it is to be granted, and what operates to discharge it. There is no instance in modern times of such a bill as the present being filed. During the Rebellion, bills were filed for alimony; but they were filed in consequence of the abolition of the Ecclesiastical Courts. The decisions during that period do not apply, as they proceed upon the peculiar state of circumstances then existing; other cases where maintenance has been allowed to the wife were cited, but neither do they apply as they were cases arising out of the fraudulent conduct of the husband, or they were cases of trust.

The simple question is whether, where the alimony has been suffered to run in

use? Alimony materially differs from separate property. It is liable to be varied by the Ecclesiastical Court, according to the husband's circumstances; whereas, separate property always remains the same, whatever alteration may take place in the circumstances of the husband, and whether he is living or dead, or whether he is abroad or not.

As the Plaintiff has misstated his case by misrepresenting that the £300 a year was separate property of the wife, and as the law is strongly against him, I shall dissolve the injunction, with costs. The costs of General de Blaquiére must be costs in the cause.

[324] HOLLOWAY v. HEADINGTON. Jan. 25, 1837.

[S. C. 6 L. J. Ch. (N. S.) 199.]

Voluntary Settlement.

By a voluntary settlement, a husband and wife assigned all the property to which the wife then was, or which she or her husband in her right might become, entitled to, in trust for the wife for life, for the husband for life, and for the children of the wife living at her death, whether begotten by her present or any future husband.

The Court refused to give effect to the settlement.

The decision in *Ellis v. Nimmo* observed upon.

This was a suit to carry into effect a voluntary post-nuptial settlement, by which the Plaintiff Mrs. Holloway and her husband conveyed certain property to which she was entitled under her father and mother's marriage settlement, and also all other property to which she or her husband in her right might become entitled to, to trustees in trust for the Plaintiff for her separate use for life, and, after her death, for her husband for life, and, after the death of the survivor of them, for their children as the Plaintiff should appoint, and in default of appointment for all the Plaintiff's children living at her death, whether begotten by Mr. Holloway or by any future husband.

The cause was originally heard in 1836, when the bill was dismissed. It now came on to be reheard.

Mr. Wakefield and Mr. Hughes, for the Plaintiff who was living separate from her husband, said that the Court ought to give effect to the settlement, as it was founded on a meritorious consideration; for Mr. Holloway had relinquished in favour of his wife and children all the property that might come to him through his wife. They relied on *Ellis v. Nimmo* (Lloyd & Goold's Rep. 333), and *Muskerry v. Chinnery* (*Ibid.* 185).

Mr. Knight and Mr. O. Anderdon, for the Defendant Mr. Holloway. The decision in *Ellis v. Nimmo* proceeded on the ground that, before the passing of the

arrears, a bill can be maintained by the executors of a wife against the husband. It was said that, in analogy to the cases in which this Court grants the writ of *ne exeat regno*, and on principle, the bill might be sustained; but it is impossible to look into those cases without seeing how very reluctantly the Court has acted in giving relief. See *Shaftoe v. Shaftoe* and *Dawson v. Dawson*. Then it was said that the party will be without remedy, because executors cannot maintain a suit in the Ecclesiastical Court. That argument operates, I think, the other way, for executors may maintain suits in the Ecclesiastical Court, but not for arrears of alimony. It should seem, therefore, that the claim must cease with the death of the wife. That is probably the principle; but it does not follow that, therefore, this Court has jurisdiction. There is no instance of such a bill as the present being filed against a husband by the executors of the wife; and I should be very averse to establish a precedent. The authorities do not warrant it. The cases in which the Court has granted the writ of *ne exeat regno* do not warrant it, nor, from the circumstance of the Ecclesiastical Court not interfering, can I find any jurisdiction in this Court. The demurrer must be allowed.

Statute of Uses, [325] Courts of Equity compelled the specific execution of contracts founded on the consideration of blood. It has been, however, established by a series of decisions since the passing of that statute that Courts of Equity will not exercise their jurisdiction to compel specific performance, except where the agreement which they are asked to execute is founded on a valuable consideration. There are other cases which shew that Courts of Equity do not now pay the same regard to the consideration of blood as they did before the passing of the statute: for they will not supply a defective execution of a power or the want of the surrender of a copyhold estate in favour of a brother or nephew, or even of a grandchild. Whereas, before the passing of the statute, they would have compelled the execution of a covenant to stand seised in favour of persons standing in the same or even remoter degrees of relationship to the covenantor. Consequently, it is now too late to resort to the ancient jurisdiction of the Court; and the decree made on the original hearing was right.

Mr. E. Montagu and Mr. Jeremy appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. However high the authority may be of the Lord Chancellor who decided *Ellis v. Nimmo*, that cause was reheard by his successor, who rejected the grounds of the former decision and decided in the same way, but on different grounds. Therefore, there is the authority of one Lord Chancellor in its favour, and the authority of another Lord Chancellor against it. Consequently, it is not a decision that binds. Besides, the case in which that decision was made was wholly unlike the present, because there the question was not [326] how far the husband was bound, but how far the father of the lady was bound with respect to property that descended from her uncle. Here I have a case that is totally unlike that; for here, without any apparent reason, a husband and wife, whilst they are living together, agree that all the property of the wife shall be settled in a given manner. The parties seem to have been dealing quite at random; for not only is there no reason for such an agreement, but I do not understand what the parties meant—whether they intended that the wife or the husband, or that both of them should be bound. And it seems to be extraordinary that a provision should be made, which might have the effect of giving the whole of the wife's fortune, not to her grandchildren by her husband, but to a child of a future husband. The whole transaction appears to be so vague and unreasonable that, unless there is some specific authority to shew that Courts of Equity have interfered to give effect to such a post-nuptial settlement, I will not be the first Judge to enforce it. Therefore, the prior decree was right.

[327] PAULI v. VON MELLE. Jan. 26, 1837.

Interpleader. Injunction.

The common order for an injunction in an interpleading suit is irregular, if it does not make the issuing of the injunction dependent on the payment of the money into Court.

The bill prayed that the Defendants might interplead respecting the sum of £104 in the Plaintiff's hands, and that the Plaintiff might be at liberty to pay that sum into Court, and that the Defendants might be restrained from taking any further proceedings against him, either at law or in equity, relating thereto.

On the 14th of January the Plaintiff obtained, *ex parte*, and without any affidavit of merits, an order for payment of the £104 into Court and for the injunction; but the order, as drawn up, did not make the issuing of the injunction dependent upon the payment of the money; and the Plaintiff did not pay the £104 into Court until the 19th of January, although he served the Defendants with notice of the injunction on the 14th, and thereby prevented them from taking out execution against him, which otherwise they might have done on the 16th.

[328] Mr. Jacob and Mr. O. Anderdon, for the Defendant Von Melle, now moved to discharge the order for irregularity on the ground that it made the issuing of the

injunction and the payment of the money into Court independent of each other, whereas it ought to have made the latter a condition precedent to the former.

THE SOLICITOR-GENERAL and Mr. Hayter, for the Plaintiff, said that the order could not have been drawn up until the day after it was pronounced, at the soonest, and that the Accountant-General would not receive money until the order for paying it in had remained two days in his office; and, therefore, the injunction would have been useless if the issuing of it had been made dependent on the payment of the money.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The order for the injunction ought to have been so worded as to prevent the Defendant from being affected by it until the Plaintiff had paid in the money. I am not aware that the Accountant-General will not receive money until the order for paying it in has been left two days in his office; but, supposing that to be the case, it was the Plaintiff's duty to have been more alert in filing his bill.

An error has been committed which has prevented the Defendant from issuing execution at the time when he was entitled to issue it; and, therefore, the order in question, like every other erroneous order, must be discharged with costs. (See *Sieveking v. Behrens*, 2 Myl. & Craig, 581.)

[329] GRANT v. HIBBERT. Jan. 30, 1837.

Practice. Construction of 11 Geo. 4 and 1 Will. 4, c. 36, s. 3.

An order was made under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3, directing a Defendant, who had absconded, to appear to the bill. The Defendant's only residence in England was at a hotel, where he remained two days, and then sailed for Jamaica. Held, that the order ought to be published in the church of the parish in which the hotel was situate; that being the parish where the Defendant made his usual abode within thirty days next before his absenting.

By 11th Geo. 4 and 1 Will. 4, c. 36, s. 3, it is enacted that, upon an affidavit being made to the satisfaction of the Court that a Defendant has gone out of the realm to avoid being served with the process of the Court, the Court may make an order directing such Defendant to appear at a certain day therein to be named; and a copy of such order shall, within 14 days after such order made, be inserted in the *London Gazette* and published on some Lord's Day, immediately after divine service, in the parish church of the parish where such Defendant made his usual abode within 30 days next before such his absenting.

The bill in this cause was filed on the 5th of November. Shortly afterwards one of the Defendants, who resided in Scotland, arrived at a hotel at Blackwall, where he remained for two days under an assumed name, and then sailed for Jamaica.

The Plaintiff having been unable to serve the Defendant with a *subpœna* to appear to the bill, now moved, under the before-mentioned Act, for an order directing the Defendant to appear. The motion was supported by an affidavit shewing that the Defendant had gone out of the realm to avoid being served with the *subpœna*.

Mr. Knight and Mr. G. Richards appeared in support of the motion.

[330] THE VICE-CHANCELLOR made the order: and on its being suggested that there would be some difficulty in complying with that part of the Act which directs the order to be published in the parish church, His Honor said that, as the Defendant's first and only residence in England was for two days, the place at which he resided during that time must have been his residence for some time within 30 days next before his absenting; and, therefore, the order ought to be published in the parish church of the parish in which the hotel was situate.

[330] MILES v. DYER. Jan. 30, 1837.

Will. Construction. "Or" construed "And."

Testator bequeathed his real and personal estate to trustees, in trust to pay an annuity to his wife, and to raise and pay to each of his children £2000 on their attaining 21, and to accumulate the surplus income of the trust property during the life of his wife, and after her death to sell the property and divide the proceeds amongst his children on their attaining 21; and in case all his children should die in the lifetime of his wife *or* under 21 and without leaving issue, then, after his wife's death, to sell the trust property and divide the proceeds amongst certain other persons. Held, that "*or*" ought to be read as "*and*," and that the children, having attained 21, were absolutely entitled to the property, though their mother was living.

This cause now came on to be heard, and the question which was discussed on the hearing of the demurrer (see *ante*, vol. 5, p. 435) was again argued.

Mr. Knight and Mr. Sidebottom, for the Plaintiffs.

Mr. Jacob and Mr. Campbell, for some of the Defendants who claimed under the executory devise, contended that the Court could not construe the word *or* as *and*, unless there was an absolute necessity for so doing, that is, where, if it were taken in its natural sense, the will [331] would be nonsensical; that no such necessity existed in that case; and, therefore, the words, "and without leaving lawful issue," must be applied to both the preceding branches of the sentence, namely, to dying in the lifetime of the wife as well as to dying under 21.

Mr. G. Richards, Mr. Teed, Mr. Stinton, Mr. Haldane and Mr. Berkeley appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator directs, in the first instance, that certain sums shall be subtracted from the capital of his residuary estate, and that those sums shall be paid to or appropriated for the benefit of his children in the lifetime of his wife; and then he directs that the rents, dividends and interest of the surplus shall be accumulated during her life, and that, after her decease, his freehold and leasehold estates shall be sold, and that the money arising therefrom, together with the money in the funds and all other his estate and effects, shall be paid to and divided amongst his children on their attaining the age of 21 years. That, therefore, is a clear gift to the children whether they die in the lifetime of his wife or not. Then he says: "And in case all my said children shall happen to depart this life in the lifetime of my said wife or under the said age of 21 years, and without leaving lawful issue of their, his or her body." Now, when the disjunctive particle *or* is used, it is not usual to apply what follows it to the preceding branch of the sentence. And, moreover, it would be inconsistent with the gift to the children, if I were to hold that the property which is the subject of it was intended to go over in case the children should die in the lifetime of the wife; for the gift to the children is made to [332] depend on their attaining 21, whether they die in the lifetime of the wife or not.

The best construction, therefore, that can be put upon this will, is by taking that liberty with the words of it which the Court has frequently done in other cases, that is, to construe *or* as *and*.

Declare that, subject to the annuity of £400 given to the Defendant Elizabeth Miles, the testator's widow, the Plaintiffs Harriet Miles and Charles Miles, and the said Frederick Miles and the trustees of the settlement of the Plaintiffs, John Hopkinson and Elizabeth, his wife, in trust for them and their issue, have become absolutely entitled to the whole residuary real and personal estate of the said testator, including all accumulations of the income thereof; and declare that the trusts or directions, contained or implied in or by the said will, for the investment and accumulation of the surplus rents, dividends and interest of the said testator's estate, are void so far as the same extend to a time beyond the period of 21 years from the said testator's death.

[333] VIGERS v. LORD AUDLEY. Jan. 31, 1837.

Practice. Defendant. Contempt.

If an attachment has issued against a Defendant for want of answer, he cannot file a demurrer and answer, although the former is confined to an allegation which the Defendant might, by answer, have insisted he was not bound to answer.

The bill contained an allegation that Solari, one of the Defendants (against whom an attachment had issued for want of answer), was an alien. Solari demurred to answering that allegation, on the ground that it would subject him to penalty or forfeiture; but he answered the rest of the bill.

Mr. Wakefield and Mr. Rogers moved to take the demurrer and answer off the file, on the ground that it had been filed when the Defendant was in contempt. They relied on *Curzon v. Lord De la Zouch* (1 Swanst. 185).

Mr. Wigram, for the Defendant, said that the demurrer did not affect the merits of the case, but was confined to an allegation which tended to subject the Defendant to penalty or forfeiture, and therefore he might, by answer, have insisted that he was not bound to answer it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In *Curzon v. Lord De la Zouch* Lord Eldon adverted to the very point which Mr. Wigram has raised. For his Lordship says: "In many cases practice gives a construction to the term answer. If, of the interrogatories in the bill, some require an answer, while others tend to criminate the Defendant, is it not clear that he might, by answer, insist on not answering the latter interrogatories? Suppose the case of a bill in which there [334] was not one question that the Defendant could answer without subjecting himself to a penalty." And his Lordship affirmed the order of Sir Thomas Plumer, V.-C., who had directed the demurrer and answer to be taken off the file.

When a Defendant is in contempt for want of answer, he is not at liberty to file a dilatory; and, consequently, the demurrer and answer in this case are irregular, and must be taken off the file.(1)

[334] NEDBY v. NEDBY. Feb. 1, 1837.

Practice. Demurrer.

After the 12 days allowed for demurring had expired, the Defendant referred the bill for scandal and impertinence. The Master reported in the affirmative; and seven days afterwards the Defendant demurred to the bill. Held, that the demurrer was regularly filed.

After the twelve days allowed for demurring, by the 10th Order of 1833, had expired, the Defendant referred the bill for scandal and impertinence. On the 30th of November the Master reported in the affirmative. On the 7th of December the Defendant filed a demurrer for want of parties.

Mr. Girdlestone, for the Plaintiff, moved that the demurrer might be taken off the file for irregularity, on the ground that it had been filed after the time allowed for demurring had expired.

Mr. Wakefield and Mr. Rogers, *contrà*, said that, if the Defendant had filed his demurrer before he had obtained the Master's report, he would have admitted [335] the matter objected to to be pertinent; and, therefore, the case was not within the New Orders.

THE VICE-CHANCELLOR [Sir L. Shadwell] considered that, until the Master had reported as to the scandal and impertinence, there was, in fact, no bill which the Defendant was compellable to answer, and refused the motion with costs.

(1) Affirmed by the Lord Chancellor. See 2 Myl. & Craig, 49. [40 E.R. 559.]

[335] FORBES v. SKELTON. Feb. 15, 1837.

Merchants' Accounts. Statute of Limitations. Plea and Pleading.

The joint-owners of plantations in Java, which they worked in co-partnership, kept an account with certain merchants and agents at Bombay, to whom they became largely indebted in respect of monies advanced and paid for their use. Held, that the account was not a mercantile account within the meaning of the exception in the Statute of Limitations.

A plea of the Statutes of Limitations of 21 Jas. 1, and 9 Geo. 4, is not double.

Averments in a plea of the Statute of Limitations negating facts that would defeat the plea, but which are not stated in the bill, are surplusage, but do not vitiate the plea.

A plea of the Statute of Limitations need not negative the usual *general* allegation that the Defendant has, in his custody, documents relating to the matters contained in the bill.

In 1826 Forbes and Stewart, two of the Plaintiffs, together with the Defendant, General Skelton, and two other persons, were joint-owners of certain plantations and estates in the island of Java, and of the buildings, furniture, stock, crop, engines, implements, utensils and other things thereupon, which they worked in partnership together, under the name of the proprietors of the estates of Pamanookan and Tiassam. The proprietors kept an account with the Plaintiffs, who were partners as merchants and agents at Bombay; and in June 1826 one million rupees were due from the proprietors [336] to the Plaintiffs in respect of monies advanced and paid for their use; and it was then arranged that each proprietor should take upon himself personally a part of the debt in proportion to his share in the estates. In pursuance of this arrangement the Plaintiffs, in compliance with three written orders sent to them by the proprietors (the last of which was dated the 20th of March 1827), entered in their books to the credit of the joint account of the proprietors the several sums mentioned in the orders, and entered to the debit of the private or personal account of each proprietor the several sums set opposite to his name in the orders.

The bill, which was filed in November 1836, after stating as above, alleged that since such private or personal account was opened by Forbes & Co. in their books with the Defendant Skelton, in manner and under the circumstances aforesaid, various dealings and transactions had taken place between him and Forbes & Co. as his agents, and that Forbes & Co. had from time to time received divers sums of money from divers persons for and on account of Skelton, and had, with his knowledge and approbation, carried the same to his credit in such private and personal account, which account still remained open and unsettled, and there was at the filing of the bill a sum of 60,000 rupees and upwards, due from him to Forbes & Co., on such private and personal account: that the Plaintiffs Forbes and Stewart, as representing the firm of Forbes & Co. in this country, had frequently requested Skelton to come to a settlement of his private or personal account with Forbes & Co., and to pay to them the balance, but that he had refused so to do: that Skelton had in his custody divers accounts, &c., relating to the matters aforesaid, and from which the truth of the same would appear.

[337] The bill prayed for an account of all sums from time to time paid or received by Forbes & Co. on account of Skelton, and so as aforesaid carried to the credit and debit of his private or personal account, and that what should be found due to Forbes & Co. might be paid to them by Skelton.

The Defendant Skelton filed the following plea.

This Defendant, by protestation, &c., to all the discovery and relief in and by the said bill sought from or prayed against this Defendant doth plead in bar, and for plea saith that, by an Act of Parliament made and passed in the 21st year of the reign of James the First, intituled, "An Act for Limitation of Actions, and for Avoiding of Suits in Law," it was enacted that all actions of account and upon the case, other than such accounts as concern the trade of merchandise between merchant and

merchant, their factors or servants, all actions grounded upon any lending or contract without specialty, all actions of debt for arrears of rent or any of them which should be sued or brought at any time after the end of the then present session of Parliament, should be commenced and sued within three years next after the end of the then session of Parliament, or within six years next after the cause of such action or suit, and not after: and it was thereby further enacted that if any person or persons entitled to any such action or actions should be at the time of any such cause of action given or accrued, within the age of 21 years, *feme covert*, *non compos mentis*, imprisoned or beyond the seas, then such person or persons should be at liberty to bring the same action so as they should take the same within such times as before limited after their coming to or being of age, discover, of sane memory, at large, and returned from [338] beyond the seas, as other persons having no such impediment would have done. And this Defendant saith that, if the said Plaintiffs ever had any cause of action or suit against him for or concerning any of the matters in the aforesaid bill of complaint mentioned, such cause of action or suit did accrue or arise above six years before the filing of the Plaintiffs' said bill of complaint, and above six years before suing out or serving process against this Defendant to appear to and answer the said bill: nor have the said Plaintiffs been under any of the disabilities mentioned or described in the said Act of Parliament. And this Defendant for plea further saith that, by an Act of Parliament made and passed in the ninth year of the reign of King Geo. 4, intituled, "An Act for Rendering a Written Memorandum Necessary to the Validity of Certain Promises and Engagements," it was enacted that in actions of debt, or upon the case grounded upon any simple contract, no acknowledgment or promise by words only should be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the enactments in the said Act of the 21st year of the reign of King Jas. I, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise should be made or contained by or in some writing to be signed by the party chargeable thereby. Provided always that nothing therein contained should alter or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever. And this Defendant for plea further saith that he, this Defendant, hath never at any time within six years next before the filing of the said bill, and within six years next before suing out process against this Defendant, to appear to and answer the said bill, signed any writing by or in which any acknow-[339]-ledgment or promise of or in relation to the matters hereinbefore pleaded to, or any part thereof, was or is made or contained. And this Defendant hath not, nor have any person or persons for him or on his account or behalf, or by his order, at any time within six years next before the filing of the said bill, and next before suing out process as aforesaid, paid or caused to be paid any principal money or interest on account of or for or upon or in respect of any of the matters and things in said bill mentioned. All which matters and things this Defendant doth aver to be true, and is ready and willing to prove as this honourable Court shall award: and he doth plead the same in bar to the whole of the said bill; and doth humbly demand the judgment of this honourable Court, whether he ought to be compelled to make any further or other answer to the said bill.

Mr. Knight and Mr. G. Richards, in support of the plea. The bill contains no charge to exclude the operation of the statute. It alleges that, since Forbes & Company had opened the private or personal account with Skelton, various dealings and transactions had taken place between him and them as his agents, and that they had from time to time received divers sums on his account and had carried the same to his credit in such private and personal account, which account still remains open and unsettled; and, therefore, all that the Defendant has to do is to shew that none of the dealings or transactions took place within six years prior to the institution of the suit. The fact of the accounts being open is immaterial, unless it can be shewn that the last item is within the six years.

The accounts between the parties were not merchants' accounts, and, therefore, we need not consider what is [340] the construction of that part of the statute that relates to merchants' accounts.

Mr. Wigram and Mr. Lewis, in support of the bill. The accounts mentioned in

the bill are essentially merchants' accounts. The bill alleges that Forbes & Co. were merchants and agents at Bombay. Besides, according to the present state of the law, it is not necessary to shew anything more than open accounts. *Cranch v. Kirkman* (1 Peake's N. P. C. 164), *Catling v. Skoulding* (6 T. R. 189), *Webber v. Tivill* (2 Saund. 121, 127, note), *Ormston v. Hamilton* (8 Bro. P. C. 440), *Robinson v. Alexander* (8 Bligh, N. S. 352).

If, however, it is necessary, in order to exclude some accounts from the operation of the statute, that the last item should be within six years before the filing of the bill, yet this plea does allege that the last transaction took place beyond six years. All that it avers is that the cause of suit arose above six years before the filing of the bill. The addition of an item to an open account does not create a new cause of action; but merely continues the cause of action.

The pleading of the statute of Geo. 4 as a distinct plea is informal. There is no written acknowledgment alleged in this case, and, therefore, the plea tenders two issues. Neither does the bill allege that the Plaintiffs were under any disability.

At all events, the Plaintiffs are entitled to a discovery as to the documents and papers in the Defendant's pos-[341]-session; for they might find in them something that would rebut the second plea.

Mr. Knight, in reply. No Judge has ever said that, whenever there are open accounts, they are to be dealt with as merchants' accounts. In *Robinson v. Alexander* the account was, on the face of it, a mercantile account; and both your Honor and Lord Brougham treated it as such. (See 8 Bligh, N. S. 371, note, and 374).

The decision in *Martin v. Heathcote* (2 Eden, 169) was overruled in effect by the decision of the House of Lords in *Robinson v. Alexander*. In *Welford v. Liddle* (2 Vez. 400; and see 2 Eden. 169, note) Lord Hardwicke expresses it to be his opinion that, even in a suit relating to an account between merchant and merchant, the statute might be pleaded if the account was closed and concluded between the parties, and the dealings and transactions between them were over. In *Catling v. Skoulding* Lord Kenyon puts the question on its proper ground.

The only question then is whether it is apparent, on the face of the bill, that the accounts between the parties were mercantile accounts. The original account related to an estate in Java. How it was cultivated, whether it produced anything fit for exportation, or whether there was anything in the nature of trade connected with it, does not appear. Is a general officer to be converted into a merchant, merely because he owns a share in a landed estate? Supposing that there was any mercantile dealing between Forbes & Co. and the pro-[342]-prietors of the estate, it ceased in 1827. The debt was then divided, and Skelton became, solely, debtor for his proportion. The Plaintiffs say that various dealings and transactions have since taken place between Skelton and Forbes & Co. as his agents; but not with respect to the Java estate. That matter was put an end to in 1827, and the firm then took each proprietor as its separate debtor. Nor is there a single averment that the firm have paid anything on Skelton's account. Therefore it is not a case of mutual accounts: but it is an account of which the items consist solely of sums received by the firm in diminution of the ascertained debt. Consequently, on the Plaintiff's own shewing, the account is unilateral. If the transactions down to the year 1827 were mercantile, nothing subsequent to it was; the business relating to the estate was then closed.

The case of *Foster v. Hodgson* (19 Ves. 180) decides that a Plaintiff must allege disability in his bill if he means to protect himself under it. I admit, therefore, that the averment in the plea that the Plaintiffs have not been under any of the disabilities mentioned in the statute might have been omitted: it does not, however, vitiate the plea.

The charge that the Defendant has documents in his possession is in the common form: and *Thring v. Edgar* (2 Sim. & Stu. 274), and *Macgregor v. The East India Company* (ante, vol. 2, p. 452), decide that such a charge is immaterial, unless it goes on to allege that the documents would shew that there was an item in the accounts within the six years.

[343] THE VICE-CHANCELLOR [Sir L. Shadwell]. In *Robinson v. Alexander* it clearly appears, both from the account and from the evidence of England, that there

were transactions between the parties relating to stone and other articles, independent of the partnership in the ship. The account, therefore, in that case, was clearly a mercantile account.

In *Foster v. Hodgson* (where it appears that the dealings were between merchants on the one side and bankers on the other) the first observation that Lord Eldon makes, is: "This bill has no allegation that the foundation of the suit is accounts relative to merchandise between merchant and merchant, unless it is considered as alleging that by implication from the statement of the character in which the Plaintiffs stood and the business they carried on." And his Lordship considered that that inference could not be drawn; for he allowed the demurrer.

There is nothing in this case from which it can be inferred that the accounts between General Skelton and Forbes & Co., were mercantile accounts. There is nothing in the bill which shews that the transactions between them were mercantile. The bill represents that Forbes, Stewart, Skelton and two other gentlemen were, at one time, joint-owners of two estates in Java; and that, as such joint-owners, they were considerably indebted to Forbes & Co., who then carried on the business of merchants and agents at Bombay, in respect of monies paid, laid out and expended by the firm, on account and for the use of the proprietors of the estates. The bill, therefore, does not represent that the original debt was in the nature of a mercantile debt. Then, in the years [344] 1826 and 1827, the proprietors came to an arrangement between themselves, in pursuance of which Forbes & Co. debited the private and personal account of each of the proprietors with a certain share of the original debt; and consequently the sum that was carried to Skelton's debit forms one item in the account between him and Forbes & Co. The bill then alleges that, since such private and personal account was opened by Forbes & Co. with General Skelton, various dealings and transactions had taken place between him and the firm as his agents, and the firm had, from time to time, received and been paid divers sums of money from divers persons for him or on his account, and had carried the same to his credit in such private or personal account, which account still remained open and unsettled, and there was then a very large sum of money due from Skelton to Forbes & Co., on such private or personal account. Over and over again the account that Skelton kept with Forbes & Co. is described as a private and personal account. The bill nowhere represents that it was a mercantile account, or that any transaction took place between them that was at all like a mercantile transaction; and, therefore, in deciding upon this plea, I am not at liberty to infer that the account was a mercantile account; and if it is not a mercantile account, it does not come within the exception in the statute of James.

The next question is, whether the plea is good in point of form. It first of all pleads the statute of James, and afterwards the statute of Geo. 4. But I do not think that it can be considered as a double plea on that account. For although those two Acts were passed at different times, they ought, in my opinion, to be considered as making jointly one law.

[345] The plea then avers that if the Plaintiffs ever had any cause of action or suit against the Defendant, it accrued above six years before the filing of the bill and the suing out and serving of process: and I think that that averment is sufficient, and that it was not necessary to allege that the account did not contain an item relating to any transaction that took place within the six years.

The plea then goes on to aver (unnecessarily as I think) that the Plaintiffs conjunctively had not been under any of the disabilities mentioned in the statute. That averment, if it had been necessary, ought to have been made respecting the Plaintiffs severally. But it is not necessary in pleading the statute to aver that the Plaintiff has not been under any disability, unless something is shewn on the bill from which it can be inferred that the Plaintiff has been under some disability. That averment, therefore, was superfluous, but it does not, I think, vitiate the plea.

The same observation applies to the second part of the plea. Lord Tenterden's Act says that no acknowledgment shall take a case out of the operation of the statute of James unless it be made in writing. The bill, however, does not allege that any acknowledgment has been made; and, therefore, this part of the plea may be characterized as an anticipation of a defence that might be set up to the

plea, and, consequently, it is surplusage. Upon the whole, I do not think that this plea is otherwise than good.

Plea allowed with liberty to amend.

[346] ANONYMOUS. Feb. 16, 1837.

Guardian. Infant.

If a female guardian marries it is a matter of course to appoint a new guardian.

A lady, who had been appointed guardian to an infant, married.

THE VICE-CHANCELLOR [Sir L. Shadwell], on the application of Mr. Hetherington, said that it was quite of course to appoint a new guardian in such a case.

[346] DAWSON *v.* DAWSON. Feb. 22, 1837.

Vendor and Purchaser. Option to Purchase.

Testator devised a house to trustees, upon trust to permit his son, at any time within three months after his death, to become the purchaser thereof, at the price of £4000; and to sell and convey the same to his son, his heirs, &c. But should his son not complete such purchase within the three months, then the trustees were, within 12 months from the testator's death, to sell the house by auction. The son, within two months from his father's death, declared to the trustees his intention to purchase the house at the sum mentioned, but they did not deliver the title-deeds to their solicitor, or instruct him to prepare the conveyance until the last day of the three months; and the son did not pay any part of the purchase-money, nor was any conveyance executed to him within the three months. Held, that he could not enforce his option.

Roger Dawson, by his will, dated the 30th of March 1836, devised as follows:—"I give and devise unto and to the use of my sons, John Dawson and Joseph Dawson, and John Bazley White, their heirs and assigns, all that my freehold house and premises in High Street, in the borough of Southwark, now in the tenure or occupation of my said son Joseph, with the appurtenances, upon trust to permit my said son Joseph, at any time within three months after my decease, to become [347] the purchaser of the same at or for the price or sum of £4000, and to sell and absolutely convey the same unto my said son Joseph, his heirs and assigns, or as he or they shall direct. But should my said son Joseph not complete such purchase within three months from my decease, then I direct that the said John Dawson, Joseph Dawson and J. B. White shall, within 12 months after my decease, absolutely sell and dispose of the same by public auction or private contract as they shall deem best, and for such price and prices as to them shall seem reasonable, and do and shall stand possessed of the monies to arise from such sale as part of my residuary personal estate." And the testator appointed the trustees the executors of his will.

The testator died on the 20th of April 1836; and (as the bill stated and the answer admitted), within two months afterwards, Joseph Dawson, the Plaintiff verbally communicated to his co-trustees his intention to purchase the house at the price mentioned in the will, and the co-trustees assented thereto; and from that time considered that they had actually sold the house to the Plaintiff. He, however, did not pay any part of the purchase-money: and his co-trustees waited until the last day of the three months before they delivered to their solicitor the title-deeds of the house, and instructed him to prepare the conveyance to the Plaintiff: and they did not deliver to their solicitor the probate copy of the will until a week after the three months had expired.

The conveyancer before whom the abstract was laid having expressed a doubt whether a good title could be made to the house, in consequence of the Plaintiff

having suffered the three months to elapse without having completed his purchase ; and some of the parties interested in the testator's residuary estate being infants, the bill was filed by Joseph Dawson against his co-trustees and the parties interested in the residuary estate, in order to obtain the opinion of the Court upon the point.

Mr. Knight and Mr. Collins, for the Plaintiff, said that the Court did not regard time in suits for specific performance ; and that the Plaintiff had declared his option within the three months ; that the testator had not used the words, "complete such purchase," in their ordinary sense ; and that it was not a new proposition but only the converse of the preceding proposition. *Earl of Radnor v. Shafto* (11 Ves. 448).

Mr. Turner, for the Defendants the trustees.

Mr. Messiter and Mr. Heathfield, for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator has expressed himself thus : "Upon trust to permit my said son Joseph, at any time within three months after my decease, to become the purchaser thereof at or for the price or sum of £4000." It is true that the son was allowed the three months to become the purchaser ; but, *prima facie*, the becoming the purchaser would include not only the payment of the purchase-money, but also the taking of the conveyance. Then the testator goes on to say, "and to sell and absolutely convey the same unto my said son Joseph, his heirs and assigns, or as he or they shall direct : but should my said son Joseph not complete such purchase within three months from my decease." Now [349] the words, "but should my said son not complete such purchase," are negative words ; and the testator, when he uses them, points at some act to be done, which he describes as the completion of the purchase. The whole sentence must be taken together : the son was to pay the money and then the trustees were to convey the house to him. The son ought, at the least, to have placed the purchase-money under the control of the trustees : but no such act was done. How then can a purchase be said to be completed where there was no conveyance on the one side and no payment of purchase-money on the other ? A mere verbal notification of an intention to purchase cannot be said to be a completion of the purchase.

Bill dismissed.

[349] WILLIAMS v. CORBET. Feb. 20, 1837.

[S. C. 6 L. J. Ch. (N. S.) 182. Cf. *Foster v. Elsley*, 1881, 19 Ch. D. 518.]

Auditor.

Testator devised his estates to trustees in trust to apply the rents in paying off incumbrances, and directed them to employ A. to audit their accounts, and to allow him a proper salary. Held, that the trustees could not, arbitrarily, remove A. from his office ; but that he was entitled to hold it as long as he was willing and able, and to receive an adequate salary.

Sir Corbet Corbet devised his real estates to trustees in trust to let the same, and, out of the income, to keep down the interest of such sums as should be charged thereon at his death, and to pay all taxes, rates and other outgoings payable in respect thereof and the expenses of keeping his mansion-house in repair, and also the wages and salaries of auditors, receivers, stewards and bailiffs who should from time to time be employed in the execution of the trust thereby created, [350] and to accumulate the surplus income of his estates until the same should amount to a sufficient sum to pay off the mortgages and incumbrances thereon, and then to apply the same accordingly ; and, subject thereto, he devised his estates to Richard Corbet and his sons in strict settlement.

The testator, by a codicil, appointed the Plaintiff (who was a barrister) to be the auditor of the accounts of his estates during the execution of the trusts of his will : and he directed his trustees to pay to the Plaintiff such annual remuneration as it was usual for an auditor to receive ; and, in case the Plaintiff or any subsequent

auditor should refuse to accept such office, or become incapable or unwilling to exercise the duties thereof, he requested his trustees to appoint a barrister of known judgment and integrity to be the auditor of his said accounts, and directed them to allow such auditor such remuneration as aforesaid, and to submit their accounts, once in every year, to the auditor for the time being.

The Plaintiff audited the accounts for some years after the testator's death and received a salary of £50 per annum for so doing. Some differences having subsequently arisen between him and the trustees, one of them wrote to him stating that it was their intention to remove him from his office and to appoint some other person in his place. The bill was thereupon filed, praying that the trustees might be restrained from carrying their intention into effect, and that they might be decreed to lay their accounts, from time to time, before the Plaintiff, and to allow him a proper remuneration for auditing them. The trustees in their answer charged the Plaintiff with negligence and improper conduct in discharging the duties of his office.

[351] The cause now came on to be heard.

Mr. Knight, Mr. Jacob and Mr. Duckworth, for the Plaintiff, relied on *Hibbert v. Hibbert* (3 Mer. 681).

Sir William Horne, Mr. Wigram, Mr. G. Richards and Mr. Teed, for the Defendants, contended that the trustees had the same power of removing the Plaintiff as they had of discharging a steward or bailiff.

THE VICE-CHANCELLOR [Sir L. Shadwell]. There is not the slightest ground for imputing anything improper to Mr. Williams. [His Honor then read the will and codicil.] Under this codicil, Mr. Williams has as much right to be the auditor as any one of the devisees has to the real estates.

The testator, when he directed that Mr. Williams should be employed to audit the accounts of his estates and be allowed a proper remuneration for his trouble, clearly intended to confer a benefit upon him. The trustees, therefore, were not justified in attempting to remove him: but he is entitled to be continued as auditor, and to be allowed a proper remuneration, the amount of which must be fixed by the Master.

[352] BOOTH v. CRESWICKE.(1) March 3, 8, 1837.

Mortgagor and Mortgagee.

After decree in a suit by a second mortgagee, to redeem the first and foreclose the subsequent mortgagees, one of the subsequent mortgagees assigned his interest in the premises to A. A. then filed a bill against all the parties to the former suit, praying to be entitled to the benefit of that suit, and to redeem the mortgagees who were prior to himself, and to foreclose the others. The bill was dismissed as against all the Defendants except the assignor; and A. was declared to be entitled to stand in his place, and to use his name in the further prosecution of the first suit.

A bill was filed by a second mortgagee, praying to redeem the first mortgagee and to foreclose the mortgagor and subsequent mortgagees. After the decree had been made in that suit Humphrey Creswicke, one of the subsequent mortgagees, assigned his interest in the mortgaged premises to James Booth, who thereupon filed a bill against all the parties to the former suit, praying that he might be decreed to be entitled to the benefit of that suit, and to redeem such of the mortgagees as were entitled to priority over him, and to foreclose the subsequent mortgagees.

THE VICE-CHANCELLOR dismissed the second bill as against all the Defendants thereto except Humphrey Creswicke, with costs, and referred it to the Master to take an account of what was due to Booth for principal and interest on his mortgage, and to tax him his costs of the second suit, and ordered that, upon Humphrey Creswicke paying to Booth the amount of such principal, interest and costs, and also what he

should pay to the other Defendants for their costs in the second suit, within six months after the Master should have made his report, Booth should reconvey the mortgaged premises to Humphrey Creswicke; but that, in default of Creswicke paying to Booth such principal, interest and costs at the time aforesaid, he should stand foreclosed; and, in case of such foreclosure, Booth was, as against [353] Humphrey Creswicke, declared to be entitled, in right of his mortgage security, to the benefit of the decree and proceedings in the first suit, and to stand in the place and to use the name of Creswicke in the further prosecution of the proceedings in the first suit; and, in the meantime, Booth was to be at liberty to attend the taking of the accounts in that suit.

Mr. Knight, Mr. Jacob, Mr. Chandless and Mr. Cooke were counsel in the cause.

[353] SMITH v. SMITH. March 8, 1837.

[S. C. 6 L. J. Ch. (N. S.) 175. Distinguished *In re Potter's Trust*, 1869, L. R. 8 Eq. 59; *In re Hannam* [1897], 2 Ch. 43, in which case (p. 45) *Collins v. Johnson*, 8 Sim. 356, n.; 4 L. J. Ch. (N. S.) 226 is also referred to.]

Will. Construction.

Testator gave his residuary estate to trustees, in trust for his wife for life, and, after her death, to divide it amongst all his children who might be *then* living; the shares of such of them as should then have attained 21 to be paid to them within three months after his wife's death, and the shares of the others, on their attaining 21, or to the survivors of them in case of the death of any of them in his wife's lifetime and without leaving issue. Provided that if any of his children who should die in his wife's lifetime should have left issue, such issue should have their parent's share. The testator's wife survived him. One of his children who was living at the date of his will died in his lifetime leaving issue. Held, that the issue were entitled to a share of the residue.

George Smith, by his will, dated the 29th of November 1814, gave the residue of his real and personal estate to trustees, their heirs and assigns, in trust to sell his freehold, copyhold and leasehold estates, and to get in his personal estate, and to place out the monies thereby arising in the usual manner: and he directed his trustees to stand possessed of such monies and of the securities in which the same should be invested, upon trust, in the first place, to pay thereout all his just debts and testamentary expenses, and in the next place, the pecuniary legacies thereinbefore by him given, and then, with the interest and dividends of the residue, to pay an annuity of £200 thereinbefore given [354] to his wife, and, after payment and satisfaction thereof, to pay and apply the remaining interest and dividends unto and for the use of his wife during her life, and, after her decease, upon trust to pay and divide the whole of such remaining trust funds unto and amongst all and every his children *who might be then living*, share and share alike, the shares of such of them as should have then attained their respective ages of 21 years to be paid and transferred within three months after the decease of his wife, and the shares of the others or other of them to be paid and transferred on their severally attaining the said age, or unto or amongst the survivors or survivor of them, in case of the death of any of them in the lifetime of his wife and without leaving lawful issue of his or their body or bodies, except the share of Mary Ann Bain (one of his daughters), which he directed should remain funded, and the interest and dividends thereof be paid to her, for her separate use during her life, and, after her death, the principal to be divided, in like manner, amongst her children at their respective ages of 21 years; and in case there should be no such child who should live to attain such age, the share of Mary Ann Bain of and in such trust premises to be divided equally amongst such of his children as should be living at the death of Mary Ann Bain, or at the death of her issue as aforesaid, as the case might happen. Provided that in case any or either of his children *who should happen to die in the lifetime of his wife* should have left issue of his or their body or bodies,

then he declared his will to be that such issue should have and be entitled to such share or shares of and in the said trust premises, as his, her or their deceased parent or parents would have had and been entitled to under his will, if living, such share or shares to be [355] transferred to such issue at such age or time as thereinbefore declared with respect to the transfer of their parents' share.

The testator died in 1820: and his widow died in 1827. The testator had eight children living at the date of his will. Seven of them survived their mother. The other attained 21, but died in the testator's lifetime, leaving one son, William Smith.

On the hearing of a petition presented by the seven surviving children, the question was whether William Smith (who, as well as his uncles and aunts, had attained 21) was entitled to a share of the residuary fund.

Mr. Knight and Mr. Chandless, for the Petitioners, said that the issue of a child were not objects of the original gift, but were intended to take by way of substitution for their parent; and, consequently, that the issue of a child could not take, unless there was a possibility of the parent's taking: that as William Smith's father died in the testator's lifetime, he never had any possibility of taking, and, therefore, William Smith was not entitled to participate in the fund. They relied on *Thornhill v. Thornhill* (4 Madd. 377) as being precisely in point; and they cited also *Butter v. Onmaney* (4 Russ. 70), *Waugh v. Waugh* (2 Myl. & Keen, 41), and *Tytherleigh v. Harbin* (ante, vol. 6, p. 329).

Mr. Jacob and Mr. Girdlestone, for William Smith, said that *Thornhill v. Thornhill* had been overruled by [356] Sir C. C. Pepys, M.R., in the case of *Collins v. Johnson*, (1) which was not reported.

(1) The reporter has been furnished, by his friend Mr. Nicholl, with the following note of this case:—

Collins v. Johnson. Rolls. July 3, 1835.

Thomas Johnson, by his will, dated 5th January 1831, gave legacies to several of his nephews and nieces, and, amongst them, to his niece, Catherine Barratt, £100, and to his nephew, William Hughes, £250. The will contained the following clauses:—

"But in case any or either of my nephews or nieces before named should depart this life before his, her or their said legacy or legacies, sum or sums of money, shall become due and payable, without leaving issue lawfully begotten, then upon trust that my executors and the survivor of them shall divide such legacy or legacies, sum or sums of money of him, her or them so dying without issue as aforesaid, in such manner and to such person or persons as hereinafter mentioned (that is to say), upon trust to pay and divide the legacy or legacies, sum or sums of money of him, her or them so dying and leaving issue as aforesaid, unto such his, her or their issue, share and share alike (if more than one), the payment thereof to be made to such of them as shall not have attained their several ages of 21 years to be postponed until they shall respectively have attained that age, but the interest to be applied for their maintenance."

"And as to the rest, residue and remainder of the said trust monies, including any or either of the before-mentioned legacies, sum or sums of money, which may lapse by the death of any or either of my said nephews and nieces without issue as hereinbefore mentioned." [Here followed a gift over.] The will then proceeded as follows:—

"And I hereby declare, and my will is, that the whole of the property I have hereinbefore bequeathed to my wife for her life, on her decease shall be equally divided between the several persons herein mentioned to whom I have given legacies to be received by them, share and share alike, in like manner between the survivors and survivor of them at the time of such *her* decease, according to the trusts hereinbefore declared respecting the said legacies."

Catherine Barratt and William Hughes both died in the lifetime of the testator, leaving issue.

One of the questions in the suit was whether the issue of Catherine Barratt and William Hughes were entitled to be substituted for their parents in the residue given

[357] THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the decision in *Thornhill v. Thornhill* is wrong.

The testator in this case seems to me to have meant that if a child died and left issue, the issue should take, although the child could not; and my opinion [358] further is that the event that has happened is not only within the general meaning, but also within the words of the will. (See *Giles v. Giles, post*, p. 360.)

Declare that the fund is distributable in equal eighth parts amongst the seven surviving children and William Smith.

[358] GLASCOTT v. LANG.(1) March 15, 1837.

[S. C. affirmed, 3 My. & Cr. 451; 48 E. R. 1000.]

Jurisdiction. Admiralty Court. Bottomry Bond.

If a bottomry bond has been fraudulently obtained, this Court has jurisdiction to restrain proceedings on it in the Admiralty Court.

Motion by the obligor in a bottomry bond to restrain the Defendant, who was alleged to have obtained the bond by fraud, from proceeding to enforce it in the Admiralty Court.

The motion was opposed on the ground that the Admiralty Court was the proper Court for trying the question, and that the Plaintiff was attempting to supersede the jurisdiction of that Court.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he had no doubt that this Court had jurisdiction to interfere in a case of fraud to restrain proceedings on a bottomry bond; and as it appeared by the affidavits in support of the motion that there was ground for suspecting that the bond had been fraudulently obtained, he should grant the injunction on the Plaintiff paying the money secured by the bond into Court.

[359] CLAY v. PENNINGTON. March 17, 1837.

Infant. Maintenance.

An infant's share of a residue, amounting to £125, ordered to be paid to his father, on account of the expenses (which the father had been forced to borrow money to defray) of the infant's outfit and passage to India.

See a report of the hearing of this cause, *ante*, vol. 7, page 370. The cause now came on for further directions; and, at the same time, one of the parties interested

by the will, it being apprehended that, inasmuch as a life interest in the whole of the testator's property was given to his widow, no substitution could be made for the issue of any nephew or niece who might have died in the lifetime of the testator. *Thornhill v. Thornhill*, 4 Madd. 377. *Corbyn v. French*, 4 Ves. 418.

Mr. Sidebottom and Mr. Blenman, for the issue of C. Barratt and W. Hughes, cited *Bone v. Cook*, M'Clell. 168. *Howes v. Herring*, M'Clell. & You. 295.

The decree declared that according to the true construction of the will, the testator intended that William Hughes and C. Barratt, deceased, should be entitled to shares of his residuary real and personal estate, together with the other nephews and nieces named as legatees in the will. And His Honor did declare that according to the true construction of the said will the said Defendants, — Hughes and — Barratt, were entitled to be substituted for their respective parents, and to receive the respective shares of the said testator's residuary real and personal estate which their respective parents would have been entitled to if they had survived the said testator.

(1) *Ex relatione.*

in the testator's residuary estate, who was an infant, joined with his father in petitioning the Court that his share, amounting to about £125, might be paid to his father on account of the expenses (which the father had been forced to borrow money to defray) of the outfit and passage of the son to India, whither he had gone as a cadet in the Company's service.

THE VICE-CHANCELLOR [Sir L. Shadwell] made an order according to the prayer.

Mr. Knight, Mr. Turner, Mr. Girdlestone, Mr. Ellis, Mr. Teed and Mr. Torriano, were counsel in the cause.

[360] GILES v. GILES. *March 21, April 6, 1837.*

[S. C. 6 L. J. Ch. (N. S.) 176; 1 Jur. 234. See *In re Potter's Trust*, 1869, L. R. 8 Eq. 58; *In re Lucas's Will*, 1880-81, 17 Ch. D. 792.]

Will. Construction.

Testator bequeathed his residue to trustees, in trust for all his children living at the decease of his wife, as tenants in common; and if any such children should die before his wife, and should leave issue, then the children of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife; provided that until the portions thereby provided for any of the said children of his said sons or daughters who might have died before their mother, should become vested, it should be lawful for his trustees to apply the interest of the portion to which any such child might be entitled in expectancy for the maintenance of such child. The testator, at the date of his will, had four sons and one daughter, and he had another daughter who was then dead, leaving children who survived the testator. Held, that those children were entitled to a share of the residue.

George Giles, Esq., by his will, dated the 30th of January 1836, devised to his wife Charlotte Giles, his son Edward Galley Giles, and his brother Francis Giles, in fee, all his freehold and copyhold estates at Enfield, in Middlesex, in trust to sell the same with all convenient speed after his decease, and to stand possessed of the money arising from the sale, upon the trusts thereafter declared of the residue of his property: and he gave to the same three persons in fee all his freehold estates in Kent, Surrey, Sussex and Dorsetshire, in trust for his wife for life, and after her decease, in trust that Edward Galley Giles and Francis Giles should sell the same with all convenient speed; provided that all or any of his last-mentioned estates might be sold during the lifetime of his wife, with her consent; and in case all or any of them should be sold, he directed that the money arising therefrom should be invested in the Government stocks or funds in the names of his wife and of Edward Galley Giles and Francis Giles, upon trust to permit his wife to receive the dividends thereof during her life, and, after her decease, upon trust to stand possessed of the capital upon the trusts thereafter declared as to the residue of his property. And he gave to his wife the sum of £500, to be paid to her within [361] one month after his decease; and he also gave to her all his household furniture, wines, plate, linen, carriages, horses and all other his effects in and about his dwelling-house at Enfield, and all his farming stock at the same place, and also all his furniture and effects in and about his houses at Brighton and Tonbridge, and all his farming stock at his farm at Tonbridge: and he gave all the residue of his personal estate and effects to his wife and to Edward Galley Giles and Francis Giles, upon trust that they and the survivors and survivor of them, his executors, administrators and assigns, should stand possessed thereof in trust for all and every the children and child of his body living at the time of the decease of his wife, equally to be divided between or amongst such children, if more than one, share and share alike, and if any such children or child should be deceased before his wife, and such children or child should leave issue of their, his, or her body lawfully begotten, then the children or child of such his son or daughter should be entitled to the portion of such his son or daughter who might be deceased before the decease of his wife, upon their

attaining the age of 21 years : provided that, until the portions therein provided for any of the said children of his said sons or daughters who might have died before their mother, should become vested, it should be lawful for his trustees or trustee for the time being to apply the interest of the portion or portions to which any such child or children might be entitled in expectancy, for the maintenance and education of such child or children : and he declared that his trustees or trustee for the time being might advance the whole or any part of such expectant portion or portions of any such child or children, for his, her or their advancement and establishment in the world : and he empowered his trustees, during his wife's life, to lease his estates for any term [362] not exceeding seven years : and he appointed his wife and Edward Galley Giles and Francis Giles the executrix and executors of his will.

The testator died on the 1st of February 1836, leaving his wife and four sons and one daughter him surviving ; and they were the only children of the testator who were living at the date of his will. The testator, however, had had another daughter, who died on the 5th of May 1834, leaving four children surviving her, and who survived the testator also.

The bill was filed by the testator's widow against her co-trustees and co-executors, and also against the surviving children and the children of the deceased child of the testator, charging that the children of the deceased child alleged, that according to the true construction of the will, they were entitled to or interested in some share or shares of the testator's estate, but that the Plaintiff was advised that, by the terms of the will, they were excluded from any right, share or interest to or in the testator's estate. The bill prayed that the will might be established and the trusts performed, and that the rights and interests of all parties to and in the testator's estate and effects might be ascertained and declared.

Mr. Knight and Mr. Bacon, for the Plaintiff.

Mr. Wigram and Mr. Evans, for the testator's surviving children.

The testator, in this case, left several children, all of whom were living when he made his will. He had had another child, who was then dead and had left children : and the question is whether the children of the deceased child are entitled to take under the gift over in the will. [363] There are only two classes of cases in which the issue of a deceased child have been admitted to share with the surviving children of the testator : first, where there has been a bequest originally to the children and the issue concurrently : secondly, where, by the words of the bequest, the issue of such of the children as may die are substituted for their parents. *Tytherleigh v. Harbin* (ante, vol. 6, p. 329), *Smith v. Smith* (ante, p. 353), *Bone v. Cooke* (Maclel. 168 ; S. C. 13 Price, 332), *Waugh v. Waugh* (2 Myl. & Keen, 41). In every case in which the words have been similar to those in the present will, the issue have been excluded. The testator, in this case, intended to benefit such only of his children as were living at the date of his will and the issue of such of those children as might afterwards die ; and, consequently, the issue of the child that was dead at the date of the will are excluded from participating in his property ; for that child was herself incapable of taking. The cases that support distinctly the construction which we contend for are *Christopherson v. Naylor* (1 Mer. 320), *Butter v. Ommaney* (4 Russ. 70), and *Thornhill v. Thornhill* (4 Madd. 377).

Mr. Jacob and Mr. Rogers appeared for the children of the testator's deceased daughter : but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said : This case is quite different from those cases which have been very properly cited and arranged by the counsel for the surviving children. The only question is whether the special language which is found in this will does not, of necessity, compel me to hold that the [364] true meaning of the testator was to make a provision for all the issue of any children that he had had or might have, who had died or might die before the death of his wife. Now he had four sons and two daughters ; and I should observe that in all the parts of the will which precede the residuary bequest there is no mention made of any son or daughter except only one son, Edward, who was a trustee. It is necessary to advert to that circumstance in order to put an interpretation upon the other words which I shall observe upon presently. He makes the residuary bequest in the following words : " In trust for all and every the children and child of my body

living at the time of the decease of my dear wife, equally to be divided between or amongst such children (if more than one), share and share alike, as tenants in common." Now if that had stood alone no question could have arisen; but then the testator proceeds, "and if any such children or child shall be deceased before my dear wife" (which is an utter impossibility, and it shews that the testator was glancing at something which he had not expressed), "and such children or child shall leave issue of their, his or her body lawfully begotten, then the children or child of such my son or daughter shall be entitled to the portion of such my son or daughter who may be deceased before the decease of my dear wife upon their attaining the age of 21 years: provided always that, until the portions hereinbefore provided for any of the said children of my said sons or daughters" (he having but one daughter living at the time), "who may have died before their mother, shall become vested, it shall be lawful for my trustees or trustee for the time being to apply the interest and dividends of the portion or portions to which any such child or children may be entitled in expectancy for the maintenance and education of such child or children."

[365] I have looked through the will from the beginning, in order to see whether there had been any mention previously made of sons and daughters so as to account for the testator's making use of the words *such* and *said* when he here speaks of them: and I find that there is no mention made of any son or daughter except the son Edward. The consequence therefore is that no other meaning can be affixed to the words "said sons or daughters," but that meaning which is before expressed, namely, children or child; and, if that is the case, and you find that he had four sons and two daughters, and that one daughter was dead (though it is very true that these words may be taken to refer to a future daughter that might be born), yet it is obvious that the testator must have had more in his mind, the remembrance of the child that had been born and died, than the anticipation of a future child to be born and be a daughter.

The language of this will is excessively inaccurate: but it seems to me that there is no way of doing justice to the testator's intention but by saying that he has made a provision for the issue as well of the daughter who had died, as of any other son or daughter who might thereafter die.

In all cases like the present, it may be reasonably supposed that the testator intends as much to provide for his grandchildren by a deceased child as he does for his grandchildren by a child then living but which may thereafter die. And I decide this case without meaning to infringe upon the rule which is deducible from the cases that have been cited: for my opinion is that, looking at the language of this will altogether, the true construction of it is that the testator adverted [366] as much to the children of the daughter who had died as he did to the children who had survived but might die.

Declare that the children of the deceased daughter are entitled to a share of the testator's residuary estate.

[366] THE ATTORNEY-GENERAL v. LEWIN.(1) April 7, 1837.

[S. C. C. P. Coop. 51; 6 L. J. Ch. (N. S.) 204; 1 Jur. 234.]

Charity. Construction of 59 Geo. 3, c. 12.

The 59th Geo. 3, c. 12, does not extend to charity lands which are devoted to other purposes besides those to which poor's rates and church rates are applicable.

The information prayed, amongst other things, that trustees might be appointed of certain charity lands, partly freehold and partly copyhold, situate in the parish of Wickham Market in Suffolk. By the decree it was referred to the Master to inquire and certify who were the trustees in whom the charity estates were then vested; and

(1) This and some of the following cases are contained also in the reports lately published by C. P. Cooper, Esq.

it was ordered that the Master should appoint such and so many fit and proper persons as he should think proper to be the future trustees of the charity lands.

The Master found that by an ancient deed then in the possession of the vestry clerk of the parish of Wickham Market, and therein stating a grant made in the 33d year of the reign of King Henry the 6th, and by the will of Robert Christnesse of Wickham Market aforesaid, dated the 16th of September 1464, and by the will of Ann Barker, dated the 15th of August 1730, and from the court rolls of the manor of Wickham, that several pieces or parcels of land had been [367] from time to time devised, granted and bequeathed to certain persons in the said deeds, wills and grants particularly named, upon certain trusts for the reparation of the church of Wickham Market aforesaid and the relief of the poor of that parish, either in the workhouse or otherwise; for binding one poor boy apprentice in each year from the parish, for instructing the poor of the parish, and for other charitable purposes in the parish which, it was stated to the Master, were not known; and which several pieces or parcels of land then constituted the lands called the old town lands and the new town lands. And the Master further found that divers admissions of certain of the inhabitants of the parish to the said lands, or to such part thereof as was of copyhold tenure, had been from time to time had, in order, as was stated, to avoid a forfeiture thereof to the lord of the manor; and that the last of such admissions was at a court baron of the manor which was holden on or about the 6th of November 1787, when William Salmon, William Damant, Stephen Blincoe and Samuel Salmon the younger, inhabitants of Wickham Market, and the Defendants, John Paternoster, Thomas Butcher, James Churchyard, Thomas Gall and Stephen Virtue were admitted tenants to such parts of the lands as were of copyhold tenure as trustees thereof: and the Master further found that of the several trustees so admitted, four of them, namely, William Salmon, William Damant, Stephen Blincoe and Samuel Salmon the younger, were dead, and that the Defendants, Thomas Butcher, J. Churchyard, T. Gall and S. Virtue, as the survivors of such trustees, had, since their appointment as such trustees, continued to act in the trusts as to so much and such parts of the said lands as were of copyhold tenure: and that it could not then be ascertained in whom the freehold lands or the legal estate in fee [368] thereof was then vested; but that for a great many years past the said freehold lands and the rents thereof had been under the direction, controul and administration of the churchwardens for the time being of the parish of Wickham Market, and had been managed, applied and disposed of by them accordingly, subject to the superintendence, direction and approbation of the parish in vestry assembled. And the Master was of opinion that as well the freehold as the copyhold hereditaments were, under the provisions of an Act of the 59th Geo. 3d., intituled "An Act for the Relief of the Poor," then vested in the churchwardens and overseers of the parish of Wickham Market, subject, however, to the charitable uses for which the same were so devised, granted and bequeathed as aforesaid: and therefore the Master had not proceeded upon that part of the order which directed him to appoint trustees thereof. The cause now came on for further directions.

Mr. Cooper and Mr. Anderdon, for the relators. By 59 Geo. 3, c. 12, ss. 10 and 12, churchwardens and overseers are empowered to purchase lands for the building of workhouses, and for employing the poor. The 17th section, however, is more extensive. It enacts: "That all buildings, lands and hereditaments, which shall be purchased, hired or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this Act, shall be conveyed, demised or assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish." This section, so far, relates only to lands purchased or hired for the purposes mentioned in the preceding sections of the Act. It then proceeds to enact, "that such churchwardens and overseers of the poor and their [369] successors shall and may, and they are hereby empowered to accept, take and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands and hereditaments, *and also all other buildings, lands and hereditaments belonging to such parish*: and in all actions, suits, indictments and other proceedings for or in relation to any such buildings, lands or hereditaments, or the rent thereof, or for or in relation to any

other buildings, lands or hereditaments belonging to such parish, or the rent thereof, and in all actions and proceedings upon or in relation to any bond to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, indictment or other proceeding shall cease, abate or be discontinued, quashed, defeated or impeded by the death of the churchwardens and overseers named in such proceeding, or the deaths or death of any of them, or by their removal or the removal of any of them from or the expiration of their respective offices." The case of *Doe v. Hiley* (10 Barn. & Cress. 885) decides that this Act applies to lands originally vested in trustees for the benefit of a parish, and that its operation is not confined to lands, the profits of which are applicable solely to the relief of the poor, but that it embraces all property that is held for parish purposes. The Master's report is therefore right.

Sir W. Horne and Mr. Younge, for the Defendants. By the 59 Geo. 3 the churchwardens and overseers are converted into a body corporate. Now a corpora-[370]-tion cannot hold copyhold lands: the report, therefore, is clearly wrong so far as it relates to such of the lands in question as are of copyhold tenure. Some of the purposes to which the profits of the lands in question are applicable are not within any of the Acts for the relief of the poor: and, consequently, the finding of the Master is wrong with respect to the freeholds as well as the copyholds.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As far as the copyholds are concerned, I am clearly of opinion that the Legislature could not intend, by the Act that has been referred to, to vest lands of that tenure in the churchwardens and overseers of a parish.

Supposing that the Court of King's Bench was right in deciding that the Act extends to lands the profits of which are applicable to the same purposes as the church rates (a question which it is not necessary for me to decide), I am of opinion that the Act does not extend to lands, the profits of which are applicable to other purposes besides those for which the poor's rates and church rates are raised.

Declare that the estates in question are not vested in the churchwardens and overseers of the poor of Wickham Market; and refer it back to the Master to review his report.

[371] THE EARL OF MILLTOWN v. STEWART. *April 12, 1837.*

Injunction. Decree in Ireland.

In June 1827 M., an Irish nobleman, joined, as surety, in a bond given by L. to S. L. died in May 1829. In January 1832 S. brought an action on the bond, in Ireland, against M., and M. then filed a bill against S. in the Irish Court of Chancery for an injunction, on the ground that the bond was given for a gambling debt. S. appeared to the bill, and in February 1832 the injunction issued restraining execution in the action. S. did not proceed to trial, and stood out all process of contempt for want of answer. In June 1833 the bill was ordered to be taken *pro confesso* against him, unless, on being served with the decree, he should shew cause to the contrary. In October 1833 the decree was served upon him; and, two days afterwards, he died, without having shewn cause. In 1837 his representatives (who had proved his will in England only) brought an action against M. on the bond. M. then filed a bill in this country for an injunction, on the ground before mentioned. The answer stated that the Defendants believed that S. gave a fair valuable consideration for the bond, but that the Defendants were ignorant of the circumstances under which it was given and of the consideration for it; and it admitted that the Defendants had destroyed S.'s books, but denied that those books shewed how the debt arose. Held, that the decree in Ireland, though not conclusive, afforded sufficient evidence for granting the injunction in this country, especially as the Defendants were ignorant as to the consideration given for the bond, and had destroyed S.'s books.

In June 1827 H. Leeson, the Plaintiff's brother, requested the Plaintiff to join him in a bond to R. Stewart, of Chelsea, for certain sums which H. Leeson represented he had lost, to Stewart, on bets at horse-races and at games of chance, and, at the same time, assured the Plaintiff that he would never be called on to pay the amount. The Plaintiff accordingly joined with his brother in executing a bond to Stewart, conditioned for payment of £2400 and interest, on the 19th of June 1828.

Leeson died on the 29th of May 1829. The Plaintiff never heard further of the bond until September 1831, when he was applied to for payment on Stewart's be-
[372]-half, although he was convinced that Leeson had, long before, satisfied the debt. In January 1832 Stewart brought an action on the bond against the Plaintiff, in the Court of King's Bench in Ireland; and thereupon the Plaintiff filed a bill against him in the Court of Chancery in Ireland, stating to the effect aforesaid, and praying that the bond might be given up and cancelled, and for an injunction to restrain the action. On the 2d of February 1832 Stewart appeared to the bill, but he never answered it; and on the 7th of the same month the Plaintiff obtained an injunction restraining Stewart from issuing execution in the action until answer and further order; but he was to be at liberty to proceed to trial. Stewart having stood out all process of contempt, it was ordered, on the 29th of June 1833, that the bill should be taken *pro confesso* against him, and that he should bring in the bond and deposit it with the proper officer of the Court, in order that the same might be given up and cancelled, or otherwise dealt with, as the Court might think fit; and it was further ordered that the Plaintiff might make up and enroll a decree with costs against Stewart, unless, on his being served with the decree and a *subpoena* for that purpose, he should shew good cause to the contrary on some certain day in the then next Michaelmas term, to be mentioned in the *subpoena*; but, before he was to be permitted to shew such cause, he was to purge his contempt, and to pay to the Plaintiff the full costs out of pocket of obtaining the decree.

On the 17th of October 1833 Stewart was served with a copy of the decree, and with the *subpoena*; and, on the 19th, he died without having shewn cause against the decree, or proceeded to trial in the action. The [373] Defendants were his executors; and, in November 1833, they proved his will in England, but not in Ireland. In February 1837 they brought an action, in the Court of Exchequer in England, against the Plaintiff, to recover the £2400, with interest from the date of the bond. The bill in this cause was thereupon filed, and, after stating as above, it charged that Stewart never gave any good or valuable consideration for the bond: and that the Defendants had, in their possession, betting and other books, &c., belonging to their testator, from which the truth of the matters aforesaid would appear: and it prayed that the Plaintiff might have the benefit of the decree in Ireland; that the bond might be cancelled, and that the Defendants might be restrained from proceeding in their action.

The answer stated that Stewart annexed to his will a list of his property and of his demands against certain individuals, and that such list contained the bond in question, with an allegation that the Plaintiff made his brother's death an excuse for not paying the bond; that the Defendants had taken possession of Stewart's papers, and, amongst them, of the bond in question, and two copies of letters written by Stewart to the Plaintiff relative to the bond, and a copy or extract of some letter, written by Stewart to his solicitor or some third person, relative to some bill filed against him with respect to the bond, and also a document purporting to be a copy of a decree *nisi*, made by the Master of the Rolls in Ireland on the 29th of June 1833, in a cause therein stated to be depending between the Plaintiff and Stewart, together with a copy of the *subpoena* to shew cause against such decree, dated the 12th October 1833; and that such document contained statements relative to a bill filed by the Plaintiff against Stewart, which appeared to have been to [374] the effect mentioned in the bill in this suit; but the Defendants, except as therein appeared, were wholly ignorant as to the truth or falsehood of the statements contained in such documents: that, in or about February 1833, one of the Defendants heard Stewart say to several persons that the bond debt due from the Plaintiff had never been paid, and that he intended to go to Ireland to obtain justice; but that Stewart was shortly afterwards taken dangerously ill, and was not allowed by his medical attendants to attend to

business; that the Defendants believed that Stewart gave full, fair and valuable consideration for the bond, because he was frequently in the habit of lending considerable sums of money to many of his friends, and that upon such occasions he took from them bonds or other securities of a like nature; that the Defendants believed that the bond had not been satisfied, for no trace of the receipt of the money could be found in Stewart's cash-books, or in his banker's accounts: that there were among Stewart's papers at the time of his death several memorandum books, memoranda and notes relating solely to bets on horse races between him and divers individuals, and containing calculations upon horse races, and that the Defendants carefully examined such memorandum books, memoranda and notes, but the same did not in any manner shew how the debt for which the bond was given arose, or what was the consideration for the bond, or (with the exception of the fact that Stewart had betted on horse races) the truth of any of the matters mentioned in the bill: and that one of the Defendants being fully aware, as the fact was, that such memorandum books, &c., were totally useless, and related solely to claims which were irrecoverable at law, did, at sundry times in or about the year 1835, destroy the whole thereof as waste paper; that the Defendants [375] were entirely ignorant of all the facts contained in the bill, and of the circumstances under which the bond was given, and of the consideration for it, except as before mentioned, or as appeared by the before-mentioned documents, which they still had in their possession.

Mr. Knight and Mr. Purvis, for the Plaintiff, now moved for the injunction. They relied on the decree and proceedings in the suit in Ireland, and said that if Stewart had given a good, legal consideration for the bond, he would have answered the bill filed against him in that country, and would not have allowed the injunction to remain in force from February 1832 until October 1833.

Mr. Jacob and Mr. Hetherington, for the Defendants, contended that the allegations in the bill upon which the Plaintiff sought to obtain the injunction were not admitted by the answer: that the effect of a decree taken *pro confesso* in Ireland was essentially different from the effect of a similar decree in England, inasmuch as the former was conditional only in the first instance, and, unless confirmed, was inconclusive; *Reynolds v. Dillon* (1 Molloy, 55); and they cited the following passage from the judgment in *Ball v. Storie* (1 Sim. & Stu. 210): "It has been insisted that this Court ought to follow the Court of Equity in Ireland, by granting the injunction which is sought for by the Plaintiff, without entering into the merits of the case. I cannot entertain that opinion. An interlocutory order of the Court of Chancery in Ireland can only be regarded here as an authority, and not as binding upon the Court; although a final judgment of that Court, in a case in which it has concurrent jurisdiction, might be entitled to different consideration."

[376] THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not think that *Ball v. Storie* is analogous to the present case. There the Plaintiff had not fully stated the merits of his case upon his bill, but relied upon what had taken place in the Court of Chancery in Ireland.

The question here is not whether the decree and proceedings in Ireland are conclusive, but whether they must not be taken as furnishing some degree of evidence of the facts stated in the bill. And, in my opinion, the decree *nisi* in Ireland must be taken as affording some evidence on which this Court is bound to act, especially in a case where the Defendants are ignorant of the facts, and have destroyed the testator's books which might have thrown light upon the matters in question in the suit. Besides, the Defendants ought to have proved the will in Ireland, and to have proceeded on the bond in that country; instead of which they proved the will in England only, and took the opportunity, when Lord Milltown was in England, of suing him on the bond in this country.

Injunction granted.(1)

(1) Affirmed by the Lord Chancellor; see 3 Myl. & Craig, 18. [40 E. R. 830.]

[377] THE ATTORNEY-GENERAL *v.* THE SKINNERS' COMPANY. *Ex parte* WATKINS.
April 15, 1837.

[S. C. 1 C. P. Cooper 1.]

Agent. Privilege. Arrest.

A solicitor who had retired from practice was taken on an attachment for non-payment of costs in a Chancery suit, whilst returning from attending an appeal in the House of Lords, as agent for the Appellant. Held, that he was entitled to be discharged, and that the order for his discharge might be made either by the Court of Chancery or by the House of Lords.

The information had been ordered to be taken off the file, and the costs of the Attorney-General and the Defendants to be paid by the relator and his solicitor, Watkins. The relator afterwards took the benefit of the Insolvent Debtors Act; and Watkins ceased to practice as a solicitor and to take out his certificate. The costs not having been paid, an attachment for them was issued against Watkins; and he was taken upon it, within half an hour after he had left the House of Lords, and as he was quitting a public-house at the corner of a street leading out of Piccadilly, into which he had gone for the purpose of procuring a glass of beer, as he was returning to his residence at Kensington, after having attended, as agent to the Appellant, on the hearing of an appeal from the Court of Exchequer in Ireland. Watkins did not go the shortest way home (which was through St. James's Park), but went along Parliament Street, the Haymarket and Piccadilly; and he stopped to speak to several persons on his road. On being arrested, he insisted that he was privileged from arrest, on the ground that he was returning home after having attended in the House of Lords as before mentioned, and desired the officer to conduct him to the Lord Chancellor, who was then presiding in the House of Lords, in order that he might apply for his discharge: the officer, however, took him to the Fleet prison.

On the 14th of April Mr. Cooper obtained an order from the Lord Chancellor that Watkins should be dis-[378]-charged, unless the Defendants should shew good cause to the contrary.

Mr. Bethell now shewed cause, by permission, before the Vice-Chancellor.

If Watkins was privileged from arrest, a contempt has been committed, not against this Court, but against the House of Lords, and, consequently, the application for his discharge ought to have been made to that House. In *List's case* (2 V. & B. 373) Lord Eldon says: "If a person going to make an affidavit before a Master was arrested, this Court would discharge him; but a Judge would not: as the application must be to that Court of which the proceeding is a contempt." I contend, however, that as Watkins had ceased to be a solicitor, he was not entitled to the privilege; and, if he was, that he cannot claim the benefit of it; for, first, he did not go the shortest way home: secondly, he stopped to speak to several persons, and, thirdly, he went out of his way into the public-house.

Mr. Cooper, for Watkins. The party claiming to be privileged from arrest may apply for his discharge either to the Court which he has been attending, or to the Court from which the process issued. The privilege is not confined to solicitors, but extends to barristers on the Circuit, witnesses on trials, parties to arbitrations, and creditors of bankrupts. *Walker v. Webb* (3 Aust. 941), *Randall v. Gurney* (3 Barn. & Ald. 252), *Ricketts v. Gurney* (7 Pri. 699).

Parliamentary agents are not required to be, and many of them are not solicitors. The privilege is more [379] for the benefit of the party than of the solicitor or agent: and, unless it existed, justice could not be duly administered. If Parliament had been prorogued on the day after the arrest, and Watkins could not have obtained his discharge except by an order of the House of Lords, he must have remained in prison until the next session.

If the road that Watkins took was not the shortest, it was one that any person might have fairly taken: nor was there any unreasonable delay or deviation on his

part. He swears that he merely stopped to speak to one or two friends whom he met on his way home; and that, being much exhausted by his long attendance in the House of Lords, he went into the public-house, which was not more than two yards from Piccadilly, in order to procure some refreshment.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I entertain no doubt that this Court has jurisdiction to discharge Mr. Watkins; for the process on which he was arrested issued out of this Court. He might, with equal propriety, have applied for his discharge to the House of Lords; for it appears, by his affidavit (which is uncontradicted), that, when he was arrested, he had been attending the hearing of an appeal in that House as agent to the Appellant.

It was said that he had forfeited his privilege because he did not take the shortest road to his residence at Kensington, and because he stopped to speak to some of his acquaintance in the street, and deviated from his course by going into the public-house. Now, although the road that Mr. Watkins chose may not have been the shortest possible, it is one which is not unusually chosen, and which he therefore might reasonably and [380] fairly take. And I do not think that his stopping to speak to some persons of his acquaintance whom he met on his way home, or his deviating, for a yard or two, from his course, in order to procure the refreshment of which he stood in need, are sufficient grounds for depriving him of the benefit of his privilege.

Order absolute.

[380] DRYDEN v. FROST. *April 22, 1837.*

Construction of 3 & 4 W. 4, c. 94, s. 27. Depositions.

Although it is directed by 3 & 4 W. 4, c. 94, s. 27, that all depositions of witnesses examined in the Court of Chancery shall be taken in the first person, the enactment refers only to depositions taken before the Examiners.

An objection was made to the reading of depositions taken before commissioners in the country, because they were taken in the third person, and not in the first, as directed by the 3 & 4 Will. 4, chap. 94, sec. 27.

But THE VICE-CHANCELLOR [Sir L. Shadwell] overruled the objection, saying that the section alluded to referred only to depositions taken before the Examiners.

Mr. Knight and Mr. Duckworth.

Mr. Temple and Mr. J. J. Jervis.

[381] In the Matter of THE CHARITY OF W. PHILLIPOTT. And in the Matter of AN ACT PASSED IN THE 52D YEAR OF GEO. 3, c. 101. And in the Matter of AN ACT OF THE 5TH & 6TH WILL. 4, c. 76. *April 19, 1837.*

Jurisdiction. Charity.

New trustees of a charity were appointed under the Municipal Corporation Act. The trustees afterwards presented a petition under the 52 Geo. 3, c. 101, stating that it was doubtful whether the legal estate in the charity property was vested in them, and that the town council claimed certain powers adversely to the trustees; and raising several other doubtful and difficult questions relating to the charity. Held, that the Court had no jurisdiction to decide questions of such a nature upon petition.

William Phillipott, by his will, dated the 18th of March 1556, devised an almshouse, which he had erected in Newark-upon-Trent, and certain messuages, lands and other hereditaments, to the alderman and 12 assistants of that town and their successors, for the lodging and maintenance of five poor men, to be nominated by the alderman with the advice of the assistants, of 12 persons called coadjutors, of the Vicar of Newark, and of two of the commons of the town to be elected by the alderman and

assistants; and he willed that the two chamberlains of Newark should receive the rents of the estates, and apply the same in the repairing thereof, and in making the payments thereafter directed; and that they should account for the rents received by them before the alderman and his assistants, the coadjutors, the vicar and two of the commons of the town to be elected by the whole of the commoners, with the consent of the alderman and his assistants. The testator then directed the chamberlains to pay certain yearly sums to the five poor men, to the usher of the grammar school at Newark, to the alderman, vicar and two commoners, and to the auditor of their accounts, and that they should retain certain sums [382] for their own use; and, after reciting that he had given certain other lands to the alderman and his assistants and their successors, he declared that the alderman and three of the assistants, with the advice of the vicar and the two commoners elected by the commoners of the town, should yearly bestow £5 out of the rents of the last-mentioned lands in paving the town; and that the chamberlains should receive and account for the rents of those lands before the alderman, assistants, coadjutors, vicar and commoners, and that the residue of the rents should be applied towards the maintenance of the almshouse and the lands belonging thereto, and towards the fifteenths and tenths, or other like charges of the town, as the most need should require.

In 1732 an information was filed against the Corporation of Newark for the regulation of the charity; and, by the decree made in 1738, it was directed that, in future, the almsmen should be chosen by the mayor and aldermen of Newark and 12 persons paying to the church and poor, to be chosen by them instead of the 12 coadjutors, and by the vicar and two commoners, to be chosen as after mentioned; and that the 12 persons substituted for the coadjutors should remain in office during their lives, unless they should leave Newark, or be chosen aldermen or chamberlains; that the inhabitants of Newark paying to the church and poor should nominate four commoners, two of whom were to be selected by the mayor and aldermen, and were to remain in office during their lives and residence in Newark; that no leases should be granted of the charity estates without the privity and consent of the mayor and aldermen; that the £5 given by the will for paving the streets should be laid out by the surveyors of the highways of Newark in such manner and in such places [383] as should be approved of by the mayor and three senior aldermen, the vicar and the commoners. The decree then directed the chamberlains to pay, out of the rents received by them, certain sums to the almsmen, the mayor, usher, vicar and commoners, and to retain certain sums for their own use; and to pass their accounts before the mayor, aldermen, vicar, two commoners and the 12 men chosen instead of the coadjutors. The decree concluded by directing that the surplus of the rents should be annually laid out in such manner as the mayor, aldermen and two commoners should deem to be most agreeable to the intent of the founder, and for the common good of the town of Newark.

In pursuance of a local Act of Parliament, passed in the 13th Geo. 3, a town hall and certain other buildings were erected on part of the charity lands; and the Corporation of Newark had ever since occupied the town hall, but without paying any rent for it. In 1799 part of the estates was sold for redeeming the land tax, and the surplus proceeds were invested in £423 three per cents. in the name of the mayor and aldermen. In December 1836 the Petitioners, together with four other persons, were appointed trustees of the charity estates under the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

The petition, after stating as above, alleged that, by reason of the provisions of the last-mentioned Act, and of the appointment of the Petitioners and the other persons before mentioned as trustees of the charity in the place of the corporation, numerous doubts and difficulties were created as to the management of the charity estates and the administration of the funds and income of the charity according to the directions of the decree [384] of 1738; and considerable doubts existed as to the powers and duties of the Petitioners, as such trustees, with respect to such management and administration; and that, as the decree was made with reference to the corporation being the trustees of the charity, many of the directions therein contained had become inapplicable, since the charity had been placed under the administration of individual trustees; that the Petitioners were advised that they and their co-trustees ought, when

any vacancies occurred amongst the persons substituted for the coadjutors, or in the two commoners, to fill up the vacancies in the manner directed by the decree, or otherwise, that directions ought to be given for regulating the manner in which such vacancies should be filled up; that, previously to the passing of the Municipal Corporation Act, the mayor and aldermen elected, pursuant to the decree, Thomas Caparn, James Wilson, James Betts, and nine other persons, instead of the twelve coadjutors; that Wilson and Betts had since died, and no persons had been chosen in their stead: that Caparn had lately been elected an alderman of Newark, and that it was doubtful whether he had not become disqualified thereby from acting as one of the persons substituted for the coadjutors; that, prior to the passing of the last-mentioned Act, two persons named Branston and Gilstrap were chosen by the then mayor and aldermen to be the two commoners, but that they had lately been elected town councillors, and that it was doubtful whether they had not, thereby, become disqualified, according to the decree, from acting as commoners: that none of the inhabitants of Newark paid or were liable to pay church rates: that, if Caparn, Branston, and Gilstrap had become disqualified, the Petitioners and their co-trustees were entitled to choose two persons in their place, according to the directions in [385] the decree; or, otherwise, that directions ought to be given as to the mode in which those vacancies ought to be supplied: that the town council insisted that, by the operation of the Municipal Corporation Act, they were entitled immediately to elect 12 persons in the place of those who on the 1st of August 1836 were substituted for the coadjutors, and that they were also entitled to elect two commoners in the place of Branston and Gilstrap: that it was also doubtful by what persons divers other duties, by the decree directed to be performed by the mayor and aldermen, ought to be performed, and in what persons divers powers, by the decree vested in the mayor and aldermen, were then vested: that for many years there had been no chamberlain of Newark, but a person appointed by the corporation and styled chamberlain had received the rents of the charity estates: that the Petitioners conceived that the decree directed the rents to be received by the chamberlains, as being officers of the corporation, the [then] trustees of the charity; and they submitted that the corporation, having ceased to be such trustees, the chamberlain ought not to continue to receive the rents, but the Petitioners and their co-trustees ought to appoint a receiver: that, by reason of the altered state of circumstances since the decree, and of the operation of the Municipal Corporation Act, it had become necessary that some further directions should be given for the future management of the charity and the distribution of the funds thereof.

The petition prayed that the powers and duties of the Petitioners and their co-trustees might be ascertained and declared, and that all proper directions might be given for the future management of the charity and the proper distribution and application of the funds thereof; and that, if necessary, it might be referred to the Master [386] to approve of a scheme for that purpose, having regard to the decree of 1738, and to the provisions of the Municipal Corporation Act, and to the substitution of the Petitioners and their co-trustees for the corporation.

Mr. Jacob and Mr. Blunt, for the Petitioners, said that all the directions of the will and decree were founded on the assumption that the corporation were to continue trustees of the charity; and that, as 20 individuals had been appointed trustees in lieu of the corporation, those directions had become inconsistent with the actual trust; and, consequently, it had become necessary either that the powers and duties of the new trustees should be declared, or that a scheme should be framed for the application of the charity funds, in order to meet the altered circumstances of the trust: that there could be no doubt that the Court had jurisdiction to do what was asked, upon a petition presented under the 52 Geo. 3, c. 101; for the Respondents did not claim adversely to the charity, but the only question was as to the regulation of the charity and what particular persons were to perform particular duties; and that, in this case, there had been a clear breach of trust, as the corporation had been permitted to occupy the town hall without paying any rent for it. *In re Berkhamstead Free School* (2 V. & B. 134); *In re Upton Warren* (1 Myl. & Keen, 410); *Ex parte Fowlser* (1 Jac. & Walk. 70).

Sir William Horne, Mr. Knight and Mr. Bird, for the Respondents, the Town Council of Newark.

[387] In this case the corporation were trustees jointly with other persons; and, therefore, this case falls within the 73d and not the 71st section of the Municipal Corporation Act.

This Court has no jurisdiction to interfere upon a petition presented under the 52 Geo. 3, c. 101, except in plain and simple cases. *The Corporation of Ludlow v. Greenhouse* (1 Bligh, N. S. 17).

The longest information would hardly embrace the relief prayed by this petition. It states that numerous doubts and difficulties exist as to the management of the charity estates and the administration of the income, and as to the powers and duties of the new trustees; and that it was doubtful whether certain persons, who had been chosen coadjutors and commoners, had not become disqualified by being elected members of the new corporation, and that the right to elect the coadjutors and commoners was claimed by the town council adversely to the trustees. The petition also raises a question as to the right of the chamberlain to continue in receipt of the rents. That question alone puts this case out of the jurisdiction of the Court under the 52 Geo. 3. Besides, it is extremely doubtful in whom the legal estate in the charity property is now vested. The 71st section of the Municipal Corporation Act took the legal estate out of the old corporators; but it does not, expressly, vest it in the new trustees, and it is extremely doubtful whether it is vested in them or in the Crown or in the heir of the founder.⁽¹⁾ That is another ques-[388]-tion which of itself is sufficient to take this case out of the 52 Geo. 3. Besides, Caparn, Gilstrap and Branston have not been served with this petition; and, if they had been, the questions raised are much too difficult and complicated to be decided on the hearing of a petition.

[389] THE VICE-CHANCELLOR [Sir L. Shadwell] observed, in the course of the argument, that if it was admitted that A. was a trustee, and the only question was what he ought to do, then the case was within the 52 Geo. 3, c. 101: but if A. claimed to be a trustee and another person claimed an adverse power, then it was a case that must be decided by an information and not by a petition. His Honor afterwards delivered judgment as follows:—

I have not the slightest doubt that the time will arrive when the Court will do what is asked by this petition, namely, grant a reference to the Master to approve of a scheme adapted to the present condition of the charity. But the question is whether I can do so upon a petition presented under the 52d Geo. 3d, c. 101. Now it is

(1) That section enacts, “that in every borough in which the body corporate, or any one or more of the members of such body corporate, in his or their corporate capacity, now stands or stand, solely or together with any person or persons elected solely by such body corporate, or solely by any particular number, class or description of members of such body corporate, seized or possessed for any estate or interest whatsoever, of any hereditaments, or any sums of money, chattels, securities for money or any other personal estate whatsoever, in whole or in part, in trust for the benefit of any charitable uses or trusts whatsoever, all the estate, right, interest and title, and all powers of such body corporate, or of such member or members of such body corporate, in respect of the said uses and trusts, shall continue in the persons who, at the time of the passing of this Act, are such trustees as aforesaid, notwithstanding that they may have ceased to hold any office, by virtue of which, before the passing of this Act, they were such trustees, until the 1st day of August 1836, or until Parliament shall otherwise order, and shall, immediately thereupon, utterly cease and determine: Provided always that if any vacancies shall be occasioned among the charitable trustees for any borough before the said 1st day of August, it shall be lawful for the Lord High Chancellor or Lords Commissioners of the Great Seal for the time being, upon petition in a summary way, to appoint another trustee to supply such vacancy; and every person so appointed a trustee as last aforesaid shall be a trustee until the time at which the person in the room of whom he was chosen would regularly have ceased to be a trustee, and he shall then cease to be a trustee; provided also, that if Parliament shall not otherwise direct on or before the said 1st day of August 1836, the Lord High Chancellor or Lords Commissioners of the Great Seal shall make such orders as he or they shall see fit for the administration, subject to such charitable uses or trusts as aforesaid, of such trust estates.”

stated that it is exceedingly doubtful in whom the legal estate in the charity property is now vested. *Primâ facie*, one would have thought that if the Municipal Corporation Act had directed the estate of the corporation to cease and the Lord Chancellor to appoint new trustees in their stead, the necessary effect would be to leave the estate no longer in the old corporation, but to vest it in the newly-appointed trustees, although there are no express words for that purpose. But when it is said that there is a variety of opinions on the point, I can easily understand that it is an exceedingly doubtful question where the legal estate is; and it would be quite futile for the Court to direct a scheme before it has ascertained whether the legal estate is in those persons who, by the constitution of the charity, ought to have it. The Court, before it can decide that point, must have before it, not only the persons exercising the duties of trustees by way of management, but also the persons in receipt of the rents by virtue of the legal estate. But I cannot help observing that it is singular that certain [390] persons should be exercising the duties of trustees without having the power of receiving the rents.

The petition represents that an adverse claim is set up by the town council, who insist, in opposition to the trustees, that they have a right to elect twelve persons in place of the coadjutors. That is by no means a question to be decided offhand; but it is one which, if made *bonâ fide*, must be decided before the Court can direct a scheme. Questions are raised as to the rights of Caparn, Branston and Gilstrap; but those persons have not been served with this petition. Those questions must be decided before I can direct a scheme. The petition represents that it is doubtful who are the persons by whom divers duties, by the decree directed to be performed by the mayor and aldermen, ought now to be performed, and in what persons divers powers, by the decree vested in the mayor and aldermen, are now vested; and that for many years past there has been no chamberlain of Newark, but a person appointed by the corporation and styled the chamberlain has received the rents of the charity estates. The petition also represents a sort of general case that arises in respect of the non-payment of rent due for the town hall. These are questions which cannot be settled except by an information which should be filed, not only against the town council and the trustees who have been appointed by the Lord Chancellor, but also against those who are in any way supposed to have vested in them the legal estate of the charity property; and then, if any of those persons do not admit themselves to have the character of trustees, the Court may extract from them the legal estate if they have it. But I do not apprehend that I can, upon petition, direct the legal estate to be taken out of persons who claim it adversely. That is the point [391] decided in the *Ludlow Charity case*. In that case Lord Eldon and Lord Redesdale are reported to have said that the Act of the 52d Geo. 3 was meant to apply to simple cases: and I understand them to mean cases simple in respect of the parties upon whom the petition is meant to operate, as when some of several trustees have committed a breach of trust. But if an individual not a trustee has done any act for which he may be made answerable, that is a case which ought to be remedied by information and not by petition. In the same manner a case may arise of great intricacy with respect to the administration of the charity property, but not with respect to the parties to administer it: and there also the proceeding by petition would not be proper. So also, if the case were one in which adverse rights were to be decided, that would not be a simple case, and, therefore, it would not be a fit subject for a petition.

Upon the face of this petition there is much labour to shew the multitude of questions that may arise; and there is so much ground for contending that there are other persons interested in the discussion of those questions who are not parties to this petition that it appears to me that I cannot, after the decision in the *Ludlow case* exercise the jurisdiction by petition on this occasion.

Those who present petitions in difficult and complicated cases, after the opinions of Lord Eldon and Lord Redesdale upon the impropriety of petitions in such cases, are so well known to the profession, must take the consequences. I cannot, in this case, direct the costs to be paid out of the charity property; more especially as the counsel in the support of the petition have stated [392] that it is not known in whom the charity property is vested, or how it is to be got at. The petition, therefore, must be dismissed with costs to be paid by the Petitioners.

[392] In the Matter of RICHARD WILSON'S ESTATE. And in the Matter of RICHARD GATHORNE, an Infant. Nov. 23, 26, 1838.

Construction of 1st & 2d Vict. c. 69. Infant Trustees and Mortgagees.

Although the 3d sect. of 1st & 2d Vict. c. 69, provides that the 11th Geo. 4, and 1st Will. 4, c. 60, and the 4th & 5th Will. 4, c. 23, shall not be construed to extend to any case of a person dying seized of any land by way of mortgage, other than such as are in that Act expressly provided for, yet that section does not repeal any part of the two other Acts; and, therefore, the cases of a mortgagee dying leaving an infant heir, or where it is uncertain whether he left an heir, are not affected by the first-mentioned Act.

In the first case Richard Wilson, deceased, had made a mortgage in fee to one Wright, also deceased. Wilson's executors paid the mortgage money to Wright's administrator; and, as it could not be discovered whether Wright had left an heir, a petition was presented by the person entitled to the mortgaged estate under Wilson's will, praying that some person might be appointed in place of the heir to convey the estate to the Petitioner. The petition was intitled in the matter of Wilson's estate, and also in the matter of 11 Geo. 4, and 1 Will. 4, c. 60, and of 4 & 5 Will. 4, c. 23, and of 1 & 2 Vict. c. 69.

In the second case Jonathan Pool, deceased, had made a surrender in fee, by way of mortgage, of a copyhold estate to Elizabeth Gathorne, also deceased. Pool's executor paid the mortgage money to Elizabeth Gathorne's executor. Elizabeth Gathorne having died intestate as to the mortgaged estate leaving an infant heir, who was afterwards admitted tenant to the estate, a petition was presented, under the 11 Geo. 4 and [393] 1 Will. 4, c. 60, by the person entitled to the estate under Pool's will, praying that the infant heir might be ordered to surrender the estate to the Petitioner.

It will be observed that, in the first case, it was uncertain whether the mortgagee had left an heir, and that, in the second case, the heir of the mortgagee was an infant: and, as neither of those cases is expressly provided for by the first section of the 1st & 2d Vict. c. 69, and as the third section of that Act declares that the therein-recited Acts of the 11th Geo. 4 and 1st Will. 4, c. 60, and 4th & 5th Will. 4, c. 23, shall not be construed to extend to any case of a person dying seized of any land by way of mortgage, other than such as are thereinbefore expressly provided for, a doubt was raised, on the hearing of the petitions, whether the Court was not deprived of its power to relieve the Petitioners under the recited Acts.(1)

Mr. E. Montagu appeared in support of the first petition, and

Mr. Walker, in support of the second.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the 3d section of 1st & 2d Vict. c. 69, seemed to have repealed the 11th Geo. 4 and 1st Will. 4, c. 60, and 4th & 5th Will. 4, c. 23, so far as those Acts related to mortgagees and [394] their heirs; but that he did not think it was intended to have that effect; and, therefore, he would consult the Master of the Rolls upon the subject.

Nov. 26. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have consulted the Master of the Rolls relative to the construction that ought to be put upon the 3d section of the 1st & 2d Vict. c. 69, and his Lordship has informed me that that section was not intended to repeal any part of the two former Acts, but that those Acts are to be construed just as before, and that the first-mentioned Act is intended to apply to those cases only which it expressly provides for. It was never meant,

(1) It was decided, *In re Goddard*, 1 Myl. & Keen, 25; *In re Dearden*, 3 Myl. & Keen, 508; and *In re Stanley*, ante, vol. 5, p. 320, that the heirs of mortgagees were not within 11th Geo. 4 and 1 Will. 4, c. 60. But it was held, *In re Stanley*, ante, vol. 7, p. 170, and *Ex parte Whitton*, 1 Keen, 278, that they were within that Act as explained by the 4th & 5th Will. 4, c. 23, sect. 3.

therefore, that such a construction should be put upon it as would prevent the former Acts from applying to the case of an infant heir of a mortgagee.

The third section was introduced into the Act by Sir E. Sugden, in order to confine its application to those cases which are expressly mentioned in it.

The two former Acts being remedial Acts, I have always thought that it would have been better originally to have construed them liberally, rather than encumber them with explanatory and additional enactments; and, when the present difficulty was suggested to me, it appeared to me unreasonable that an Act which was meant to provide for cases which it was supposed the former Acts omitted to provide for should receive a construction narrowing instead of extending their operation. In Gathorne's case, therefore, I make the order.

[395] The case of Wilson's estate was this: it was uncertain whether the person who was the mortgagee had left an heir; and Lord Langdale thinks that though it is not within the 1st & 2d Vict. c. 69, yet it is within the 11th Geo. 4 and 1 Will. 4, c. 60; and therefore, I make the order in that case also. See the next case.

[395] *Ex parte FOLEY.* Nov. 29, 1838.

11th Geo. 4 and 1 W. 4, c. 60. *Trustee.*

Where a person has been ordered, under 11th Geo. 4 and 1st W. 4, c. 60, s. 8, to convey trust property in the place of a refusing trustee, it is not necessary that he should execute a new deed reciting the order, but he may execute the deed tendered to the trustee, and it should be expressed in the attestation clause, that he has executed it in the place of the trustee, in pursuance of the order.

All the trustees of a settlement, except one, being dead, a deed for appointing new trustees and conveying the trust property to them was executed by the party empowered to appoint the new trustees; but the surviving trustee, on the deed being tendered to him, refused to execute it. A petition was thereupon presented under the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, praying that a person named in the petition might be appointed in the place of the surviving trustee, to convey the trust property to the new trustees.

Mr. Lefroy, who appeared in support of the petition, said that a doubt was entertained as to whether the person to be appointed to convey the property, ought for that purpose to execute the deed that had been tendered to the surviving trustee, or whether he ought to execute a new deed, reciting the order made on the petition and indorsed on the tendered deed.

THE VICE-CHANCELLOR said that all that was necessary was that the person appointed to convey the property [396] should execute the tendered deed, and that it should be expressed in the attestation clause, that he had executed it in the place of the refusing trustee, in pursuance of the order made on the petition.

[396] *NAYLOR v. WELLINGTON.* April 20, 1837.

Injunction. Affidavits.

A special injunction had been obtained against four Defendants, who were co-partners, to restrain them from doing an act jointly. Three of the Defendants had answered, but the fourth had not. Held, that the Plaintiff might read affidavits in opposition to a motion by the three to dissolve the injunction against the four.

There were four Defendants in this case, who were co-partners as manufacturers of steel. The Plaintiff had obtained an injunction to restrain them from stamping certain marks and names on the steel manufactured by them. Three of the Defendants had answered the bill, but the fourth had not. The three Defendants that had answered now moved to dissolve the injunction as against the four.

Mr. Jacob, in support of the motion.

Mr. Knight, for the Plaintiff, contended that he was entitled to read the affidavits in opposition to the motion; as the Defendants were co-partners and the injunction restrained them from doing an act jointly. He cited *Kershaw v. Mathews* (1 Russ. 361), where Lord Eldon, C., said: "It is enough to say that Briggs has not answered; and the answer of one Defendant must, on the argument of a motion like this, be regarded merely as an affidavit, when there is another material Defendant who has not answered."

Mr. Jacob said that the distinction between that case and the present was obvious; for there the Plaintiff [397] was moving against the Defendant who had not answered as well as against the Defendant who had answered, and, therefore, the former was before the Court and was a party to the motion, and consequently it was clear that the affidavit might be read against him; but in this case, the motion was made by the three Defendants who had answered; and the fourth, who had not answered, was not a party to it.

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that the Plaintiff was entitled to read the affidavits as against a motion to dissolve the joint injunction.

[397] SUSANNAH JONES v. ROBERTS. April 28, 1837.

[Followed, *Toghill v. Grant*, 1840, 2 Beav. 262; 48 E. R. 1181. See *Cardale v. Bull*, 1843, 4 Q. B. 613; *Reid v. Burrows* [1892], 2 Ch. 415.]

Solicitor. Agent. Taxation.

This Court has jurisdiction to order an agent's bill to be taxed, on the application of the solicitor who employed him, on the latter paying the amount of the bill into Court.

In 1835, Edwards Jones, the Plaintiff's solicitor, employed Messrs. H. Jones & J. Fay of Ruthin, in Denbighshire, solicitors, as his country agents in this cause. In the course of the cause, Jones & Fay received from the Defendants £250 on E. Jones's account, and out of that sum they retained £70 on account of their bill of costs for business in the cause done for E. Jones. On the 3d of January 1837 Jones & Fay delivered their bill to E. Jones; and on the 30th of that month he obtained an order *in the cause*, that it might be referred to the Master, *on receiving proof of payment or tender* by him to Jones & Fay of £73, 4s. 8d., the amount of their bill, to tax the same *as between solicitor and client*. This order was made on an *ex parte* motion, supported by an affidavit stating as above, and adding that E. Jones was ready to pay to Jones & Fay the remaining £3, 4s. 8d of their bill.

[398] Jones & Fay now moved to discharge that order.

Mr. Jacob, for Jones & Fay. The order is irregular on four grounds: first, it was obtained, not by the Plaintiff, but by her solicitor; secondly, it is an order for the taxation of an agent's bill; thirdly, it ought to have been made, if at all, on special motion and on payment of the money into Court; fourthly, it is an order for the taxation of an agent's bill, as between solicitor and client.

The first statute relating to the taxation of solicitors' bills is 2 Geo. 2, c. 23. Subsequently to that another statute (12 Geo. 2, c. 13) was passed, which enacts that the former statute "shall not extend to any bill of fees, charges and disbursements that are now or shall hereafter become due from any attorney or solicitor to any other attorney, or solicitor or clerk in Court, but that every such attorney solicitor or clerk in Court may use such remedies for the recovery of his fees, charges and disbursements against such other attorney or solicitor, as he might have done before the making of the said Act." In the earliest cases, it was laid down that an agent's bill could not be taxed: afterwards, however, it was decided that the Courts might, under their general jurisdiction over solicitors and attornies, order an agent's bill to be taxed, but not without payment of the amount of the bill into Court. The tendency of the late cases has been to narrow the limits within which the jurisdiction of the Courts over solicitors and attornies is to be exercised with respect to money

matters; and it is now held that an agent's bill cannot be taxed. In *Lees v. Nuttall* (2 Myl. & Keen, 284) the point was raised, but as the order was [399] discharged, it was not necessary to decide it; besides, in that case, the solicitor was the Defendant in the cause. The question came distinctly before the Court of Common Pleas, in *Weymouth v. Knipe* (3 Bing. New Cases, 387); and the Judges of that Court were of opinion that the only authority possessed by them for ordering the taxation of an attorney's bill was conferred by statute; and that, as the 6th section of 12 Geo. 2, c. 13, had expressly exempted agents' bills from the operation of the former statute of 2 Geo. 2, c. 23, s. 23, they had no power to refer those bills to the prothonotary for taxation.

Under the order now sought to be discharged, the Master has no power to commence the taxation until he has received proof of payment or tender of the £3, 4s. 8d.; but he is to receive that proof in the absence of the other party, and then he is to issue his warrant. The order is so plainly erroneous in this respect that, if this were the only objection to it, it ought to be discharged.

Mr. Knight and Mr. Ayrton, in support of the order. The mere circumstance that the order was not properly obtained *ex parte* will not induce the Court to discharge it. *Howell v. Edmunds* (4 Russ. 67).

This Court has been long in the habit of exercising a jurisdiction with respect to the taxation of bills of costs, independent of the statute; and it has never hesitated to exercise that jurisdiction in a case between solicitor and agent relating to business done in this Court. Notwithstanding what is said in *Weymouth v. Knipe*, this Court does exercise a power not given by the sta-[400]tute. *Ostle v. Christian* (1 Turn. & Russ. 324), *Corner v. Hake* (2 Cox, 173). The retainer, by the agent, of £70, on account of his bill, brings this case within the principle of *In re Barker* (*ante*, vol. 6, p. 476). The bill is a regular bill in the cause, and it is headed as such; and, if it cannot be taxed, then Edward Jones will be liable to have his bill of costs taxed by his client, and will have to pay to his agents the full amount of their bill.

THE VICE-CHANCELLOR [Sir L. Shadwell]. For a series of years it has been the established practice of this Court to direct the taxation of an agent's bill, on the application of the solicitor who employed him. That practice was recognised as established by Lord Thurlow in the case of *Corner v. Hake* in 1789; and it is plain, from the mode in which Lord Eldon treats the subject in *Ostle v. Christian*, that, in his opinion, it was the undoubted practice of this Court to direct the taxation of an agent's bill. If then I find that this practice has prevailed in this Court for a long series of years, it appears to me that I am bound to adopt and follow it, notwithstanding the opinion expressed by the Judges of the Court of Common Pleas in *Weymouth v. Knipe*.

The only question then is whether the order sought to be discharged is wrong on the face of it, inasmuch as it leaves the Master at liberty to receive proof of the payment or tender of the £3, 4s. 8d., in the absence of the party whose bill was to be the subject of the taxation. Now I cannot but think that the order is erroneous in this respect; and, consequently, it must be discharged with costs.

[401] Edward Jones afterwards presented a petition, which was intitled in the cause and also in the matter of Messrs. Jones & Fay; and, after stating, amongst other things, that, on the 28th of April last, the Petitioner tendered the £3, 4s. 8d. to the town agent of Jones & Fay for their use, it prayed that such tender might, under the circumstances stated in the petition, be deemed to be a good and sufficient equitable tender to Jones & Fay; or, in case the Court should judge otherwise, then that, on the Petitioner bringing the £3, 4s. 8d. into Court, it might be referred to the Master to tax Jones & Fay's bill.

Mr. Knight and Mr. Ayrton, for the Petitioner, relied on *Binsted v. Barefoot* (1 Dick, 112; see Beam. Costs, 306, 307), in which an order was made by the M.R., on the 6th of December 1745, for the taxation of an agent's bill; and on the 17th of July 1746 Lord Hardwicke, C., refused to discharge the order. They cited also *Corner v. Hake*, *Ostle v. Christian*, *Lees v. Nuttall*, and *In re Barker*.

Mr. Jacob and Mr. Edwards, for Jones & Fay, said that the report of *Corner v. Hake* was erroneous (see Beam. Costs, 308), and that Dickens's report of *Binsted v. Barefoot* and the entry of that case in Reg. Lib. were at variance with each other;

that *Ostle v. Christian* and *Lees v. Nuttall* were distinct authorities that an order for taxing an agent's bill could not be obtained without bringing the amount of the bill into Court; but that, in *Paget v. Nicholson* (Beam. Costs, 361) and *Binsted v. Barefoot*, the amount of the bill was not directed to be paid into Court. They cited also *Willbore v. Bryan* (8 Pri. 677) and *Weymouth v. Knipe*.

[402] THE VICE-CHANCELLOR [Sir L. Shadwell]. If I find, from a series of orders and from the opinions expressed by Judges in this Court, that it is the practice of the Court to interfere in cases like the present, my opinion is that I am bound by what has taken place here; and that it is of little importance to inquire how the jurisdiction was first assumed.

Now we have, first, the order made by the Master of the Rolls in 1745; and then, in 1746, an attempt was made before Lord Hardwicke to discharge that order, but the attempt did not succeed. That, therefore, was a recognition by Lord Hardwicke that the order at the Rolls was right. Then, setting aside the case before Lord Thurlow, which seems to be incorrectly reported, we find Lord Eldon stating, in *Ostle v. Christian*, that a solicitor cannot obtain the taxation of his agent's bill without bringing the amount into Court. It would have been quite frivolous for that great Judge so to state, if his opinion had been that the bill could not be taxed, whether the money was brought into Court or not. We are, therefore, warranted in concluding that it was his Lordship's opinion, in the abstract, that the Court had jurisdiction, on the application of a solicitor, to tax his agent's bill. Then, in *Lees v. Nuttall*, the latter part of the judgment of the present Lord Chancellor, when Master of the Rolls, necessarily shews that it was his Lordship's opinion that this Court had jurisdiction to direct an agent's bill to be taxed on the application of the solicitor, provided the amount of the bill was brought into Court; and his Lordship discharged the order in that case, not on the ground that the Court had no jurisdiction, but on the special circumstances and merits of the case. That opinion, unquestionably, binds me.

[403] I can easily understand that this Court might have assumed a larger jurisdiction than the Courts of Common Law; as it has often taken the lead and suggested to the Legislature what ought to be done. As, for instance, in cases of set-off and of landlords taking advantage of breaches of covenants for payment of rent, this Court did interfere long before there was any statutory interference. It is reasonable, therefore, to suppose that, before either of the statutes of Geo. 2 were passed, this Court had the jurisdiction which it is now called upon to exercise; and there is nothing in either of those statutes to take away that jurisdiction. When the Court says that the taxation is to take place on the amount of the bill being brought into Court, it is taking a course which is quite independent of either of the statutes.

I am of opinion, therefore, that the jurisdiction does exist; and, consequently, on payment or tender to Mr. Williams, the town agent of Messrs. Jones & Fay, of the amount of the bill remaining unpaid (such payment or tender to be verified by affidavit), let the bill be taxed, and reserve costs.

[404] CHILLINGWORTH v. CHILLINGWORTH. May 3, 1837.

Annuity. Usury.

A. applied to B. to lend him £400 on mortgage of certain leasehold houses; but B. refused. It was then agreed that A., in consideration of the £400, should grant to B. two annuities of £21 each for 40 years, to be issuing out of the houses. Held, that the transaction was usurious.

By an indenture of the 27th of February 1802, a piece of ground at Newington in Surrey, with the messuage erected thereon by William Chillingworth, were demised to him for 61 years, from Christmas Day 1801, at the rent of £12; and, by another indenture of the 7th of August 1802, another piece of ground at the same place, together with the two messuages covenanted to be erected thereon by Chillingworth, were demised to him for the same term, at the rent of £11, 8s.

By an indenture of the 8th of February 1812, after reciting the two former indentures, and that Robert Fisher, since deceased, had agreed with Chillingworth for the purchase of an annual rent-charge of £21, for 40 years from the 25th of December then last, to be secured upon and issuing out of the piece of ground demised by the first indenture and the messuages and buildings thereon erected, and also for the purchase of a like rent-charge of £21 for the same term, to be secured upon and issuing out of the piece of ground demised by the second indenture, and the messuages or tenements, erections and buildings since erected thereon; and that the said respective annuities should be so granted at the price or sum of £400; Chillingworth, in consideration of the £400 paid to him by Fisher, granted to Fisher, his executors, &c., for the term of 40 years, to be computed from the 25th of December then last, two several annual rent-charges or yearly sums of £21 each, to be issuing and payable out [405] of, and charged and chargeable upon the several and respective pieces of ground, messuages and premises demised by the indentures of lease respectively, that is to say, the first-mentioned rent-charge of £21 to be issuing out of and charged upon the premises comprised in the first-mentioned indenture of lease, and the second rent-charge of £21 to be issuing out of and charged upon the premises comprised in the secondly-mentioned indenture of lease; to hold the annuities from the 25th day of December then last for the term of 40 years, the first payment thereof to be made on the 25th of March then next; and Chillingworth thereby covenanted for payment of the annuities, and demised the leasehold premises to a trustee for 40 years and a half from the 25th of December then last, upon certain trusts for further securing the annuities.

Chillingworth died in 1820. The annuities were paid during his lifetime; and, after his death, his widow and executrix continued to pay them until the 29th of September 1821.

The present suit was instituted for the administration of Chillingworth's estate; and the usual decree in such a case having been made, the Master, after reporting as above, found, by the affidavit of the grantor's son, that he was present at an interview, which took place in or a little prior to February 1812, between the grantor and Fisher, and that the grantor then applied to Fisher to lend him £400, by way of mortgage upon some leasehold property of the grantor, which Fisher declined to do, and that, thereupon, the grantor asked Fisher if he would lend the £400 by way of annuity, to which Fisher replied that he had no objection to lend the £400 at an interest of 10 guineas per cent. per annum; that it [406] was then agreed that Mr. Lilley, a solicitor, who was concerned for Fisher, should draw up the necessary securities; that the deponent was afterwards informed by Fisher that Lilley had advised Fisher that, inasmuch as the annuity might be paid off on notice, it would be better to do it by way of rent-charge for 40 years at 40 guineas per annum; that this plan was acceded to by the grantor, and it was agreed that he should secure to Fisher the interest of 10 guineas per cent. per annum on the £400 to be so advanced and lent by Fisher, upon the leasehold premises at Newington, and that the necessary deeds should be prepared by Lilley, and that thereupon the deed of the 8th of February 1812 was prepared and executed. The Master further found that the deponent positively stated that the transaction was, *bonâ fide*, a loan of money, the repayment of which was to be secured by a charge of 10 guineas per cent. per annum for 40 years.

The Master then found, by the affidavit of Lilley, that Lilley had read the former affidavit, and that, from the length of time which had elapsed since the transactions therein mentioned took place, he had no recollection of the circumstances, or of any communication made to him by Fisher, as to advancing any money to the grantor by way of mortgage at five per cent. per annum, or on annuity at £10, 10s. per cent. per annum, or relating to the purchase made by Fisher of two rent-charges of £21 each for 40 years, except as in the deed of the 8th of February 1812 mentioned: that Lilley had perused the draft of the deed, and also the deed itself by which the rent-charges were made payable, and that neither the draft nor the deed shewed any alteration, so as to induce the belief that any other contract had been originally entered into between the grantor and Fisher, than [407] that which afterwards took effect on the execution of the deed; that Lilley further stated that the deed did not

contain or imply any contract between the parties, that the same was a loan of money at £10, 10s. per cent. per annum, so that the principal money then advanced should be, either directly or indirectly, repaid; and that, although the annual payment to be made to Fisher was at the rate of £10, 10s. per cent. per annum, yet the principal money advanced was not to be returned, but the transaction was intended to be a *bond fide* purchase of the two rent-charges of £21, and £21 for 40 years, as therein mentioned, and was so understood, as he believed, both by Fisher and by the grantor.

The Master ultimately found that £588 were due to Fisher's executors, for 56 quarterly payments of the two annuities, from the 24th of June 1821 to the 24th of June 1835.

The Plaintiff excepted to the report, insisting that the Master ought to have found that nothing was due in respect of either of the rent-charges.

Mr. Knight, Mr. Moore and Mr. Girdlestone, in support of the exception.

The question is whether the transaction between Chillingworth, the father, and Fisher was not usurious. The price paid by Chillingworth was £400; and he purchased for it a sum certain of £1680: but that sum was thrown over a space of 40 years, at the rate of £42 a year. There was no risk or contingency in the transaction. In *Doe v. Gooch* (3 Barn. & Ald. 664) Bayley, J., is reported to have [408] said: "In that case the principal is in hazard from the uncertain duration of life. Here it is in the nature of an annuity for years; and there is no case in which such an annuity has been held not to be usurious, where, on calculation, it appeared that more than the principal, together with legal interest, is to be received."

In the affidavit made by Chillingworth, the son, there is a positive statement that the original negotiation was for a loan of £400, to be secured by way of mortgage on the property out of which the annuity was afterwards granted. *Fereday v. Wightwick* (1 Russ. & Myl. 45).

Mr. Campbell, in support of the report. The transaction in question is perfectly unimpeachable. The deed of February 1812 recites that Fisher had contracted with Chillingworth, the father, for the purchase of a rent-charge of £21 for forty years, to be secured upon and issuing out of the premises demised by the first indenture of lease, and also for the purchase of a like rent-charge of £21 for a like term of 40 years, to be secured upon and issuing out of the premises demised by the second indenture of lease, and that those annuities should be granted at the price of £400; and then Chillingworth grants the two annuities to Fisher, to be issuing out of the leasehold premises; and the only covenant is the usual covenant to pay the annuities.

The statute against usury has no bearing on the present case. The language of that statute shews that it does not apply to a case where there is no loan, and money is not forborne. How can money be forborne where it is not [409] to be returned at all? Where the negotiation is for the purchase of an annuity, the getting a good bargain does not make the transaction usurious; and all that can be said with respect to this transaction is that it is a good bargain. The annuities are charged on three houses of no great value; and the security is wearing out. The principal therefore is put in hazard.

The proposition laid down by Bayley, J., in *Doe v. Gooch*, is opposed both by earlier and later authorities. In *Symonds v. Cockerill* (Noy. 153) a rent-charge of £20 a year for eight years was granted for £100; and the reporter adds this note: "And this difference was agreed by the Court. If the original contract was to have a rent-charge, as in our case, that is not usury but a good bargain and pennyworth." The next authority is *Tanfield v. Finch* (Cro. Eliz. 27). There £566 were given for an annuity of £120 for 23 years; and, afterwards, the grantor, for the assurance of the annuity, infeoffed the grantee of land worth £100 a year, upon condition that, if the money were not paid, it should be to the use of the grantee in fee. And all the Judges held that it was no usury, for the mortgage was only for the assurance of the annuity. And, at the end of the case, there is the following note: "In *Doctor Goad's case*, Trin. 19 Eliz. in the Exchequer, in an information for usury, Popham and Plowden held that, if a man giveth £100 for an annuity of £20 per annum, this is not usury; for he shall never have his stock of £100 again." In *Fuller's case* (4 Leon. 208) it was held that if one give £300 to another, to have an annuity of £50 assured to him for 100 years, if he, his wife and four of his children so long shall live, this

is not within the Statute of Usury. The next case is *The* [410] *King v. Drury* (2 Levinz. 7). There A. having a lease of a house for 40 years agreed to assign it to B. for £300; but B. not having the money, C. paid it and took the assignment to himself, and then let the house to B. at a rent of £30 per annum; and C. covenanted that if, at the end of four years, B. paid the £300, then the rent should cease, and he would convey the residue of the term to B. And Lord Chief Justice Hale held that it was not usury; for B. was not obliged to pay the £300 to C., but it was at his election to pay it if he would, and determine the rent by that means and have the term. So that it was no more, in effect, than a bargain for an annuity of £30 for 39 $\frac{3}{4}$ years, for £300, to be secured in the manner stated, determinable sooner if the grantor pleased. But the grantee had no remedy for his £300, and could not recover it, unless the grantor thought fit to pay it back at the end of four years. The last case is a recent one: *Ferguson v. Sprang* (3 Nev. & Man. 665; S. C. 1 Adol. & Ell. 576). There A., in consideration of £200, granted to B. an annuity or rent-charge of £20 for 60 years, charged upon certain messuages; and the transaction was not held to be usurious.

The case *Doe v. Gooch* is different in its circumstances from the present. The instruments by which the transaction was carried into effect were a disguise in order to hide the real object of the parties, which was a loan: and, besides, there was a clause of repurchase: and Lord Tenterden, C.J., in his judgment, uses the following words: "Under the terms of the agreement, I thought that Hammond would, necessarily, be compelled to repurchase." Consequently the annuity was [411] given for money forborne, and the transaction was, therefore, usurious. In *Fereday v. Wightwick* £4000 were paid for an annuity of £664, 18s. for 11 $\frac{1}{2}$ years; and promissory notes were given for securing the half-yearly payments of the annuity; and it appeared that those payments would amount to £4000 with interest at nearly £12 per cent. per annum. The judgment of Sir J. Leach, M.R., is very short; and, in the commencement of it, His Honor expresses his intention to disregard the old cases that had been cited. That case has not been followed. The only case that has since occurred is *Ferguson v. Sprang*. I have, therefore, in my favour all the old cases and also the latest case, which re-establishes the authority of the old cases against the decision of Sir J. Leach.

W. Chillingworth, the father, died in 1820. He paid the annuities during his life; and, after his death, his widow and executrix continued to pay them. From 1812 until 1835 (when the bill in this suit was filed) no attempt was made to impeach the transaction; and now it is attempted to be impeached on the recollection of Chillingworth, the son, of a conversation which, he says, he was present at between his father and the grantee in or before February 1812. It appears, however, from Lilley's affidavit, that the transaction was, in reality, such as it appears on the face of the deed; and, that being so, it is wholly unimpeachable. At all events, this Court will not annul a contract under seal upon loose evidence of a conversation that took place 25 years ago.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In the case of *Ferguson v. Sprang*, which came before the Court of K.B. on demurrer, Lord Denman, C.J., says, [412] "The question in this case is whether it ought not to have been pleaded that this was a usurious contract. To that point the judgment of Leach, M.R., in *Fereday v. Wightwick*, is no authority. The Master of the Rolls may have acted in the capacity of a Court and of a jury also. If the nature of the transaction is equivocal, we cannot, sitting as a Court of law, determine that the transaction is usurious. It appears to me that this deed is not, on the face of it, necessarily void. Whether or not it is a cloak for usury depends upon whether the money to be paid will exceed £5 per cent. upon the sum advanced; and it is too much for the Court to take upon itself that inquiry, and to say that the transaction is, at all events, usurious." And Mr. Justice Taunton says: "It is difficult for us to say by how much this reservation of £20 a year for 60 years will exceed the amount of the principal and interest at £5 per cent. We cannot compute it. It is too difficult a question for the Court to take judicial notice of. If this was a question whether ten was more than five, or that two and two made four, the Court would take judicial notice of it. Here the question depends on a difficult calculation, and ought therefore to be inquired into by a jury." No

rule, however, is laid down by which one is to determine whether a proposition in arithmetic is difficult or not; and, in my opinion, it is not necessary to ascertain by how much the payments of an annuity for any given number of years will exceed the principal money paid with interest on it at five per cent., if we see that it will exceed it. In this case it is sufficiently clear that there would be a considerable excess; for the principal sum of £400 with interest at five per cent. for 40 years would amount to £1200 only; and 40 guineas a year for the same time would amount to £1680.

[413] What the Lord Chief Justice says in *Ferguson v. Sprang* contains the pith of the case, namely, that the Master of the Rolls sat as a jury as well as a Judge, as I do.

Chillingworth, the son, in his affidavit, swears that the original application was for a loan, and that it was an afterthought to turn it into an annuity; and Lilley does not contradict what Chillingworth speaks of. He says only that he has no recollection of the circumstances of the transaction; therefore, I must take what Chillingworth says to be true; and, consequently, I shall allow the exception.

[413] TAYLOR v. THE ATTORNEY-GENERAL. May 5, 1837.

Construction. Crown Grant. Petition of Right.

A lease granted by the Crown of all mines in the province of Nova Scotia, held to include mines in the island of Cape Breton.

Course of proceeding by a subject to enforce a claim to property as against the Crown.

The island of Cape Breton is separated from Nova Scotia by a strait which, at one part of it, is not more than a league broad; and, prior to 1784, they formed one colony. But in that year the island was, for the purposes of Government, separated from the mainland; and that separation continued until 1820. In 1788 His late Majesty King George the Third intended to make a grant or lease of mines in Nova Scotia to the late Duke of York; but His Majesty did not carry his intention into effect. In 1820 it was deemed expedient to re-annex Cape Breton to Nova Scotia; and, in August of that year, the Secretary of State for the Colonies sent the following despatch to the Lieutenant-Governor of Nova Scotia and its dependencies:—"Sir,—I had the honour of intimating to you, previous to your departure from this country, the decision to which His Majesty [414] had come of re-annexing the island of Cape Breton to Nova Scotia; and you must have observed the alterations which had, in consequence, been made in your commission and instructions. His Majesty considers it most desirable that this arrangement should be no longer delayed, and has commanded me to instruct you to take into your immediate consideration the measures which may be necessary to give effect to His Majesty's instructions. For this purpose it will be necessary that you should, in the first place, direct the issue of writs for the election of two members from the county of Cape Breton to sit in the Legislative Assembly of Nova Scotia; and in this you will follow the course adopted in

(1) where two members were actually so returned. Upon this you will dissolve the Council at Cape Breton, appointing, however, to seats in the Council of Nova Scotia, any one or more members whose knowledge of the local interests, or whose merits in other respects entitle them to that distinction. The object being to make the island, *in every respect, an integral part of Nova Scotia*, it will be for you to consider of the measures which it will be necessary for the Legislature of Nova Scotia to adopt, in order to give effect to this intention. You will at once see the necessity of either applying to Cape Breton the laws actually applicable to other parts of Nova Scotia, or of giving, by some legislative Act, legal validity, for the future, to the several ordinances passed since by the Governor and Council of Cape Breton, and under which that colony has hitherto been administered. It will be for the Legislature to decide upon which of these two courses it may be most expedient to adopt; but I cannot withhold my opinion that it will be far more advisable to follow that

(1) A blank was left here.

which would place the whole of the province under one [415] and the same system of law. With respect to the administration of justice, it will only be necessary to provide that the Judges of Nova Scotia should extend their regular circuits to Cape Breton, in order to secure, to the inhabitants, every facility which they have any title to expect."

In October 1820 the lieutenant-governor, in compliance with these instructions, issued a proclamation, which was partly as follows:—"Whereas His Majesty, with a view to promote the welfare and mutual interests of his faithful and loyal subjects of Nova Scotia and Cape Breton, hath been graciously pleased to direct that the island of Cape Breton should be re-annexed to the Government of Nova Scotia, and the same island should from henceforth be and remain *an integral part of the Government of Nova Scotia*; I do, therefore, in pursuance of His Majesty's instructions, and by and with the advice of His Majesty's Council, declare that the island of Cape Breton is, and from henceforth shall be and remain, a several and distinct county of the province of Nova Scotia, to be called and known by the name of the county of Cape Breton, and to be represented, and the civil Government thereof to be administered in like manner as the other counties in the province are administered and governed."

In December 1820 an Act of the Assembly of Nova Scotia was passed, extending the laws and ordinances of that country to Cape Breton.

On the death of King George the Third, the Duke of York applied to His late Majesty King George the Fourth to grant him a lease of mines in Nova Scotia; and, in reference to that application, the Lords of the Treasury made the following minute, dated the 29th [416] March 1825:—"Various applications have been made to their Lordships since the termination of the war in 1815, for grants of mines in Nova Scotia, New Brunswick and Cape Breton, and, amongst others, an application from Mr. Adam, on behalf of His Royal Highness the Duke of York, in the year 1815, *founded upon an intention of His Majesty's Government in the year 1788, to recommend to His late Majesty to make a grant to His Royal Highness of mines in Nova Scotia*, but which was never perfected. In consequence of these applications, the attention of their Lordships has been directed to this subject, with a view of considering in what mode such mines, if any shall exist, may be rendered most productive in aid of those services to which resources of this description have, by law or usage, been rendered applicable. In the result of the inquiries which their Lordships have directed to be made upon this subject, it appears to be clearly established, not only by original communications addressed to His Royal Highness the Duke of York in the year 1788, which have been laid before their Lordships, but also by the draft (1) of an intended grant of mines in Nova Scotia, which was submitted for the approval of His late Majesty's Attorney-General in the year 1792, and which has been found deposited in the Patent Office, that it was His late Majesty's gracious intention, at that period, that a grant should be made of certain mines in the province of Nova Scotia to His Royal Highness for his life, and for 21 years after his decease, under certain reservations and limitations specified in the said draft. The Chancellor of the Exchequer states to the Board that he has communicated with Sir Charles Long (who was one of the secretaries of the Treasury at the time when the said [417] draft of the intended grant to His Royal Highness the Duke of York appears to have been under the consideration of His late Majesty's then Attorney-General), and that Sir Charles has a distinct and perfect recollection that such a grant was then intended to be made to His Royal Highness. Under these circumstances, my Lords are of opinion that His late Majesty's gracious intentions in regard to the grant of mines in the province of Nova Scotia in favour of His Royal Highness the Duke of York, must be considered as clearly established; and the Chancellor of the Exchequer having represented to the Board that His Royal Highness has lately applied to the Earl of Liverpool, Earl Bathurst and himself for the fulfilment of His late Majesty's gracious intentions in His Royal Highness's favour, my Lords request that the Earl of Liverpool and himself will submit to His Majesty their humble recommendation that His late Majesty's gracious intentions may now be carried into effect, with such reservations as to rent

(1) This draft was not produced.

or produce as may be usual in leases of mines or minerals similarly circumstanced in any of His Majesty's colonies abroad."

On the 3d of May 1825 a further minute was made by the Lords of the Treasury, which was partly as follows:—"My Lords advert to their minute of the 29th of March last, wherein they requested the Earl of Liverpool and the Chancellor of the Exchequer to submit to His Majesty their humble recommendation that His late Majesty's gracious intentions that a grant should be made to His Royal Highness the Duke of York, of certain mines in the province of Nova Scotia, should be carried into effect, with such reservations as to rent or produce as may be usual in leases of mines or minerals similarly circumstanced in any of His Majesty's colonies abroad. The Chancellor of the Exchequer states to the [418] board that their humble recommendation having been laid before His Majesty, His Majesty has been graciously pleased to signify his approbation of such grant, and that the Chancellor of the Exchequer has had communication with Earl Bathurst on the subject of this grant, the purport and result of which he stated to the board. My Lords having taken into their consideration (with reference to the said communication of the Chancellor of the Exchequer with Earl Bathurst) all the local and other circumstances which connect themselves with a grant of this description in a foreign colony which has hitherto been wholly unexplored with regard to any mines or minerals, and especially the very great expense which must obviously be incurred in an undertaking to be commenced in a country where roads and other means of ready communication are, in a considerable degree, unformed, and in which the greater proportion of the miners and other individuals to be employed, must be sent from this country and provided with habitations and the means of subsistence before any return whatever of profit could be expected to arise from it, are of opinion that the reservations usually made in grants of mines in Great Britain, do not afford any just criterion whereby a satisfactory decision might be formed as to the reservations proper to be made in leases of mines of the description of those now proposed to be granted, and their Lordships, having consulted with persons best competent to afford them information on the subject, are of opinion that the following terms may be deemed just and equitable, both as regards the interests of the Crown and the reasonable expectations of His Royal Highness the Duke of York, and that those terms may be considered as generally applicable to all grants of mines and minerals similarly circumstanced in any of His Majesty's foreign colonies and possessions, sub-[419]-ject only to such deviations as may be rendered expedient by local or other special circumstances. The terms are as follows, viz.—1st. The grant to include the right of working *all mines and minerals* of every description in the province of Nova Scotia, with the exception only of such mines of coal as may be now under lease to, or opened and in course of working by any person or persons whomsoever under any grants or licences from the Crown. 2d. The grant to be for a term of five years, at a rent of £1 per annum, and then for a further term of 31 years (making 36 years in the whole) under the several reservations after mentioned. 3d. The reservations to commence after the expiration of the term of five years, to be as follows, namely, £1 per annum and 1-20th part in weight of all metals, after the ore has been smelted and the metals rendered marketable in a metallic state, and 1s. per ton on all coals not used and consumed for the purpose of working the mines or smelting the ore, but raised for the purpose of sale. The grant to contain such covenants and conditions as are usual in similar cases, or as may be deemed expedient by the law officers of the Crown. My Lords request the Chancellor of the Exchequer will be pleased to submit the above terms to His Royal Highness the Duke of York, as those which have appeared to their Lordships, on the fullest consideration of the subject, to be just and equitable, both as regards the interests of the Crown and the reasonable expectations of His Royal Highness."

Accordingly, letters patent, dated the 25th of August 1826, were made, in the form of an indenture, between King George the Fourth of the one part, and the Duke of York of the other part; and thereby King George the Fourth, *of his especial grace, certain knowledge and mere motion*, and in consideration of the rents thereby reserved, and [420] of the covenants and agreements therein contained, on the part of the Duke of York, his executors, &c., to be observed and performed, granted and demised to

the duke, his executors, &c., all the mines of gold and silver, coal, ironstone, limestone, slatestone, slaterock, tin, copper, lead and all other mines, minerals and ores, belonging to His Majesty, *within the province of Nova Scotia* (save as thereafter mentioned), and also full liberty to dig, open and work such mines and minerals, and also to make sufficient pit room, ground room and heap room, *within the said province*, for laying and placing such minerals, and also to erect *within the said province or any part or parts thereof*, all such gins, engines, &c., as should be needful for opening, working or draining the mines, and for smelting and converting the minerals into metals, save and except out of the grant thereby made all such mines as, by virtue of any leases or grants from the King or any of his predecessors, or any governor or governors of the said province, had been opened and were then in course of working by any person or persons whomsoever. To hold the said mines and minerals, powers and authorities unto the duke, his executors, &c., for 60 years, to be computed from the day of the date of the letters patent, yielding and rendering unto His Majesty, his heirs and successors, yearly on the 24th of June, at Halifax, *in the said province of Nova Scotia*, through the hands or by the receipt of the Governor or Lieutenant-Governor of Nova Scotia aforesaid, the several yearly rents thereafter mentioned (that is to say) during the whole of the term of 60 years, the yearly rent of £1, and, after the end of five years from the date of the indenture, and thenceforth yearly on the 24th day of June, and in addition to the aforesaid yearly rent, also rendering and delivering unto His Majesty, his heirs and successors, at the pit's mouth, or at the smelting-house [421] as the Governor or Lieutenant-Governor of the said province of Nova Scotia for the time being should direct, 1-20th part of all the gold, silver, lead, copper and other ores and minerals (excepting iron ore, ironstone and coal) which should be gotten out of the mines, and also, after the end of five years from the date thereof, and thenceforth yearly on the 24th of June, yielding and rendering unto His Majesty, his heirs or successors, the rent of 4d. for every ton of iron ore or ironstone, and the rent of 1s. for every ton of coals which should be gotten out of the mines: and the duke covenanted to pay the rents and deliver the portions of minerals thereby reserved, and to keep accounts of the minerals gotten by him; and that it should be lawful for the Governor or Lieutenant-Governor of Nova Scotia for the time being, or such person as he should appoint, to inspect and take copies of such books; and that the duke would, on the first Monday in August in every year, deliver to the governor or lieutenant-governor affidavits to be made by two credible persons principally employed in the working and management of the mines, that the entries made in such books contained a full and true account of the quantities of all the ores and minerals extracted in every year, which affidavits should be duly sworn before the Governor or Lieutenant-Governor of Nova Scotia, or before some magistrate *in the province*, and also that it should be lawful for any inspector appointed by the King or by the governor of the province: for the time being, at any time when the shafts of the mines should be at work, to descend into the mines and see that the same were regularly and fairly wrought. And it was provided that the grant should be void in case the duke should not perform the covenants therein contained, or should not, within a certain time, open and diligently work the mines: and also that the grant should not pre-[422]vent His Majesty from entering, by his agents and workmen, upon all or any of the lands *in the province of Nova Scotia*, and searching for and opening any mines or minerals, or from granting to any other person or persons any mines or minerals which should be so discovered in any place or places within the grant, but so as that notice in writing should first be given by the Governor or Lieutenant-Governor for the time being of Nova Scotia, to the duke, of the discovery of such last-mentioned mines, and so as that the duke should refuse or neglect, within 12 calendar months from the receipt of such notice, to work the same.

The bill, which was filed by the Duke of York's executors in November 1834, alleged that at the time of making the letters patent the island of Cape Breton was a county and an integral part of the province of Nova Scotia called the county of Cape Breton, and that, by force of the letters patent, the Duke of York became possessed of or entitled to all the mines of gold, silver, coal, &c., and all other mines, minerals and ores belonging to His Majesty, in that part of the province of Nova Scotia which

was called the county of Cape Breton: that the duke died in January 1827, and, on his death, a claim was made on the part of His Majesty to such of the said mines, &c., in the province of Nova Scotia, as were in that part of the province which is called the county of Cape Breton, and that, in accordance with such claim, a lease of the last-mentioned part of the said mines, &c., was granted by His Majesty to the Defendants Rundell and Bridge: (1) that the claim on behalf of His Majesty was founded on a suggestion that [423] King George the Fourth intended, by the letters patent, to carry into effect an intention, previously entertained by King George the Third, to grant to the Duke of York a lease of the mines, &c., in the province of Nova Scotia, excluding that part of it which is called Cape Breton, and that King George the Fourth did not intend, by the letters patent, to grant to the duke a lease of any mines, minerals or ores, except those which King George the Third had intended to lease, but only to carry such intention into effect; and that it was insisted, on behalf of His Majesty, that the letters patent were void so far as they comprised the mines, &c., in that part of the province of Nova Scotia which is called Cape Breton: that King George the Third did propose to grant to the Duke of York a lease of some mines, but neither the extent of the grant nor the district to be included therein, nor any of the other particulars thereof, were fixed or determined, except that Halifax in Nova Scotia had been mentioned, generally, as designating the part of the world in which the mines intended to be leased were situate: that, on the decease of King George the Third, the duke applied to King George the Fourth to grant him a lease of all the mines in the province of Nova Scotia, and that His Majesty agreed so to do, and made the letters patent in performance of such agreement, and intended thereby to grant to the duke a lease of all the mines in the province, including that part of it which is called Cape Breton; and that the intention of King George the Fourth was not and, in fact, could not be under the circumstances aforesaid limited or affected by any previous intention of King George the Third, except so far as such previous intention might have been the motive that induced King George the Fourth to make the letters patent: that in June 1834 the Plaintiffs presented their petition to His Majesty, in his High [424] Court of Chancery, stating the letters patent and the claim made, on the part of His Majesty, to the mines in Cape Breton, and praying that His Majesty would be graciously pleased to order that right be done in the matters aforesaid, and to endorse his royal declaration to that effect on the petition, and to refer the same to the Lord Chancellor in the Court of Chancery, and that the Plaintiffs might thenceforth prosecute their complaint in such Court against the Attorney-General as representing the rights and interests of His Majesty, and also against such other persons as might be necessary and proper according to the rules of equity, and that they might be at liberty to make the Attorney-General a party thereto, and to pray and obtain such relief in matters therein mentioned as should be just: that His Majesty was pleased to return the following answer to such petition: "Let right be done:" that, in consequence of such answer, the Plaintiffs presented their petition to the Lord Chancellor, praying that they might be at liberty to file a bill in the Court of Chancery against the Attorney-General, as representing the rights and interests of His Majesty in the premises, and also against such other person or persons as might be necessary, praying for such relief in the matters aforesaid as might be just; and, by an order dated the 4th July 1834, his Lordship was pleased to order the same accordingly: that the Plaintiffs had applied to the Attorney-General and requested him to advise His Majesty that their right to the mines in Cape Breton was clear and established, but he had refused so to do.

The bill prayed that it might be declared that the letters patent were valid to all intents and purposes according to the true tenor, purport and effect thereof, and that the duke thereby became, and that the Plaintiffs, [425] as his personal representatives, then were entitled to the mines, minerals and ores in that part of the province of Nova Scotia which is called the county of Cape Breton; and that the lease made

(1) This was a mistake. An agreement for a lease to Rundell and Bridge had been entered into, but no lease had been actually granted.

to the Defendants, Rundell and Bridge, was void, and that the counterpart thereof in their possession might be cancelled.

THE ATTORNEY-GENERAL, in his answer, said that the intention of King George the Third to grant a lease of mines in Nova Scotia to the Duke of York had no reference to Cape Breton or to any mines therein. He then set forth the two Treasury minutes, and added that, although Cape Breton had been then recently annexed, as a county, to the province of Nova Scotia for the purpose of Government, the intention to grant a lease to the duke of mines in Nova Scotia was founded on the original intention in 1788, and that it was not adverted to, on either side, that the lease was to include mines in Nova Scotia as comprising Cape Breton, and that the negotiation for the lease proceeded with reference to the original intention in 1788, when Cape Breton formed no part of the province; that, at the date of the letters patent, Cape Breton was, as to Government only, and not as to locality or territorial boundary or in any other respects, an integral part of or within the province of Nova Scotia; and that the words "Nova Scotia" were used in the letters patent as descriptive of locality only, and not of political limits; and that a grant by the Crown ought to be construed strictly and ought not to be extended by doubtful words: that if the letters patent did, by their purport, include mines in Cape Breton, the King must be taken to have been deceived or surprised, and the same were, to that extent, void.

[426] Mr. Knight, Mr. Wigram and Mr. James Russell, for the Plaintiffs. The question is whether the mines in Cape Breton are included in the letters patent. The lease thereby granted is not a lease of bounty, but is founded on onerous and valuable reservations depending on the profitable working of the mines. It gives the Crown the power of inspecting the mines and checking the accounts, and of preventing the duke from keeping any mines unworked, by reserving the privilege of resuming such mines as the duke might, after notice, decline to work: and, therefore, the Crown could compel the lessee to make the lease profitable to the lessor. The lease contains no recital of any promise or contract, or of any such intention on the part of King George the Third, as has been alleged; and if there was any such intention, no one can tell, with any degree of precision, what it was. Supposing that that intention could be distinctly defined, what was there to prevent the Crown from making, in 1826, a more extensive grant than was contemplated in 1788?

Cape Breton is divided from the mainland by a very narrow strait; and it might as well be contended that the Isle of Wight forms no part of England, as that Cape Breton forms no part of Nova Scotia. They formed one colony and one Government until 1784, when it was thought convenient to separate them for the purpose of Government. In 1820 (which was six years before the lease was made) the old state of things was restored; but during the interval between 1784 and 1788 Cape Breton remained part of Nova Scotia, except for particular purposes of Government; and there can be no doubt that, after the re-annexation took [427] place, Nova Scotia included Cape Breton for every possible purpose. The Colonial Secretary, in his despatch of August 1820, says that the object of His Majesty was to make Cape Breton, in every respect, an integral part of Nova Scotia, and the lieutenant-governor, in the proclamation which he issued in pursuance of that despatch, declared that the island of Cape Breton should, from thenceforth, be and remain a distinct county of the province of Nova Scotia, which words are the very same as are used in the subsequent grant of 1826; and it is very remarkable that there is no instance in which the word *province* is omitted, except where the governor or lieutenant-governor is mentioned; and there the entire province, including Cape Breton, must of necessity be intended; for there was no governor or lieutenant-governor of Nova Scotia exclusive of Cape Breton. Besides, in some parts of the grant, the governor and lieutenant-governor are styled the governor and lieutenant-governor of the said province, and, in others, the governor and lieutenant-governor of the said province of Nova Scotia. Therefore the lease in 1826 of all the mines in the province of Nova Scotia included the mines in Cape Breton. *Martyn v. McCulloch* (1 Moore's Privy Council Cases, 308).

The Defendants hardly venture to suggest that the language of the instrument does not include those mines; but they say that the King was deceived in his grant, taking those words in their technical meaning and not as imputing any fraud or

misrepresentation to the grantee. It is impossible, however, that that can have been the case, for the re-annexation had taken place only a few years before. Even if the Crown were [428] here as an actor, by *scire facias* or information, there is no case in which, even in favour of the Crown, this Court could touch or reduce the rights conferred by this grant. The principles on which the Courts proceed, with reference to the Crown in cases of this description, are laid down in *Lord Chandos's case* (6 Rep. 55). "And, as to the said three objections (that the King was deceived in his grant in the instances put), it was considered how much of the said recital was the suggestion of the party, and how much the affirmation of the King himself. And, as to that, it was resolved that the recital of the estate tail, and that the patentee had surrendered or delivered the said letters patent to the Chancellor to be cancelled, both these were, in judgment of law, the information and suggestion of the party; but the clause *virtute cuius* (we were seised in our demesne as of fee) was but the collection of the King himself, as a consequence on the surrender; in which the King mistook the law. Also the party informed the King that he had delivered the letters patent to the Chancellor to be cancelled; upon which the King affirmeth (*quæ quidem literæ patentēs autunc et ibidem cancellat' fuer'*) that is not the information of the party, but the affirmation of the King; and the collection or the affirmation of the King (on the information of the party) when it is not made any part of the consideration, shall not avoid his grant. For all that the party had informed was true, and the error was in the consequent or collection which the King made upon it; then, for as much as the party had truly informed the King of the estate tail, and of the delivery of his letters patent to be cancelled; although the King hath mistaken the law, or the matter in fact, in that case, it being no part of the consideration, shall not [429] avoid his grant; for no fault was in the party." Again, in the 2d Institute, page 496, Lord Coke says: "Here is an excellent rule for construction of the King's letters patents, not only of liberties, but of lands, tenements and other things which he may lawfully grant, that they have no strict or narrow interpretation for the overthrowing of them, *sed secundum earundem plenitudinem judicentur*, that is, to have a liberal and favourable construction for the making of them available in law *usque ad plenitudinem*, for the honour of the King." In the *King v. Kemp* (1 Lord Raym. 49, 51) the law is thus expressed. "Secondly; in what manner these letters patent of the King shall be construed, when he is mistaken in his own words and affirmation. And he said that it is a rule in law that where the King is not deceived by the suggestion of the party, and it appears, by the letters patent, that the intent of the King was that the patentee should take, such construction shall be made, that the grant shall not be void."

The Defendants rest their defence wholly upon the expression in the Treasury minute of March 1825, that the application made on behalf of the duke was founded on an intention of His Majesty's Government in 1788 to recommend to His late Majesty to make a grant to the duke of mines—not *the* mines—in Nova Scotia, but which was never perfected. The draft which is mentioned in the minute to have been found deposited in the Patent Office is not produced; nor have the Defendants examined either Sir C. Long or Mr. Adam; so that there is nothing to shew what mines were then intended to be granted, or on what terms the grant was to be made. But, before the De-[430]fendants can sustain their defence, they must fully inform the Court what the particulars of that intended grant were; otherwise the Court will have nothing to guide it in cutting down a specific and perfect grant made 38 years afterwards. The minute itself shews that the rent and reservations as to produce remained unsettled, and, consequently, that there was no pre-existing contract. That such was the case appears also from the minute of May 1825. The term there proposed is thirty-six years; but the term actually granted was 60 years.

[THE VICE-CHANCELLOR. The last clause in that minute shews that it was intended to be nothing more than a proposal to the Duke of York.]

It is plain that it was merely a proposal, and that it was afterwards departed from. It nowhere appears that the Lords of the Treasury, in 1825, meant to do no more than what the Government, in 1788, intended to recommend to King George the Third. The Defendants take it for granted that the name "Nova Scotia," as used in 1825, must mean the same thing as Nova Scotia as used in 1788. But it does not follow that, when the Lords of the Treasury are speaking, in 1825, of what was intended

with regard to Nova Scotia in 1788, they must mean the Nova Scotia of 1788 rather than the Nova Scotia of 1825. They may have meant either; but there is no evidence to shew what it was that they did mean. Even in 1788 the term Nova Scotia might have properly included Cape Breton. But, supposing that the intention of 1788 had reference to the mainland only, what is there to shew that the grant of 1826 was meant to be confined to that which was the subject of a floating intention in 1788? Whatever the intention of 1788 may [431] have been, it is evident that the terms of the ultimate agreement were not governed by it; for those terms vary, in many most important particulars, from the terms which are said to have been in contemplation in 1788.

THE SOLICITOR-GENERAL and Mr. Wray, for the Defendants. The present bill, as appears from the statements in it, is grounded on a regular application by a petition of right. In construing grants made by the Crown, it is a principle of law that, if two constructions can be put upon them, that construction is to be adopted which is most favourable to the Crown. That doctrine will appear, on consideration, to have been adopted with a view to the benefit of the subject. In early times, almost the whole revenue of the kingdom was derived from the territorial possessions of the Crown; and, therefore, by a variety of devices and maxims of law, every sort of difficulty was interposed, in order to prevent the Crown from alienating its possessions. At present, we know that the Crown cannot alienate any of its possessions in this country. The first question then is whether, having regard to this principle, anything passed, by these letters patent, except mines in Nova Scotia proper. Cape Breton, though made part of the province of Nova Scotia for political purposes, still remains, according to the common understanding of mankind, a distinct colony. It does not constitute part of Nova Scotia, as the Isle of Wight does of England, although it is subject to the jurisdiction of Nova Scotia. The situation of it with respect to that country resembles the situation of Sicily with respect to Italy, rather than that of the Isle of Wight with respect to England. Now no one can say that Sicily forms part of Italy; neither can it be [432] said with propriety that Cape Breton forms part of Nova Scotia. In Comyns's Digest ("Grant." (G. 12.)), the law is thus laid down: "If the King's grant can enure to two intents, it shall be taken to the intent that makes most for the King's benefit. And, therefore, it shall be construed strictly; as, if the King grant a manor purchased by him with all franchises belonging, &c., the franchises in the hands of the feoffee do not pass; for, by the purchase of the King, they are reannexed to the Crown. If he grant a manor with all lands, &c., accepted or reputed as parcel, nothing passes which is not parcel in truth and of right. And it must have been parcel time out of mind."

[THE VICE-CHANCELLOR. That is a proposition which, when applied to an American colony, must be applied with a little modification.]

Now here is a grant of all mines within the province of Nova Scotia. What is the meaning of "the province of Nova Scotia?" There is a certain peninsula called Nova Scotia, and there is a closely adjoining island which, for the purposes of Government, has been annexed to Nova Scotia, but which has always borne a name of its own, and which, until a very recent period, has had a Government of its own. Then shall the King, when he grants all the mines in the province of Nova Scotia, be held to mean in the province of Nova Scotia proper, or in the province of Nova Scotia, including, as part of that province, an island which is not geographically, but is politically, part of the province?

[THE VICE-CHANCELLOR. Then the question will be whether, on the 25th of August 1826, there was any other [433] province of Nova Scotia than that which comprehended Cape Breton.]

There is no doubt that there was no other province of Nova Scotia; but "the province of Nova Scotia" would not have been an inaccurate description of Nova Scotia exclusive of Cape Breton. The object in describing the locality of the mines was to point out where the subject of the grant was situate; therefore, the parties must be supposed to have attached a local and not a political meaning to the words which they used for that purpose. Suppose that the King were to grant all the mines situate in the county of Lancaster, and that, before the grant was made, there had been an Act of Parliament enacting that the Isle of Man should be within the bailiwick of the Sheriff of Lancashire; could it be contended, as against the Crown, that

the grant of the mines in the county of Lancaster would include every mine that might happen to be discovered in the Isle of Man?

[THE VICE-CHANCELLOR. The descriptive words used in the grant are not "Nova Scotia" simply, but "the province of Nova Scotia." Those words have reference to the Government. It may be said that if the Crown intended only to grant all the mines within the country commonly called Nova Scotia, there would have been no necessity for using the word "province;" but, when that term is used, the question is whether something more is not intended than merely Nova Scotia.].

The word "province" is as applicable to the one as the other; but, if there was any doubt upon the subject, it is removed when we look at the two Treasury minutes. The first begins thus: "Various applications [434] have been made to their Lordships, since the termination of the war in 1815, for grants of mines in Nova Scotia, New Brunswick and Cape Breton, and, amongst others, an application from Mr. Adam on behalf of His Royal Highness the Duke of York, in the year 1815, founded upon an intention of His Majesty's Government, in the year 1788, to recommend to His late Majesty to make a grant to His Royal Highness of mines in Nova Scotia." It is manifest, therefore, that at that time the Lords of the Treasury considered Nova Scotia and Cape Breton to be two distinct colonies, and that they were describing the mines with reference to their locality and not with regard to their political circumstances: and the intention which King George the Third is said to have entertained in 1788 of making a grant of mines in Nova Scotia must have been an intention to make a grant of mines in what constituted Nova Scotia at that time. Taking the two minutes together, it is perfectly clear that there was no intention on the part of the Treasury to extend the locality that had been contemplated in the reign of George the Third.

It was said that we ought to have examined Sir Charles Long and Mr. Adam; but there would have been no use in examining them, for they could have told us nothing beyond what is contained in the Treasury minutes.

In *Martyn v. McCulloch* certain duties were to be levied on spirits in the islands of Guernsey, Jersey, and Alderney, according to certain rates: and it is perfectly obvious, having regard to the object, which was the raising of a revenue, that the term "Guernsey" must include every island that was subject to the Government of Guernsey. Suppose, however, that a testator, having lands in Guernsey and also lands in Herm, were to devise [435] all his lands in Guernsey to A., and all his other lands, wheresoever situate, to B., it would be impossible to contend that, because Herm was subject to the jurisdiction of Guernsey, the lands in Herm would pass under the devise of lands in Guernsey. The case put bears a very strong analogy to the case now before the Court.

THE VICE-CHANCELLOR. At present, as I understand, no lease has been granted to Messrs. Rundell and Bridge; and, therefore, all that I have to do is to put a construction on the language of the letters patent. The only question then is whether there is any ambiguity on the face of them. In the Treasury minutes which have been referred to there appears to be some inconsistency. The minute of the 29th of March 1825 begins with mentioning an application made for a grant of mines in Nova Scotia, New Brunswick and Cape Breton. These countries are there spoken of in a popular way, and they are spoken of in 1825 by some members of His Majesty's Government who ought to have known what had taken place during the year 1820 when the annexation of Cape Breton to the province of Nova Scotia took place. Then the minute proceeds in these words: "Founded upon an intention of His Majesty's Government, in the year 1788, to recommend to His late Majesty to make a grant to His Royal Highness of mines in Nova Scotia." There the locality of the mines is spoken of in a general way. Allusion is then made to the draft of an intended grant of mines in Nova Scotia. What that grant was I do not know; what the draft was I do not know; it is not produced. The minute then proceeds to state that it was His late Majesty's gracious intention at that period to grant certain mines in the province of Nova Scotia. Now, *prima facie*, when the Lords of the Treasury are [436] speaking of the intention of King George the Third, in the year 1788, to make a grant of mines in the province of Nova Scotia, I must conclude that they were speaking of what was His Majesty's intention with reference to what was then the province of Nova Scotia. Then they say: "Under these circumstances, my Lords

are of opinion that His late Majesty's gracious intentions in regard to the grant of mines in the province of Nova Scotia, in favour of His Royal Highness the Duke of York, must be considered as clearly established." Then, in the Treasury minute of the 3d of May 1825, their Lordships advert to their former minute, wherein they requested Lord Liverpool to submit to His Majesty King George the Fourth their humble recommendation that His late Majesty's gracious intention that a grant should be made to His Royal Highness the Duke of York of certain mines in the province of Nova Scotia should be carried into effect. And then they proceed to say: "The terms which are proposed are as follows, namely, first, the grant to include the right of working all mines and minerals of every description in the province of Nova Scotia;" and then they mention further terms; and all of them are mentioned for the purpose of being submitted to the consideration of His Royal Highness the Duke of York. Now admitting that it may have been the intention of the Lords of the Treasury at the time when they made these minutes to make a grant of those mines only which were in the old province of Nova Scotia; yet who can tell what was the discussion that took place in consequence of the submission of those terms to the Duke of York? No one can tell: all that appears is that, after the terms had been submitted to the Duke of York, the letters patent of the 25th of August 1826 were made, on which the question in the cause arises.

[437] In the first place the instrument contains no recital at all. It witnesses that our Sovereign Lord the King has granted certain mines belonging to His Majesty within the province of Nova Scotia in America. Now, at that time, what was the province of Nova Scotia? It was a province that comprised as part of it Cape Breton. For, when we look at that which is strictly evidence, namely, the proclamation and the Act of the Colonial Assembly, I think there cannot be a doubt that Cape Breton was meant to become and did become part of the province of Nova Scotia. The proclamation states: "That His Majesty, with a view to promote the welfare and mutual interests of his faithful and loyal subjects of Nova Scotia and Cape Breton, hath been graciously pleased to direct that the island of Cape Breton should be reannexed to the Government of Nova Scotia, and the same island should, from henceforth, be and remain an integral part of the Government of Nova Scotia. I do, therefore, in pursuance of His Majesty's instructions, and by and with the advice of His Majesty's Council, declare that the island of Cape Breton is and from henceforth shall be and remain a several and distinct county of the province of Nova Scotia, to be called and known by the name of the county of Cape Breton." How does it become a county of the province of Nova Scotia except by becoming a part of the province of Nova Scotia? And that it was distinctly understood so to be by the local Government in Nova Scotia is put beyond all doubt when we look at the Act of the local Legislature which was passed, and which, I presume, had the ratification of His Majesty. This Act recites: "Whereas His Majesty has been graciously pleased to reannex the island of Cape Breton as an integral part of the province, and a distinct and several county thereof, to be called and known by the name of the county of Cape Breton;" and [438] then it proceeds to make a provision, the clear effect of which is to extend the institutions which were then existing in old Nova Scotia to Cape Breton, and to abolish the institutions which then existed in Cape Breton for the administration of justice and various other purposes; so that, when one looks at the proclamation and the Act of the local Legislature, it is beyond all doubt that the province of Nova Scotia does, necessarily, comprehend, as part of it, Cape Breton. I have very carefully looked at every part of the letters patent in which reference is made either to the province or to Nova Scotia; and the expressions I find are, "within the province of Nova Scotia," or "the said province," or "Nova Scotia" alone. But, whenever Nova Scotia is mentioned without the word province, it is so mentioned as to shew that it must, of necessity, mean the province of Nova Scotia. The first passage in the *reclendum* is "yielding and paying unto His Majesty, his heirs, &c., at Halifax in the said province of Nova Scotia, through the hands or by the receipt of the governor or lieutenant-governor of Nova Scotia aforesaid." Now there was not, nor ever could be, after the proclamation and the Act of Assembly, any other governor nor lieutenant-governor than of the province of Nova Scotia; and there was no other Nova Scotia than this, and therefore the expression, "The

Governor or Lieutenant-Governor of Nova Scotia," is manifestly equivalent to "Governor or Lieutenant-Governor of the Province of Nova Scotia." The same expressions occur several times afterwards in other parts of the same instrument.

It appears to me, therefore, that the construction to be put upon these letters patent does not admit of question. I admit that a question might be raised by looking at the extremely inaccurate language which is used in the [439] Treasury minutes; but I think that where there is such authority as the proclamation and the Act of Assembly afford as to what is to constitute the province of Nova Scotia, you are not at liberty to say that any question, in point of law, arises on the letters patent. If, therefore, I am to give an opinion, the only opinion that I can give is that those mines which are locally situate in what was once Cape Breton, but is now part of the province of Nova Scotia, are comprised in the demise, made by the letters patent, of all the mines in the province of Nova Scotia.

[439] NANNEY v. VAUGHAN. June 8, 1837.

Injunction.

A. covenanted with B. and C. to pay them an annuity, in trust for D. The annuity being in arrear, and C. declining to take steps to recover the arrears, B. brought an action, for that purpose, against A., in the names of himself and C. A. then filed a bill against B., C. and D., alleging that the covenant had been obtained by fraud, and praying for an injunction to restrain the action: and he afterwards obtained injunctions against B. and C. separately. B., having put in his answer, moved to dissolve the injunction issued against himself: but the motion was ordered to stand over until C.'s answer was in.

The answers of all the Defendants having been filed, both the injunctions were dissolved, on a motion by D. supported by his own answer.

By the settlement on the marriage of the Defendant Vaughan, the Plaintiff's nephew, with the daughter of the Defendant Massey, the Plaintiff covenanted with Massey and with the Defendant, Williams, to pay them an annuity, in trust for the intended husband and wife. The annuity having fallen in arrear, and Williams (who was the confidential solicitor of the Plaintiff, and had been employed by him to negotiate the terms of the settlement and to prepare the deed) having declined to take any steps to enforce the payment of it, an action for the arrears was brought against the Plaintiff by Massey, in the names of himself and Williams. The bill was thereupon filed, alleging that the action was [440] brought at the instigation of Vaughan, and praying that the settlement might be set aside on the ground that it had been obtained from the Plaintiff by false representations and deceit, and that Massey and Williams might be restrained from prosecuting the action. The Plaintiff afterwards obtained a separate order for an injunction against each of the last-named Defendants. Massey, having put in his answer, obtained the usual order *nisi* for dissolving the injunction which had issued against him.

Mr. Spence and Mr. James Russell, for the Defendant Massey, now moved to make that order absolute.

Mr. Knight, Mr. Jacob and Mr. Bethell, for the Plaintiff, said that Williams had not filed his answer: that, as he was employed to negotiate and prepare the settlement, he was most likely to be acquainted with the particulars of the case, and therefore the motion ought not to be proceeded with, until it was known what Williams had to state, as otherwise the Court would be acting in ignorance of what was most material to be known.

Mr. Spence contended that, as Massey had put in his answer, he was entitled to move to dissolve the injunction which had issued against him separately.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is represented, by the counsel in support of the motion, that Massey is willing to proceed with the action, but that Williams is not; and, supposing that to be the case, still, unless the injunction is dissolved as against Williams as well as Massey, Massey cannot proceed with the action.

without being guilty of a contempt, as he must proceed in the joint names of himself and Williams.

[441] This case must be managed in the same manner as the case of *Montague v. Hill* (4 Russ. 128) was. There, not only the party who was the Plaintiff at law in name only had put in his answer, but also the party who was the Plaintiff at law in substance, had put in his answer; and, consequently, the Court was enabled to judge of the real rights of the parties and the true merits of the case. So, in this case, in order to enable me to decide as to the right of Massey to dissolve the injunction, all the facts and circumstances of the case must be fully before me. The motion must, therefore, stand over, until Williams has filed his answer.

Massey's motion was not renewed: but, the answers of all the Defendants having been filed, Vaughan and wife served the Plaintiff with notice of a motion, on their behalf, to dissolve the injunction, and of their intention to read their own answer in support of the motion.

The motion was heard on the 5th of August, and the injunction was then dissolved. (See *Joseph v. Doubleday*, 1 V. & B. 497.)

[442] FRYER v. BUTTAR. June 10, 1837.

[See *In re Parry*, 1889, 42 Ch. D. 579; *Harbin v. Masterman* [1896], 1 Ch. 362.]

Will. Construction. Annuity.

Testator gave to M. W. an annuity of £40 for her life, payable out of his stock of long annuities; and directed that at M. W.'s death the principal out of which the annuity arose should go to his next of kin then living; and he further directed that the annuity should be secured on his stock of long annuities. The testator died possessed of £509 long annuities. Held, that a fund for payment of the annuity ought to be provided in the three per cents., and that the money required for that purpose ought to be raised by the sale of part of the long annuities, and that the remainder of the long annuities formed part of the testator's residuary estate.

Edward Fryer, the testator in the cause, left to his wife, for her life, the rents of his lands, the interest of his monies in the funds and of all his other monies, with the exception of such bequests as he should thereafter name. He then gave several specific and pecuniary legacies; and afterwards bequeathed as follows: "To my servant, Mary Watson, I bequeath an annuity of £14 a year to be paid during the life of my wife; and, at the decease of my wife, I leave the said Mary Watson the further sum of £26, making together an annuity of £40 a year payable out of my stock of long annuities, during the said Mary Watson's life:" and, after making a precisely similar bequest to his other servant, Mary Clarke, he proceeded thus: "And, in case of the death of the one or the other, the said Mary Watson or Mary Clarke, my will is that the survivor shall enjoy the annuity of the other as well as her own, that is, £80 a year for her, the survivor's, life; and, at the death of the survivor, the principal out of which the whole annuity of £80 arose to go to my nearest of kin, who may be then living. These annuities of £80 are to be secured, at the decease of my wife, on my stock of long annuities, and made payable to the said Mary Watson and Mary Clarke half-yearly." The testator bequeathed the residue of his property to the Plaintiff and to the Defendant, W. V. Fryer.

The testator died possessed of £509 long annuities. His wife died in his lifetime.

The question was whether £80 of the testator's long annuities ought to be set apart to answer the annuities [443] given to Mary Watson and Mary Clarke, in which case they would run the risk of the long annuities expiring in their lifetimes; or whether their annuities were a charge upon the whole of the testator's long annuities.

THE VICE-CHANCELLOR held that a sum of three per cent. stock producing £80 a year ought to be purchased with money to be raised by sale of a sufficient part of the long annuities; and that the dividends of such stock ought to be paid to the

annuitants and to the survivor of them; and that the remainder of the long annuities fell into the testator's residuary estate, and that the Plaintiff and the Defendant, W. V. Fryer, were entitled to it as the residuary legatees under the will. (See *Bethune v. Kennedy*, 1 Myln. & Craig, 114; and *Vincent v. Newcombe*, 1 Youn. 599.)

Mr. Wigram and Mr. Rudall, for the Plaintiff.

Mr. Knight, Mr. James Russell, Mr. Stephens, and Mr. Coleridge, for the Defendants.

[443] RUST v. BAKER. June 10, 1837.

Will. Construction. Presumption of Death.

Testator by his will, dated in 1828, bequeathed a fifth of his residue to W. R., E. R. and J. R., and all the children of J. R. the elder, and the issue of such of his children as should have departed this life, such issue to take such portion of the fifth as their parents would have taken if living. The testator died in 1829. J. R. the elder had two children besides those named in the will. One of them, N. R., went abroad in 1809, and had not been heard of since 1815. Both before and after the testator's death endeavours were made by inquiries and advertisements to ascertain whether N. R. were living or dead, but without success. Held, that he must be presumed to have died before the date of the will, but, nevertheless, that his children were entitled to the share which he would have taken if he had survived the testator.

James Carter, by his will, dated the 27th of December 1828, bequeathed one-fifth part of his residuary personal estate unto and equally between William [444] Rust, Edward Rust and John Rust, and all and every other the children of John Rust, of Great Waltham, in the county of Essex, miller, and the issue of such of his children as should have departed this life, such issue, nevertheless, to take equally between them such portion only of the said fifth part or share as his or their parent or parents would have taken if living.

The testator died on the 12th of April 1829.

John Rust, the father, had two children besides those named in his will, namely, George Rust and Nathan Rust. In 1809 Nathan Rust, who had previously married Sarah Rust, quitted this country and went to the United States of America, and resided for some time in New York under the name of Nathan Perry. About a twelvemonth after he had left England he wrote to his wife requesting her to join him in America; which she declined to do. She occasionally received letters from him afterwards, until the end of the year 1815. The last letter was dated New York, 8th of September 1815. It was addressed to her under the name of Sarah Gurney, and contained the following passage:—"You must direct to me as under: you must remember that, unless the postage is paid, they will not come;" and then the following address was added: "N. Rust per packet." Since that time no tidings had been received of N. Rust by any person whatsoever; although, both before and after the testator's death, diligent inquiry had been made to ascertain whether he was living or dead; and in November 1829 the testator's executors advertised for him in several newspapers published in London, and in the counties of Essex and Hertfordshire, where he had resided; and in 1835 they advertised for him in the New York papers, but without effect.

The bill was filed, in May 1837, by his two children, against Sarah Rust, the executors of the will, and the [445] other four children of John Rust, the father, alleging that Nathan Rust died, or, under the circumstances before mentioned, must be presumed to have died in the testator's lifetime, and that thereby and under the bequest in the will the share of the testator's residuary estate to which he would have been entitled if he had survived the testator then belonged to the Plaintiffs.

The bill prayed for a declaration that, in the events that had happened and under

the will, the Plaintiffs were entitled to the share of the testator's residuary estate which their father would have taken if he had survived the testator.

The Defendants admitted the facts stated in the bill; and Sarah Rust did not dispute the fact of her husband's death, but submitted whether, under the circumstances before mentioned and in the absence of any direct proof as to the time of her husband's death, it must not be presumed that he survived the testator and afterwards died intestate, in which case she would be entitled to a share of the fund in dispute, under the Statute of Distributions.

The cause was heard as a short cause. It was the wish of all parties that the case should be decided upon the allegations in the bill, in order to save the expense of inquiries.

Mr. Knight and Mr. Elmsley, for the Plaintiffs, said that the presumption of death arose at the end of seven years after the party was last heard of; and, therefore, it must be presumed that N. Rust died in 1822, which was before the date of the will; and, consequently, that the Plaintiffs, as the issue of a child of John Rust, the father, who had departed this life, were entitled to participate in the one-fifth of the testator's residuary estate.

Mr. Wigram, for the surviving children of John Rust, the father, contended that as N. Rust must be presumed [446] to have died before the date of the will, he was himself incapable of taking under it, and therefore his issue could not take by way of substitution for him. *Wagh v. Wagh* (2 Myl. & Keen, 41).

Mr. Jacob and Mr. Hood, for Sarah Rust, said that N. Rust might be presumed to have died after the testator, but not before.

THE VICE-CHANCELLOR [Sir L. Shadwell]. From what is stated in the bill, I must hold that Nathan Rust died before the date of the will, and that his issue are entitled according to the prayer of the bill. (See *Smith v. Smith*, ante, 353; and *Giles v. Giles*, ante, 360.)

[446] ARCHER v. JEGON. June 10, July 14, 1837.

[S. C. 6 L. J. Ch. (N. S.) 340; 1 Jur. 792. See *Heasman v. Pearce*, 1871, L. R. 11 Eq. 537. *In re Milne*, 1887, 57 L. T. 829.]

Will. Construction.

Testator gave £7000 in trust for his sister for life, and, after her decease, for her husband for life, and, after his decease, for his nephew and nieces, the children of his sister who should be *then* living. The husband died leaving five children by his wife; then one of the children died, and, afterwards, the wife. Held, that the deceased child took a vested interest in one-fifth of the fund.

Joseph Moser, by his will, dated the 10th of April 1817, gave £7000 stock to his executors, in trust to pay the dividends thereof to his sister Elizabeth, the wife of John Graham, to and for her separate use for her life, and not to be subject to the debts, contracts or engagements of her then present or any future husband that she might intermarry with: and, from and after the death of his said sister, then upon further trust to pay the dividends of the stock to the said J. Graham for his life; and, from and immediately after his decease, the testator gave the said £7000 stock, and the interest and dividends thereof, unto his nephew and nieces, the [447] children of his said sister, *who should then be living*, to be shared and divided equally between them share and share alike.

The testator died in 1819. John Graham died shortly afterwards, leaving a son and four daughters surviving him. Mrs. Graham died in September 1836. One of her daughters died in her lifetime. The question was whether that daughter took a vested interest in one-fifth of the £7000, or whether the fund was wholly divisible amongst the four children who survived their mother.

Mr. Wakefield and Mr. Lee, for the representatives of the deceased daughter, said that, according to the grammatical construction of the will, the deceased

daughter took a vested interest in the fund; for the word *then* referred to the last antecedent, which was the death of John Graham. *Lugar v. Harman* (1 Cox, 250), *Smith v. Streatfield* (1 Mer. 358).

Mr. Cooper and Mr. Harwood, for the surviving children, said that the vesting of the children's shares was contingent on their surviving both their parents: that the testator clearly contemplated that his daughter would survive her husband; as he had provided against a future husband's taking any part of her life interest; and that if she had married again and had children by her second husband, and all the children of the first marriage had died in her lifetime, it was clear that the children of the second marriage would have taken the £7000.

Mr. Spurrier and Mr. Tennant appeared for the other parties.

[448] THE VICE-CHANCELLOR [Sir L. Shadwell]. The safest rule in construing wills is to take the words according to their ordinary meaning, unless there is something else in the will which shews that they were not meant to be so taken.

It is possible that the testator may have meant that those children only should take who should be living at the death of the survivor of Mr. and Mrs. Graham; but he has not said so. He certainly, however, contemplated her marrying again. He says: "Upon trust that my executors do and shall receive the interest and dividends thereof, as the same shall become due, and pay the same, from time to time, when received, unto my sister Elizabeth, the wife of John Graham, to and for her own sole and separate use and benefit, for and during the term of her natural life, and not to be subject or liable to the debts, contracts or engagements of her present or any future husband that she may intermarry with; but her receipt alone, notwithstanding any such coverture, shall be a good and sufficient discharge to my executors for the same; and, from and immediately after the death of my said sister, upon further trust to pay the interest and dividends of the said £7000 stock unto the said John Graham, during the term of his natural life; and, from and immediately after his decease, I give and bequeath the said £7000 stock and the interest and dividends thereof unto my nephew and nieces, the children of my said sister, who shall then be living." There the word *then* necessarily refers to the antecedent, "after his decease."

Declare that the fund is divisible into five shares, and that the representatives of the deceased daughter are entitled to one of those shares. (See *Smith v. Smith*, ante, p. 353; and *Giles v. Giles*, ante, 360.)

[449] TAYLOR v. SALMON. June 15, 1837.

Practice. Contempt. Pro Confesso. New Orders.

A Defendant who is in contempt for want of answer filed his answer, and obtained an order to clear his contempt, and paid the costs. The answer was insufficient. Held, that the contempt was not cleared.

A Defendant who was in contempt for want of answer filed his answer, and obtained an order to clear his contempt, and paid the costs. The answer was excepted to, and the Defendant submitted to the exceptions, whereupon a sequestration issued, and afterwards the bill was ordered to be taken *pro confesso*. Before that order was drawn up and served, the Defendant answered the exceptions. The answer was taken off the file.

The Defendant not having put in his answer, the Plaintiff obtained, first, an attachment and, afterwards, an order for a serjeant-at-arms against him. On the 12th of May the serjeant-at-arms returned *non est inventus*. On the same day the Defendant filed his answer; and on the day following the Defendant obtained an order to clear his contempt, (1) and paid the costs. On the 25th of May the answer was

(1) The order is in the following form: "Upon a motion this day made unto this Court, by Mr. _____, of counsel for the Defendant, it was alleged that an attachment having issued against the Defendant for want of his answer to the Plaintiff's

excepted to. On the 2d of June the Defendant submitted to answer the exceptions. On the 3d the Plaintiff obtained an order for a sequestration (see the 8th and 9th Orders of 1828 and the 24th Order of 1831), and on the 6th he obtained an order for taking the bill *pro confesso*, but that order was not drawn up and served until the 8th. On the 7th the Defendant filed his further answer.

Mr. Wakefield, for the Defendant, now moved to discharge the orders for a sequestration and for taking the [450] bill *pro confesso* for irregularity. He referred to the 18th Order of 1833, and said that the Defendant was not in contempt when the order for a sequestration was made; for he had put in his answer, and obtained an order to clear his contempt, and paid the costs.

Mr. Knight and Mr. Loftus Wigram, for the Plaintiff.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Defendant, being in contempt for want of answer, put in an insufficient answer, and then obtained an order to clear his contempt. But an insufficient answer is no answer, and, consequently, the order did not clear his contempt.

Motion refused with costs.

June 16. Mr. Knight and Mr. Loftus Wigram now moved that the further answer might be taken off the file, on the ground that it had been put in after the bill had been ordered to be taken *pro confesso*. They cited *Lorimer v. Lorimer* (1 Jac. & Walk. 284), *Aberdeen v. Watkin* (*ante*, vol. 6, p. 146), and *James v. Cresswicke* (*ante*, vol. 7, p. 143).

Mr. Wakefield and Mr. Wray, for the Defendant, relied on the Defendant's having cleared his contempt, and on the order for that purpose remaining undischarged. They referred to the 8th Order of 1828 and the 18th Order of 1833, and said that the object of those orders was to give the Defendant an opportunity of putting in a further answer. They referred also to the judgments in *Williams v. Thompson* (1 Cox, 413; and 2 Bro. C. C. 279), and *Hearne v. Ogilvie* (11 Ves. 77).

[451] THE VICE-CHANCELLOR [Sir L. Shadwell]. There is this fallacy in your argument. You speak of a Defendant having cleared his contempt by putting in his answer. But I apprehend that a Defendant does not clear his contempt by putting in his answer and paying the costs, unless the answer is sufficient. It is plain that the 8th and 9th Orders of 1828 and the 18th Order of 1833 refer to a case where a Defendant is not in contempt: but the 24th Order of 1831 refers to a case where the Defendant is in contempt. The language of that last order is unambiguous, and it appears to me to be right to make an order to take the answer off the file. (See 3 Myl. & Craig, 109.)

[451] LANG v. LANG. June 22, 1837.

[S. C. 6 L. J. Ch. (N. S.) 324; 1 Jur. 472.]

Widow. Construction. Settlement.

A., a domiciled Englishman, married a lady at the Mauritius, where the French law was in force. By their settlement (which was in the French language and form) they declared that they intended to marry according to the laws of England, the benefit of which they reserved to themselves the power of claiming; and it was stipulated that A. should invest, in certain securities, £4000 (the property of the

bill, directed to the Sheriff of _____, the said Defendant was arrested thereon: that the said Defendant has since put in his said answer, as by the Six Clerks' certificate appears, and, therefore, it was prayed that the said Defendant may be discharged out of the custody of the said sheriff upon payment of costs of the said contempt. Whereupon and upon hearing the Six Clerks' certificate read, this Court doth order that the said Defendant, on paying or tendering the costs of his said contempt, be discharged out of the custody of the said Sheriff of _____, as to his said contempt."

lady which he acknowledged he had received from her), and that she should receive the income on her sole receipts, for her maintenance and personal wants, and that on her dying in A.'s lifetime without leaving issue by him the capital should belong to him: and if A. did not invest the £4000 in his lifetime, she was to be at liberty to take it out of his assets on his death. A. died intestate in his wife's lifetime. He never received the £4000, nor invested a sum to that amount. Held that his widow was entitled to be paid the £4000 out of his assets, and also to receive her distributive share of the residue.

In 1830 Henry Lang, a British subject, domiciled in England and a lieutenant in the Navy, was stationed with his ship at the Mauritius, where he married Mary Philip. The laws then in force there were similar to [452] those of France. In contemplation of the marriage a settlement, or agreement for a settlement, in the French language, was executed by the parties, in such manner as to be valid according to the laws of the island. It was as follows: "There shall not be any community of property between the intended husband and wife, who mean to marry agreeably to the laws and customs of England, the benefit of which they reserve to themselves the power of claiming as occasion may require for the exercise of their rights; and, consequently, neither of them shall be answerable for the debts contracted by the other prior or subsequent to the marriage. The property of the intended wife consists, first, of her paraphernalia, furniture and trinkets, a statement of which has not been made out, because their existence is proved by authentic lists; 2dly, of the sum of £4000 sterling, which is her own private property, as arising from her savings and economy, and which she has delivered to her intended husband, who acknowledges the receipt of it and consents to remain charged therewith by the sole fact of the solemnization of their marriage. This sum shall be invested by the intended husband in the purchase of lands or inscriptions in the Great Book, or in some other investment approved by the intended wife; and if, on the day of the decease of the husband, such investment should not have been effected, it shall be optional for the intended wife to retake the said sum of £4000 sterling out of the clearest property of her husband. An inventory shall be made of all articles liable to be consumed that may devolve to the intended wife during the marriage. The intended wife is authorized to receive on her sole receipts, of whom it may concern, the interest of the said sum of £4000 sterling, in order to provide for her own maintenance and her personal wants. In case the intended wife should happen to die before [453] her intended husband, without leaving any issue of the marriage, she does hereby make donation unto him of the said sum of £4000 sterling, in absolute proprietorship, but such donation shall become null in case there should be children born or to be born of the said marriage; but it would resume its full force and validity if such children should happen to die during their minority, or even when of age without having legally disposed thereof."

There was no issue of the marriage. H. Lang died in September 1832, domiciled in England, and intestate; and his widow, who was the Defendant in the cause, took out administration to him. The Plaintiffs were his next of kin.

The bill alleged that although the laws which, at execution of the settlement, were in force in the Mauritius, were similar to those of France, yet the construction of the settlement and of the provisions thereof, and the distribution of Lang's personal estate, ought to be determined according to the laws of England; that the £4000 or any other sum was never paid or accounted for to Lang by or on behalf of the Defendant; and that the Defendant claimed to retain the £4000 out of his effects as a debt, and also one moiety of the residue of his effects, under the Statute of Distributions, as his widow.

The bill prayed that the rights and interests of all parties in Lang's personal estate might be ascertained and declared; and that it might be declared that the provision made by the settlement for the Defendant was in bar of any claim which she might be entitled to make upon Lang's estate as his widow; and that she was not entitled to retain out of it any greater sum than the £4000 and the interest (if any) due thereon; or, in [454] case the Court should be of opinion that the provision did not operate as a bar to such claim, then that it might be declared that the agreement in the settlement, on the part of Lang, had been performed or satisfied, and that the

Defendant was not entitled to retain the £4000 as a debt out of Lang's personal estate, under the settlement, and also a moiety of the residue as his widow, under the Statute of Distributions; or that it might be declared that the Defendant was entitled to retain, as a debt, so much only of the £4000 as was actually paid or accounted for to Lang by her or on her behalf.

The Defendant, in her answer, submitted whether the construction of the settlement or of the provisions thereof ought to be determined according to the laws of England. She said that all the necessary negotiations and transactions previous to and at the time of the marriage, including the preparation of the settlement and the requisite steps to render it valid and effectual according to the laws of the Mauritius and to secure to her the marriage portion of £4000, were duly performed by legal and accredited agents of Lang and herself, and that it was intended that the settlement and Lang's being a party to and executing the same and thereby acknowledging the receipt of the marriage portion should constitute an effectual security to the Defendant for the same, as a debt upon his estate; that the £4000 was not, in fact, paid to Lang, but that the expressions in the settlement as to that sum were used for the purpose of creating a valid claim to that amount, on her behalf, against Lang's assets, according to the law and custom of France and the Mauritius; and that, by the settlement, a debt in respect thereof was as effectually created by him in her favour as if the sum had actually [455] been paid; that the meaning and operation of the clauses and provisions was that the payment of the £4000 should be secured to her in the event of her husband dying without issue of the marriage, so as that the same should constitute and be considered as a debt payable out of the most available part of his estate; that she claimed to retain the £4000 as a debt, with interest from her marriage, and also one moiety of the residue of her late husband's estate, as her distributive share thereof as his widow.(1)

(1) The following case was stated by the Plaintiffs, for the opinion of a French advocate, as to the rights of the parties.

After setting forth the settlement, the case proceeded thus: "It is understood that no sum of £4000 (as mentioned in the settlement) was paid over, by the wife to the husband, upon the marriage, and that the wife had no fortune at that time. Mr. Lang died in September 1832, intestate and without issue, and his widow obtained letters of administration to his effects in England. Mr. Lang was entitled, under the will of his father who died in 1828, to some considerable legacies, which will ultimately greatly exceed £4000: part of the bequest (£3500 and upwards) has already been paid to Mrs. Lang. Some further sums having now become payable, it is necessary to ascertain what share of her late husband's estate Mrs. Lang will be entitled to claim as her own property: and the question arises as between Mrs. Lang, claiming as the widow of her late husband, and the mother, brothers and sisters of Mr. Lang, claiming as his next of kin.

"1st. Whether Mr. Lang's estate is bound by the statement in the settlement, so as that it stands charged with the £4000, and entitles Mrs. Lang to such £4000 absolutely, although such statement in the settlement, as to that sum having been paid over by her on the marriage, be incorrect? 2dly. What is the effect of the stipulation in the settlement that '*il n'y aura pas de communauté de biens*' between the husband and wife: and 3dly. You will please to advise, generally, as to the respective rights of the parties in the property of the late Mr. Lang."

Opinion.

"The undersigned, having perused the case containing a copy of the marriage contract entered into in the island of the Mauritius, on the 6th of November 1830, between Lieutenant Henry Lang and Miss Mary Anne Philip, upon the questions submitted, is of the following opinion: He begins by observing that the marriage contract is so worded as to be contradictory to itself; since the parties commence by declaring that they mean to marry according to the laws and customs of England, whereas by the context of the marriage contract, especially by the proviso against community of property, and by the fact that no trustee is named, it is evident that it

[456] Mr. G. Richards and Mr. Freeling, for the Plaintiffs.

The settlement, though made at the Mauritius, must be construed, and the rights of the parties must be de-[457]-termined according to the law of England. At the time when the settlement was made the Mauritius was in the possession of the English; and the settlement declares that the parties intended to marry according to the laws of England, and that they reserved to themselves the power of claiming the benefit of those laws for the exercise of their rights, as occasion might require. [458] *Lashley v. Hog* (Robertson on Personal Succession, 408; see 427, 428. See also 6 Bro. P. C. 577.) According to what Lord Eldon there says, if a husband and wife, natives of and married in a foreign country but domiciled in England at their death, have stipulated, in their marriage settlement, that wherever they might die the distribution of their property should be regulated by the law of their native country, their property must be disposed of according to that law. In this case the husband was a British subject, and his domicile was English both at the time of the marriage and at his death; there can be no doubt therefore that the rights of the parties must be governed by the law of England.

The next question is whether the widow is entitled to retain the £4000 out of her late husband's assets. She agreed to pay the £4000, but she never paid it; can she then be entitled to retain that sum, without having performed her part of the contract on which she now insists? The answer alleges that the requisite steps were taken to render the settlement valid and effectual according to the law of the

was the French Code Civil then in force in the Mauritius, which the parties intended to take as the rule of their engagements. Taking this for granted, the undersigned replies to the questions as follows: 1st. As the contract declares that the intended wife has transferred the sum of £4000 to the intended husband, who acknowledged it and rendered himself liable for it in pursuance of the fact of the celebration of the marriage, it is impossible to raise a doubt as to this point. It comes within the Article 1341 of the late Civil Code, which provides that, when the sum in question exceeds 150 francs, no proof shall be admissible in opposition to the written agreement. The application of this article is the more clear as, on the one hand, the marriage contract adds that if, at the date of her husband's decease, the £4000 should not be laid out, his widow shall recover this sum out of the most accessible part of his property; and, on the other hand, upon the supposition that the gift here was only colourable, there is no French rule of law to render such a donation invalid. Mrs. Lang has therefore a clear right to the restoration of the £4000. 2dly. The proviso against community of property enables either husband or wife to acquire or receive real and personal property during the marriage, for his or her own and separate benefit, excluding the right of the other to any interest therein. 3dly. In defining the rights of Mrs. Lang, the undersigned will at the same time have sufficiently defined those of the heirs of the husband; with regard to this, the undersigned is of opinion that Mrs. Lang is entitled as follows: 1st. For the *trousseau* (the wearing apparel^(*)), the value of which not being fixed by the marriage contract, must be so by the authentic documents therein mentioned. 2d. To the entire sum of £4000. 3d. To the legal interest upon this sum during the marriage, provided the wife has given no discharge for it. This is grounded upon the express clause in the contract, which entitles the wife to the receipt of the interest upon her sole discharge. 4th. To all the property of which the wife became possessed, by purchase or otherwise, during the marriage, and which has been received or recovered by the husband; and this according to the inventories or other documents which may particularize the value of them. 5th. By the terms of the Articles 1461 and 1481 of the Code Civil, the widow is entitled to board and lodging, for the period of three months and forty days, in the house of the husband, and to the expense of her mourning according to the circumstances of the husband. To more than this the widow has no right. To the remainder of the fortune of the husband after these deductions, the heirs of the latter will be entitled." (Signed) "J. M. DELAGRANGE."

(*) The term "*trousseau*" includes wearing apparel, household linen and other useful and ornamental articles, which the wife brings with her on her marriage.

Mauritius and to secure to the Defendant the £4000 as a debt upon her husband's estate; and that the expressions in the settlement as to the £4000 were used for the purpose of creating a valid claim, on Mrs. Lang's behalf, against her husband's assets, according to the law and custom of France and the Mauritius. But, for the reasons before mentioned, the laws or customs of France or the Mauritius have nothing to do with the question; the settlement must be interpreted according to the law of England, and effect must be given to it according to that law only. If Mrs. Lang had filed a bill against her [459] husband in his lifetime, to compel him to invest the money, she would have been met by the defence that she had not paid the money, and, therefore, had not put it in her husband's power to make the investment. It is an established principle of this Court, that it is the duty of a party who is attempting to enforce a contract to shew that he has performed his part of it. We contend, therefore, that as the £4000 was never brought into settlement by Mrs. Lang or by anyone on her behalf, she is not entitled to retain that sum out of her husband's assets. We admit, however, that if she is not entitled to the £4000 she will be entitled to her distributive share of her husband's estate. *Gambier v. Gambier* (ante, vol. 7, p. 263), *Leman v. Whitley* (4 Russ. 423).

Supposing, however, that Mrs. Lang is entitled to the £4000, she is excluded from taking anything more out of her husband's estate. The settlement provides that there shall be no community of property between the parties, and that an inventory shall be made of all articles liable to be consumed which shall devolve to the wife during the marriage. It then directs that the £4000 shall be invested, and that the wife shall receive the income of it to provide for her support and personal wants. Then, if she dies in her husband's lifetime without leaving issue of the marriage, she makes a donation of the money to him. The husband is allowed the whole of his life to make the investment; and, if it should not have been made at his death, then the wife is to be at liberty to take the £4000 out of his most available assets. This provision has reference to what the wife was to receive at her husband's death; and, taking the whole of the contract together, if she is entitled to [460] the £4000, she is excluded from taking anything more out of her husband's estate. At any rate, she is not entitled both to the £4000 and to her distributive share; but, according to the cases that have been decided in this Court, the husband must be taken to have satisfied the £4000 by suffering a moiety of his residue to devolve upon his wife. In *Blandy v. Wulmore* (1 P. W. 324) the Lord Chancellor says: "I will take this covenant not to be broken; for the agreement is to leave the widow £620. Now the intestate, in this case, has left his widow £620 and upwards, which she, as administratrix, may take presently upon her husband's death. Wherefore let her take it; but then it shall be accounted as in satisfaction of, and to include in it, her demand by virtue of the covenant. So that she shall not come in first as a creditor for the £620, and then for the moiety of the surplus." In *Lee v. Cox & D'Aranda* (3 Atk. 419) Lord Hardwicke, C., says: "I am of opinion, upon the strength of the authorities which have been cited, that the Defendant, Martha Cox, is not entitled to the £1000 and the distributive share, likewise, of C. H. Lee's personal estate. I am of this opinion, too, from the reasoning of the thing. It is natural to think this was only to secure a provision to the wife, without any intention of the husband to leave it as a debt. I go likewise upon the foundation of the Court's leaning against double provisions and double satisfactions; in such a case they consider the intention of the parties; for, where it is left to arise out of his estate after his death, and meant only to secure a provision for the wife, the Court will regard it in no other light." The next case is *Garthshore v. Charlie* (10 Ves. 1; see p. 13). There Lord Eldon says that *Blandy v. [461] Wulmore*, *Lee v. Cox & D'Aranda*, and the other cases which his Lordship refers to, are distinct authorities that, where a husband covenants to leave or pay at his death a sum of money to a person, who, independent of that engagement, by the relation between them and the provision of the law attaching upon it, will take a provision, the covenant is to be construed according to that; and his Lordship held that the intestate's widow was not entitled to what her husband had, by their settlement, covenanted should be paid to her by his heirs, &c., within six months after his death, and also to her distributive share of his personal estate. In *Goldsmid v. Goldsmid* (1 Swans. 211; see 217 and 220) Sir T. Plumer,

M.R., says that the question has been at rest more than a century ; and that the rule clearly is that the distributive share of the widow, in the case of absolute intestacy, is considered as performance of a covenant by which the husband had undertaken that she should receive a fixed sum at his death, provided that her share is equal to that sum. These cases shew that the distributive share to which Mrs. Lang is entitled is to be taken by her in performance of the covenant in the settlement ; and, consequently, she is not entitled to the £4000 and also to her distributive share.

Mr. Jacob and Mr. Stuart, for the Defendant. The settlement begins with declaring that the parties intend to marry according to the laws and customs of England, the benefit of which they reserve to themselves the power of claiming. The Defendant, therefore, is entitled to her dower, thirds and everything else that the law of England gives her. The instrument then recites that the property of the wife consists, amongst other [462] things, of a sum of £4000, which she has delivered to her husband. It is admitted that that recital was untrue ; but it was known to be so by both parties, and the husband acknowledges the receipt of the £4000.

[THE VICE-CHANCELLOR. There can be no doubt that that recital is to be taken as a contract by the husband to settle £4000.]

The husband is not to have the whole of his life to do it in ; but the intention of the parties was that he should invest the sum immediately after the marriage, and that the wife should receive the income of it for her separate use, in effect, during the coverture. The recital and the acknowledgment by the husband created a debt payable *in presenti*.

[THE VICE-CHANCELLOR. The question is whether the settlement is not to be construed in the same way as if the husband had covenanted with a trustee to pay £4000 and that it should be invested, and the income paid to the wife, for the purposes mentioned.]

The settlement, instead of providing that the wife shall take the £4000 in lieu of her thirds, expressly stipulates that she shall take that sum and also whatever else she would be entitled to according to the law of England.

In *Blandy v. Wilmore* the husband agreed, in case his wife should survive him, to leave her £620. The husband died intestate in the lifetime of his wife, and her distributive share of his personal estate exceeded £620. There the right of the wife did not and could not arise [463] until the death of the husband, and he did leave her more than £620, and, consequently, the agreement was literally performed. In *Lee v. Cox & D'Aranda*, the covenant was not to take effect except on the death of the husband in the lifetime of the wife ; and, in that case also, there was a literal performance of the covenant. Here the wife had a right to have the £4000 paid and invested *instantly*, and the dividends paid to her during the coverture. We submit, therefore, that Mrs. Lang is entitled to the £4000 and also to her distributive share.

Mr. Richards, in reply. If Mrs. Lang had applied to this Court to compel her husband to invest the £4000, the Court would not have decreed him to do so, as she had never given him the means of making the investment, and, consequently, she would have been asking for the performance of a contract which she herself had not performed on her part. If, however, she might have applied to this Court in her husband's lifetime, she never did apply. She was at liberty to forego the payment of the dividends, if she pleased to do so ; and, as she did not insist on the investment, she must be taken to have forgone them. It is clear that the husband had the whole of his life to make the investment ; for the settlement provides that, in case he did not invest the sum, she was to take it out of his assets.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is not a case of much difficulty.

It is plain, on the face of this instrument, that no such objection ever could have been made as Mr. Richards supposes might have been made, namely, that the [464] wife had not paid the £4000. The husband acknowledged that he had received the consideration, although in fact he had not ; but there was no surprise or deceit practised upon him in that respect. And we find that, though he had not received it, he proceeded to make a stipulation as to the investment of the sum, which, as it seems to me, never was intended by the parties should depend for its validity on the fact of there having been any previous actual payment. The husband consents,

in the first place, to be charged with the sum of £4000; and then there is a stipulation (in terms applicable to the French law, but certainly informal according to the English law) by means of which we collect, upon the whole, that the £4000 was to be invested. But the Courts of this country, if they had had to direct the investment, would have directed it to be made according to the English law; that is, not in the French funds, but in the three per cent. stock of the kingdom.

Then it is provided that the wife shall have the interest for her separate use during her life: not in those words certainly, but in French words which no one can read without seeing that they convey that meaning to the mind of an English lawyer.

Then there is a proviso that this fund shall go to the children of the marriage, in the event of their being any, or to their issue if they should die under 21, leaving issue. I mention that only, because it is apparent on the settlement that there is a provision made, not only for the wife, but also for the children of the marriage in a given event. The event happened in which it is provided by the settlement that the £4000 should go to the wife; and I think that if the wife had filed a bill (living the hus-[465]-band) to compel him to make the investment, the Court would have considered that the husband had entered into a contract, which was to be fulfilled in his lifetime, and would have compelled him to produce the £4000, and to make the investment.

If that be the right conclusion, such cases as *Blandy v. Widmore* and *Lee v. Cox & D'Aranda* have no application to the subject; because those cases decide only that, where the husband has bound himself to fulfil some obligation by the payment of money, or by doing an act equivalent to the payment of money at the time of his death (whether it be at the time of his death, or within six months after, makes no difference), that obligation is satisfied if, by dying intestate, he allows the law to confer a benefit on the covenantee equivalent to that which he had bound himself to confer. Those cases have no reference to the subject, there being in this case an obligation on the husband to produce the sum in question: and in my view it is the same thing as if there had been a covenant with a trustee to make a settlement of that sum in the manner provided for; and then, if the husband had died intestate, the trustee would have taken from his assets what was sufficient for the purpose, and the wife would have been at liberty to take her share of the residue under the Statute of Distributions.

Declare that the widow is entitled to the £4000, with interest at £4 per cent. from her husband's decease, and also to her distributive share of his personal estate.

[466] THE ATTORNEY-GENERAL v. CRADOCK. June 24, 1837.

Practice. Plea and Pleading.

A plea purported to be the joint and several plea of several Defendants, but was sworn to by some of them only. The Court refused to order it to be taken off the file.

A demurrer for multifariousness, filed by one of the Defendants, was allowed. The other Defendants then pleaded the allowance of that demurrer. The plea was overruled.

S. Cradock, one of the Defendants, had demurred to the information for multifariousness; and the Vice-Chancellor allowed the demurrer.(1) Afterwards a joint and several plea was filed on behalf of the other persons named as Defendants. The plea was sworn to by all those persons except one, who had died a few days before the information was filed.

Mr. Wigram and Mr. Smythe, for the Plaintiff, now moved that the plea might

(1) The Vice-Chancellor's order was reversed by the Lord Chancellor. See 3 Myl. & Craig, 85.

be taken off the file, on the ground that one of the parties by whom it purported to be filed had not sworn to it. They cited *Harris v. James* (3 Bro. C. C. 399), *Cope v. Parry* (1 Madd. 83), *Cooke v. Westall* (1 Madd. 265), and *Done v. Read* (2 V. & B. 310). Mr. Knight and Mr. Bethell, for the Defendants, said that the plea was good as to the parties who had sworn to it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case of *Done v. Read* is against the application, in support of which it has been cited.

In *Harris v. James* the answer professed to be a joint answer only.

[467] It is singular that *Cooke v. Westall*, which has been relied on as precisely in point, should have been decided on the authority of two cases in the Exchequer, neither of which is reported. Moreover, that case is inconsistent with *Done v. Read*.

Cope v. Parry was decided by Sir Thomas Plumer, V.-C., in 1813, and *Cooke v. Westall* was decided by the same learned Judge in 1816. Those two cases are contrary the one to the other: and if I am to choose between them, I prefer the decision in 1813.

As far as the present objection is concerned, I will not order the plea to be taken off the file.

Motion refused.

July 3, 4. The plea now came on to be argued. It stated that Cradock, having been served with process, appeared and filed a general demurrer to the information: it then stated the contents of the demurrer, that it was argued and allowed, and that the order allowing it was drawn up, passed and entered and still remained unreversed; and that Cradock had thereby ceased to be a party Defendant to the information.

Mr. Knight, Mr. Jacob and Mr. Bethell, in support of the plea, said that the information prayed two different sorts of relief, one against Cradock, and the other against the rest of the Defendants (see 3 Myl. & Craig, 89 and 90): that Cradock, by the allowance of his demurrer, had obtained a decision that the record was improperly constituted; and, therefore, the relators ought to have amended the informa-[468]-tion by striking out that portion of the relief which affected him. *Tarleton v. Hornby* (1 Youn. & Coll. 333).

Mr. Wigram, Mr. G. Richards and Mr. Smythe appeared in support of the information.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Is there any precedent for such a plea as this? The case of *Tarleton v. Hornby* bears no resemblance to the present case. There the bill was filed against the assignees of a bankrupt; and the case against all of them was one and the same; and, consequently, a decision that there was no equity against one of them was, in effect, a decision that there was no equity against the others. But it by no means follows as a necessary consequence that, in every case in which a bill is multifarious as to one of the Defendants, it is multifarious as to the rest.

The effect of allowing the demurrer is that the information, as against the Defendant who filed the demurrer, is out of Court; and this plea is a plea virtually alleging that the allowance of the demurrer was wrong.

My present impression is that the plea is bad; but I will not overrule it without giving the Defendants an opportunity of searching for precedents.

July 10. The plea was again mentioned on this day; but no precedents were produced in support of it.

[469] THE VICE-CHANCELLOR [Sir L. Shadwell]. The opinion which I before expressed remains the same.

What is brought forward by this plea, which is a plea to the whole information, is that a certain Defendant has demurred, and that the demurrer has been allowed. But it does not follow that a plea to the whole information is right, because a certain person has been improperly made a party to it. According to the prayer, relief may be given as to those matters in which Cradock has no interest or concern: and it is not certain that, as to the rest of the matters in which Cradock has an interest or concern, relief may not be given as against the trustees.

Tarleton v. Hornby was a very different case. There Lord Lyndhurst, C.B., held that, as the demurrer had been allowed as to the responsible assignee, the case had been already decided; and, therefore, it ought not to proceed as to the other assignees.

Plea overruled.

[470] SCHOLEFIELD v. HEAFIELD. Nov. 15, 1838.

Construction of 11 G. 4 and 1 W. 4, c. 47. Infant Heir. Mortgagor and Mortgagee.

In a suit by an equitable mortgagee against the infant heir of the mortgagor, the estate was directed to be sold, as being most beneficial to the infant; and under 11 Geo. 4 and 1 W. 4, c. 47, the infant was directed to convey the estate to the purchaser.

Under the decree made on the hearing of this cause (see *ante*, vol. 7, p. 669) the estate was sold, and the mortgagee who had obtained permission to bid at the sale became the purchaser. He then presented a petition in the cause, praying that the infant heir might be ordered to convey the estate to him. (See 11 G. 4 and 1 W. 4, c. 47, s. 11.)

Mr. Knight Bruce and Mr. Sharpe, in support of the petition, said that by the decree the estate was directed to be sold forthwith, notwithstanding the infancy of the heir, and, therefore, it followed, as of course, that the Court had jurisdiction under 11 G. 4 and 1 W. 4, c. 47, s. 11, to direct the infant heir to convey the estate to the purchaser.

Mr. Jacob, for the heir, said that this case was not within the 11 G. 4 and 1 W. 4, c. 47, as the suit was instituted by an equitable mortgagee to compel payment of his own debt only, and that the Act did not apply except where the object of the suit was to compel payment of the debts due to the general creditors of the deceased. *Prior v. Carver* (3 Myl. & Craig, 157).

THE VICE-CHANCELLOR said that the statement of what had passed between the Lord Chancellor and himself (*ante*, vol. 7, p. 670) was correct: that the 11th section of the Act provided for the case of an estate being decreed to be sold for the satisfaction of any debt in the singular number, as well as of debts: that in this case the estate had been sold for the satisfaction of a debt, and, therefore, the case was within the Act, and, consequently, an order must be made according to the prayer of the petition.

[471] WILLIAMS v. JONES. Dec. 13, 1838.

11 G. 4 and 1 W. 4, c. 36. Practice. Contempt.

The Plaintiff served the Defendant, who was in custody for want of appearance, with notice to enter her appearance within 14 days; and on her not having done so, he moved that the Junior Six Clerk might be directed to enter her appearance for her. In the meantime, however, she had been discharged, because the Plaintiff had not brought her to the Bar of the Court within 30 days from the time of her being in custody. Held that, as the Defendant was no longer in custody, the Court had no authority to make the order.

The Defendant had been taken on an attachment for want of appearance, and was afterwards lodged in Lancaster gaol. The Plaintiff, in order to save expense, did not bring the Defendant into Court by *habeas corpus*, but whilst she was in custody he served her with notice to enter her appearance under 11 G. 4 and 1 W. 4, c. 36, s. 11. The Defendant not having entered her appearance within the time allowed by the Act, the Plaintiff moved that the Junior Six Clerk might be directed to enter an appearance for her. Before, however, the motion was made, the sheriff had discharged

the Defendant out of custody because the Plaintiff had not brought her to the Bar of the Court within the time prescribed by the 15th section of the Act, rule 5.

THE VICE-CHANCELLOR was of opinion that, as the Defendant was no longer in custody, he had no authority to direct an appearance to be entered for her, and refused the motion.

Mr. Cooper, for the Plaintiff.

[472] THE ATTORNEY-GENERAL v. POULDEN. June 29, 1837.

Charity. Mortmain Act.

A. conveyed a piece of ground, by bargain and sale enrolled, to trustees for charitable purposes; but he retained possession of the deed and of the land for more than 20 years afterwards, and then the trustees reconveyed the land to him. After A.'s death his heir agreed to sell the land to B. An information was then filed against the heir and B., claiming the land on behalf of the charity; but the Court held that the conveyance to the trustees was void; as it was to be inferred, from the circumstances above mentioned, that there was a secret trust for A.

By an indenture of bargain and sale, dated the 21st of March 1800, Thomas Fitzherbert conveyed to George Daysb, F. Booth and George Poore, in fee, a piece of ground in the parish of Portsea in Hampshire, in trust to permit a competent part thereof to be used as the site of 12 almshouses to be built according to the plan annexed to the indenture, and to permit the houses to be occupied by four poor men, four poor widows and four poor single women of the age of 50 years or upwards, who should have been born in the parish of Portsea or have been resident there for 10 years next before their admission, and to permit the residue of the piece of ground to be allotted into gardens so that there might be a garden to each almshouse; and to permit the vicar of the parish, or his curate, and also the officiating ministers of St. John's and St. George's chapels in Portsea, and the churchwardens and the impropriator of the great tithes of the parish or his lessee, to be governors and managers of the charity, with power to elect the persons who should occupy the almshouses; and, until the almshouses should be finished, to permit the piece of ground to be applied to such charitable purposes as the governors for the time being should, by writing under their hands, direct; and Fitzherbert thereby declared that the expense of building the almshouses should not exceed £2000, and that the same should be defrayed out of such money as he should from time to time advance for that purpose, and also out of such legacies or sums of money as he had given, and from time to time should give to the trustees, and also out of any other money which from time to time should be con-[473]-tributed or subscribed for that purpose. The deed then contained rules and regulations for the management and government of the charity; and it was duly executed and enrolled in the manner required by the Mortmain Act (9 Geo. 2, c. 36); but Fitzherbert kept possession of it and also of the piece of ground.

By an indenture of bargain and sale, dated the 4th of June 1821, and enrolled in Chancery on the 20th of the same month, after reciting the former indenture; that Poore, one of the trustees, was dead; that no fund was ever provided for the erection of the almshouses; that it was Fitzherbert's intention, by his will or a codicil thereto, to provide a fund for that purpose, but which was not to be so applicable till after the decease of certain persons to whom he intended to bequeath annuities for their lives to be secured upon the fund; that the possession of the piece of ground was never delivered to the trustees, nor was it intended that they should have possession of it until the fund for the erection of the almshouses should fall in and become applicable thereto; that Fitzherbert had continued and then was in possession and receipt of the rents of the piece of ground: that the parties were advised that doubts might be entertained whether, under the circumstances before stated, the former deed was not void in law; and that Fitzherbert, being desirous of carrying the benevolent purposes contemplated by that deed into effect, in a different form and manner, but

without providing for the erection of almshouses or in anywise affecting any lands or tenements, Daysh and Booth had, at his request, agreed to reconvey the piece of ground to him: it was witnessed that they did bargain and sell the piece of ground to him in fee.

[474] Fitzherbert, by his will, dated the 8th of June 1821, directed his executrixes and executors to set apart or invest in the names of Daysh, Booth and Alexander Poulden £10,000 four per cents., as a fund to answer the annuities given by his will: and he devised all his real estates in the island of Portsea to his sisters, Mary Fitzherbert and Jane Fitzherbert in fee, and appointed them, and also Daysh, Booth and Alexander Poulden, executrixes and executors of his will.

The testator, by a codicil, dated the 11th of June 1821, directed that Daysh, Booth and Poulden should stand possessed of the £10,000 four per cents., subject to the annuities charged thereon by his will, in trust, to accumulate the dividends until one-half thereof should have fallen in by the termination of the annuities, and then to apply such moiety of the dividends, and also such further parts thereof as should from time to time fall in by the termination of the annuities, and the whole of the dividends, when the annuities should have determined, for the maintenance and support of five poor men, ten poor widows and five poor single women, who should be of the age of 50 years or upwards and born in the parish of Portsea; and that the vicar of the parish and the officiating ministers of St. John's and St. George's chapels in the town of Portsea, and the officiating minister of every new church or chapel which might be thereafter erected within the parish, and the churchwardens of Portsea, should be the governors and directors of the charity: and the codicil contained various rules and regulations similar to those contained in the indenture of March 1800.

The testator died on the 30th January 1822, leaving his two sisters his co-heirs; and after his death his [475] executrixes and executors invested £10,000 four per cents. in their names according to the directions of the will and codicil.

Jane Fitzherbert afterwards died intestate as to her real estates, leaving her sister Mary her heir at law. Mary Fitzherbert afterwards died, having by her will, dated the 29th May 1831, devised her real estates to William Tireman, Alexander Poulden and George Poulden, in fee, in trust to sell the same. Daysh and Booth afterwards died, and Tireman and George Poulden were appointed trustees of the testator's will in their place. Tireman died in December 1833.

The information was filed against Alexander and George Poulden and C. C. Askew, to whom the Pouldens in execution of the trusts of Mary Fitzherbert's will had agreed to sell the piece of ground for £225. The questions raised by the information were, first, whether, by means of the reconveyance of June 1821, and by the trusts of the testator's will and codicil, the trusts of the indenture of March 1800 had been destroyed, or whether the reconveyance was fraudulent and void as against the charity: secondly, whether it was not the testator's intention that the charity should have the piece of ground and also the benefits conferred by the will and codicil, or whether he intended the latter to be in lieu or satisfaction of the former.

Mr. Gurney appeared for the relators.

Mr. Cooper and Mr. Witham, for the Defendants A. and G. Poulden, said, first, that the deed of 1800 was valid notwithstanding the testator retained possession of it and of the piece of ground until his death, and consequently the reconveyance of 1821 was inoperative: [476] that, after the deed of 1800 was enrolled, the trustees might have taken proceedings for establishing the charity and carrying the trusts of that deed into effect; that it provided that the expense of erecting the almshouses should be defrayed out of such money as the founder should from time to time advance for that purpose, and also out of any other money which from time to time should be contributed or subscribed for that purpose; and, therefore, it was clear that any person might have subscribed the money and then become relators in an information for carrying the charity into effect: *Doe v. Pitcher* (3 M. & S. 407); in which case Lord Ellenborough considered that the conduct of the parties to the deed was immaterial, and that all that was required was that there should be a power in a Court of Justice to enforce, as against the donor, the deed that he had executed.

Secondly, that the charities created by the deed and by the codicil were very nearly the same as to the objects, the persons who were to be the governors and directors, and the rules and regulations for the management of the charities, and that the question whether the charity was entitled both to the land and to the benefits conferred by the codicil, depended very much upon the recitals in the reconveyance, and that those recitals shewed clearly that it never was the founder's intention that both the land and the £10,000 stock should be enjoyed by the charity.

Mr. Wood appeared for the Defendant Askew.

THE VICE-CHANCELLOR said that, as the grantor had retained possession of the deed of 1800 and of the land, [477] for more than 20 years after he had executed the deed, and then the trustees reconveyed the land to him, it must be inferred that there was a secret trust for him; and therefore that the deed of 1800 was wholly void.

[477] PIDDING v. HOW. June 17, 19, 21, 1837.

[S. C. 6 L. J. Ch. (N. S.) 345. See *The Leather Cloth Company v. The American Leather Cloth Company*, 1865, 11 H. L. C. 542; 11 E. R. 1444; *Morgan v. M'Adam*, 1865, 36 L. J. Ch. 229; *Ford v. Foster*, 1872, L. R. 7 Ch. 625; *Eno v. Dunn*, 1890, 15 App. Cas. 262.]

Injunction. Misrepresentation.

The Plaintiff had made a new sort of mixed tea, and sold it under the name of "Howqua's Mixture;" but, as he had made false statements to the public as to the teas of which his mixture was composed and as to the mode in which they were procured, the Court refused to restrain the Defendant from selling tea under the same name, until the Plaintiff had established his title at law.

In 1832 the Plaintiff began to sell in London a mixed tea, composed of many different sorts of black tea, under the name of Howqua's Mixture, in packages weighing a catty (1) each, and having Chinese characters and the figures of a male and female Chinese on three of the sides, and a printed label containing the words "Howqua's Mixture" and some other particulars relating to the tea on the fourth side. The Defendant having sold tea under the same name and in packages with labels resembling those used by the Plaintiff, the Plaintiff obtained an *ex parte* injunction to restrain him from so doing. The Defendant now moved to dissolve the injunction.

The case made by the Plaintiff was that the mixture in question was originally made by one of the Hong merchants at Canton, named Howqua, for his own private use; that the Plaintiff when he was at Canton had been intimate with Howqua, and had frequently drunk tea made from the mixture at his house; that, having ascertained the particular kind of tea which gave to the mixture its peculiar flavour, he in 1832 purchased from Howqua and brought to England a large quantity of that tea and also of other black teas, and made a mixture of them similar to that used by Howqua, and that he had con-[478]-tinued to sell large quantities of it, under the name and in the packages before mentioned.

The Plaintiff, in his labels and advertisements, intimated that the mixture was made by Howqua in Canton, and was purchased from him and imported into this country by the Plaintiff, in the packages in which it was sold: that the tea which gave it its peculiar flavour was very rare and high priced even in China, and was grown in only one province of that country, named Kiang Nan; and that it could not be procured in England at any price.

The affidavits on the Defendant's behalf were made by persons some of whom had been acquainted with Howqua. They stated that the mixed tea sold by the Plaintiff as Howqua's Mixture was neither made nor used by Howqua: that it was composed of scented Orange Pekoe (which gave it its peculiar flavour) and of other black teas

(1) A catty is a Chinese weight equal to 1½ lb.

of the ordinary kinds: that Orange Pekoe was not considered in China to be one of the best teas; and that that sort of tea had been imported into and sold in England previously to 1832, and had been since generally imported and sold by persons engaged in the tea trade: that no black tea, but only green tea, was produced in the province of Kiang Nan: that the Plaintiff did not purchase the teas from which the mixture was made from Howqua, or import them from China, but that he purchased them in England, and that the packages in which the mixture was sold were made, not in China, but in England.

Mr. Jacob and Mr. Cankrien, for the Defendant, said that the Plaintiff had no exclusive right to use the name of Howqua, or, at all events, none such as a Court of Equity would protect: that the mixture was neither [479] used nor made by Howqua, nor were the teas of which it was composed purchased of him; nor, in short, had the Plaintiff any connexion whatever with Howqua: that the Plaintiff had made use of representations for the purpose of deluding the public, and the Court would not allow any person to have a monopoly of a particular mode of effecting that object. *Hogg v. Kirby* (8 Ves. 215).

Mr. Knight, Mr. Willecock and Mr. Taylor, for the Plaintiff, said that, supposing the mixture not to have been made or used by Howqua but to have been invented by the Plaintiff, yet the Plaintiff, by having sold it for several years under the name of Howqua's Mixture, had acquired a property in that name, and, consequently, was entitled to the exclusive use of it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The view that I have taken of this case is this. The Plaintiff having acquired, either by some communication from Howqua or in some other manner, the method of compounding a mixed tea, which has been so agreeable to the public as to induce them to purchase it, began, some years ago, to sell it under the name of Howqua's Mixture: and the Defendant, finding that the Plaintiff's mixture was in considerable demand, has recently begun to sell a mixture of his own, which I take to be different from the Plaintiff's, under the same designation. I apprehend that, *prima facie*, the Defendant was not at liberty to do that. There has been, however, such a degree of representation, which I take to be false, held out to the public about the mode of procuring and making up the Plaintiff's mixture, that, in my opinion, a Court of Equity ought not to interfere to protect the Plaintiff until he has established his title [480] at law. As between the Plaintiff and the Defendant, the course pursued by the Defendant has not been a proper one: but it is a clear rule, laid down by Courts of Equity, not to extend their protection to persons whose case is not founded in truth. And, as the Plaintiff in this case has thought fit to mix up that which may be true with that which is false, in introducing his tea to the public, my opinion is that, unless he establish his title at law, the Court cannot interfere on his behalf.

What, therefore, I intend to do is to dissolve the injunction, and to give the Plaintiff liberty to bring such action as he may be advised. Let there be liberty to both parties to apply; and reserve the consideration of costs.

[480] JAQUET v. LEWIS. July 4, 1837.

Debtor and Creditor. Bond. Parish Officers.

A parish being indebted to A. for repairs done to the church, the parishioners agreed at a vestry that the parish officers should give a bond for the amount; that A. should give the parish 12 months' notice when he required payment, and that the parish should be at liberty to pay the debt by instalments: and, at another vestry held shortly afterwards, it was resolved that the obligors should be indemnified by the parishioners and out of the rates, and the parish officers for the time being were authorized and directed to pay the interest and the principal, when required, out of the rates. A., who was himself a parishioner, and several of the other parishioners, signed both the agreement and resolution; and he received the interest on his debt for several years, and part of the principal also, out of the rates, and never called on the obligors to pay the interest. Held, that, as the

parishioners had no power to bind the parish, the obligors were not exempted from their liability on the bond, notwithstanding A. had signed both the agreement and the resolution.

In 1810 a parish in Essex being indebted to Johnson, one of the parishioners, for repairing the church and building a workhouse, it was agreed at a vestry that the parish officers should give him a bond for the [481] amount; that he should give the parish 12 months' notice when he required payment, and that the parish should be at liberty to pay the debt by instalments. This agreement was entered in the vestry book, and signed by the parishioners present, and also by Johnson. Shortly afterwards another vestry was held, at which it was resolved that Wright and Jaquet, who were the parish officers who had given the bond, should be indemnified by the parishioners and out of the rates: and the parish officers for the time being were authorized and directed to pay the interest, and the principal when demanded, out of the rates. This resolution also was entered in the vestry book, and signed by Johnson and the other parishioners present. During Johnson's lifetime the interest on the bond was paid to him out of the parish rates; and, after his death, the interest and part of the principal were paid to his executrix out of the same fund.

The executrix having brought an action against Jaquet for the principal and interest remaining due on the bond, the bill was filed by Jaquet against her, and also against Wright's executors and the other parishioners who had signed the agreement and resolution, alleging that Johnson, by signing these documents, had agreed to accept payment of what was due to him out of the parish rates, and had precluded himself from suing on the bond; and praying that the bond might be cancelled, and for an injunction to restrain the action; or, at all events, that the parties who had signed the agreement and resolution might be decreed to contribute to the payment of what remained due to Johnson's estate.

Mr. Knight and Mr. Rogers, for the Plaintiff, and Mr. G. Richards, for Wright's executors.

[482] The debt for which the bond was given was contracted, not by Jaquet and Wright, but by the parish. Johnson was a party both to the agreement and to the resolution. By the former he agreed to give 12 months' notice to the parish officers for the time being, when he should require payment of what was due to him; and he also bound himself to accept payment from the parish by instalments. It is plain, therefore, that he gave credit, not to the obligors, but to the parish. What right then can his executrix have to rely on the credit of the individuals, whose credit the testator himself never trusted to?

The resolution also shews that Johnson trusted the parish and not the obligors. It directs the parish officers for the time being to pay the interest and the principal, when demanded, out of the rates, and it directs also that the parties who had given the bond should be indemnified out of the rates. Johnson was a party to that resolution by which the parish came under a liability to him, and he contracted that the parties who had given the bond should be indemnified. How then can his executrix be entitled to sue those parties; more especially as they have never been called upon to pay the interest, but both Johnson and his executrix have received it for 25 years, and she has received part of the principal also, out of the rates of the parish.

If, however, the Court should think that the executrix is entitled to sue on the bond, the Plaintiff has a right to contribution, as against all the parishioners who were present at the vestries.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The giving of the bond shews, *prima facie*, that it was the intention of the parties that the obligors should [483] be liable on the bond; and there is no expression, either in the agreement or in the resolution, which shews that the bond was to be considered as mere waste paper, or that the parishioners who signed the agreement and resolution undertook personally to pay the debt.

Johnson left it to the parishioners to make such resolutions as, it was thought, would have the effect of binding the parish; but he never meant to exempt the obligors from their personal liability under the bond. He acceded to those resolutions

so far only as they would bind the parish: and as the parishioners had no power to bind the parish, the liability of the obligors remains unaffected.

Bill dismissed with costs.

Sir William Horne, Mr. Wakefield, Mr. Lovat, Mr. Koe, Mr. Blunt and Mr. Craig appeared for all the Defendants except Wright's executors; but the Court decided without hearing them.

[483] PETLEY v. THE EASTERN COUNTIES RAILWAY COMPANY. Jan. 15, 1839.

Waste. Injunction. Practice.

An injunction to restrain the pulling down of houses granted on an *ex parte* motion, although the Defendants had appeared.

The Plaintiff was the owner of certain houses in Spitalfields, and had agreed to sell them to the Defendants, at a price to be fixed by arbitrators. Before the award was made the Defendants began to pull down the houses: upon which the bill was filed praying for an injunction to restrain them from so doing. The De-[484]-fendants entered their appearance on the day on which the bill was filed; and on the same day, but *after the Defendants had appeared*,

Mr. Wigram and Mr. Parry, for the Plaintiff, moved, *ex parte*, for the injunction. They cited *Aller v. Jones* (15 Ves. 605), *Harrison v. Cockerill* (3 Mer. 1).

Motion granted.

[485] BALL v. HARRIS. July 4, 1837.

[S. C. affirmed, 4 My. & Cr. 264; 41 E. R. 103 (with note).]

Charge of Debts. Trustee.

Testator devised his estates, subject to debts, to a trustee in trust for several persons in succession, and appointed the trustee and his widow his executor and executrix. Held, that the trustee had power to mortgage the estates to secure money which he had borrowed for the purposes of the will.

The trustee, under a power of sale in the will, sold part of the estates, and invested the proceeds in the purchase of another estate, which was conveyed to him, to the uses, upon and for the trusts, &c., of the will. Held, that the purchased estate must be taken, for all intents and purposes, as if it had been devised by the will, and, consequently, that the trustee had the same power to mortgage it as he had to mortgage the devised estates.

The will of Richard Perrey was dated the 14th of July 1826, and was partly as follows:—"First, I direct all my just debts, funeral and testamentary expenses and the charges of the probate of this my will to be paid. I give to my daughter Ann Shewell, wife of Nathan Shewell, a legacy of £50 for her own use absolutely. I give to my executors hereinafter named a legacy of £30, upon trust to be paid and applied by them, for the benefit of my son, William Wareing Perrey, in such manner as they, in their discretion, shall think proper. I give unto my said son, William Wareing Perrey, one annuity of £50, during his natural life. [486] I give and devise unto my said daughter, Ann Shewell, my messuage or dwelling-house and garden, with the appurtenances, situate at Holt Hill, during her natural life: and I declare and direct that the same shall be held and enjoyed by my said daughter, Ann Shewell, for her sole and separate use, and that the same shall not be subject or liable to the debts, control, engagements or disposition of her present or any future husband. As to my said house and garden at Holt Hill aforesaid, and, from and immediately after my decease, as to all the rest, residue and remainder of my estate and my effects whatsoever and wheresoever, both real and personal, I give, devise and bequeath the same

unto my friends Thomas Leathom and William Harris, their heirs, executors, &c., to hold the same unto and to the use of the said Thomas Leathom and William Harris, their heirs, executors, &c., upon trust that they do and shall permit my wife, Mary Perrey, and her assigns to hold and enjoy the same, for her natural life, but subject nevertheless to the payment of the said annuity of £50 to my said son for his life: and, from and immediately after the death of my said wife, upon trust that they, the said Thomas Leathom and William Harris, their heirs, &c., do and shall permit my daughter Mary Shewell Thompson, widow, and her assigns to hold and enjoy the same, for her natural life, but subject nevertheless to the payment of the said annuity to my said son; and, from and immediately after the decease of my said daughter, Mary Shewell Thompson, upon trust that they, the said Thomas Leathom and William Harris, their heirs, &c., do and shall stand seised and possessed thereof in trust for my granddaughter Elizabeth Ann Shewell Perrey Thompson, her heirs, executors, administrators and assigns absolutely for ever, but subject nevertheless to the payment of the said annuity [487] to my said son, and to become vested in her on her attaining the age of 21 years, and to be conveyed, assigned or transferred accordingly after the decease of my said daughter, Mary Shewell Thompson; and upon further trust that they, the said Thomas Leathom and William Harris, their heirs, &c., do and shall, after the decease of my said wife and my said daughter, Mary Shewell Thompson, pay and apply the whole or a competent part of the rents, interests, dividends and annual produce of the residue of my estate and effects, for the maintenance and education of my said granddaughter, until she shall attain the age of 21 years; but if my said granddaughter shall happen to die before she shall attain the age of 21 years, and my said wife and my said daughter, Mary Shewell Thompson, shall be then dead, then upon trust that they, the said Thomas Leathom and William Harris, their heirs, &c., do and shall sell and absolutely dispose of such parts of the said residue of my estate and effects as are or shall be in their nature saleable and as shall not have been sold under the power hereinafter given for that purpose, and do and shall collect and get in the other parts of the residue of my estate and effects, and do and shall lay out and invest in their names, in or upon any of the Parliamentary stocks or public funds of Great Britain, or at interest upon Government or real securities in England, so much of the money to arise from such sale and collection, the dividends and interest whereof will amount to the clear yearly sum of £50, and do and shall, by, with and out of the said dividends or interest, pay, unto my said son, the said annuity of £50 hereinbefore devised to him: and upon trust that they, the said Thomas Leathom and William Harris, their heirs, &c., do and shall pay, distribute and divide the monies to arise by or from such sale and collection, subject never-[488]-theless to the payment of the said annuity to my said son as aforesaid, unto, between, or amongst the person or persons who shall be my next of kin, according to the Statute of Distributions of Intestates' Effects. And I do hereby declare and direct that the provision hereby made for my said daughter, Mary Shewell Thompson, and my said granddaughter, shall be for their own respective sole and separate use and benefit, and that the same shall not be subject or liable to the debts, control, engagements or disposition of any husband or husbands with whom they may respectively marry. And I do hereby authorize and empower my said trustees, at any time or times during the continuance of the trusts hereby reposed in them, with the consent of my said wife and my said daughter, Mary Shewell Thompson, during their joint lives, and of the survivor of them during her life, and, after the decease of the survivor of them, then at their or his discretion, to make sale of, dispose and convey all or any of the messuages, lands, tenements and hereditaments hereby devised, and the fee-simple and inheritance thereof, to any person or persons, either together or in parcels, and by public sale or private contract, and for such price or prices as to my said wife or my said daughter, Mary Shewell Thompson, or the survivor of them, shall seem reasonable: and also, with the consent of my said wife and my said daughter, Mary Shewell Thompson, or the survivor of them as aforesaid, and, after the decease of the survivor of them, then at their or his discretion, to lay out and invest all or any part of the monies which shall arise and be received under the trusts of this my will in the purchase of any other messuages, lands, tenements, or hereditaments, being fee-simple, to be situate in England or Wales, and again,

with the like consent or at the discretion of my said trustees as aforesaid, to sell, dis-[489]pose of and convey such last-mentioned messuages, lands, tenements and hereditaments in manner aforesaid: and I do hereby further declare and direct that all the said messuages, lands, tenements and hereditaments purchased as aforesaid, and the purchase-monies of all the said messuages, lands, tenements and hereditaments sold by my said trustees as aforesaid, shall be, remain, continue and enure to the same uses and intents and purposes, or such of them as are then subsisting and capable of taking effect, and as near as the nature of the estates will admit of, as my messuages, lands, tenements, and hereditaments hereby devised, before the sales thereof, and the said trust monies, before they were invested in the purchase of the said messuages, lands, tenements and hereditaments, were severally subject and liable to: provided also that it shall and may be lawful for my said trustees, with the consent of my said wife and my said daughter, Mary Shewell Thompson, or the survivor of them as aforesaid, to lay out and invest all or any of the trust monies, in their or his names or name in or upon any of the Parliamentary stocks or public funds of Great Britain, or upon Government or real securities, and do and shall stand possessed thereof, and of the interest, dividends and annual produce thereof, upon the trusts hereinbefore declared concerning the residue of my estate and effects, or such of them as are then subsisting and capable of taking effect." The testator then declared that the receipts of his trustees should be sufficient discharges to the purchasers of the premises thereby made saleable; and he directed his trustees to apply so much of the rents and profits of his messuages and tenements as they should think necessary, in keeping the same in repair and insured from fire, and he appointed his trustees and his wife, Mary Perrey, executors and executrix of his will.

[490] The testator died in January 1828; and Harris and Mary Perrey proved his will. In February 1828 Leathom disclaimed the trusts of the will. In the same year Harris, with the consent of Mary Perrey and Mary Shewell Thompson, agreed with J. Hughes for the purchase of certain houses and pieces of land, situate in Toxteth Park near Liverpool, for the sum of £1050, which was part of the testator's estate or of the proceeds thereof; and Harris thereupon entered into and had been ever since in possession of the purchased premises; and by indentures of lease and release, dated the 24th and 25th of April 1829 (to which Mary Perrey and Mary S. Thompson were parties) Hughes conveyed the purchased premises to Harris and his heirs, to the several uses, upon the trusts, and for the several ends, intents and purposes, and subject to the powers, provisoes, limitations and declarations contained in the testator's will, or so many of them as were then subsisting and capable of taking effect. Afterwards Mary S. Thompson married Thomas Warrington.

In February 1831 Harris, with the privity and consent of Mrs. Perrey and Mrs. Warrington, borrowed £400 of the Plaintiff *for the purposes of the testator's will*, and, to secure the repayment of that sum with interest, deposited with the Plaintiff the title-deeds of the purchased premises, and delivered to the Plaintiff a memorandum signed by himself and by Mrs. Perrey and Mrs. Warrington, similar in its contents to the memorandum after mentioned. In July 1831 Harris borrowed of the Plaintiff upon the security of the deeds the further sum of £200 for the purposes of the will, and delivered to the Defendant a memorandum in the following words: "I, the undersigned William Harris, sole acting devisee in trust of the last will and testament [491] of Richard Perrey deceased, do hereby acknowledge to have deposited the accompanying deeds relating to houses and land in Dexter Street, Toxteth Park, with Mr. Ball, as security for the repayment to him of the sum of £600 and interest after the rate of £5 per cent. per annum, now lent and advanced to me and Mrs. Mary Perrey, as executor and executrix of the said Richard Perrey deceased, for the purpose of effecting the trusts of his said will. And we the undersigned Mary Perrey and Mary Shewell Warrington do hereby testify our consent to such deposit being made of the said deeds, and do declare that no power of the sale shall be exercised over the houses and land thereby conveyed, except subject to the repayment to the said James Ball of the said sum of £600 and interest as aforesaid. Dated this 21st day of July 1831." When this memorandum was delivered to the Plaintiff it was signed by Harris only; but on the same day the Plaintiff procured it to be signed by Mrs. Perrey and Mrs. Warrington.

Afterwards Mrs. Perrey died and Harris became bankrupt.

The bill was filed against Harris, Mr. and Mrs. Warrington, Elizabeth Ann Shewell Perrey Thompson, who was Mrs. Warrington's daughter by her first husband, Mr. and Mrs. Shewell and William Wareing Perrey, alleging amongst other things that Miss Thompson was still an infant, and that Mrs. Shewell, Mrs. Warrington and William W. Perrey were the testator's next of kin, and, as such, as well as in respect of their legacies and other interests under the will, they claimed some interest in the matters contained in the bill; and praying that the Defendants might be decreed to pay to the Plaintiff what was due for principal and interest on [492] the aforesaid security, together with his costs of the suit; and, in default thereof, that Harris and all other proper parties might be decreed to convey the purchased premises to the Plaintiff in fee, and that the Defendants might be foreclosed from all right and equity of redemption therein; or, otherwise, that the premises might be sold and all proper parties be decreed to join in the conveyance thereof; and that out of the monies arising therefrom the amount of the principal, interest and costs might be paid: and that a receiver of the rents might be appointed in the meantime.

Mr. and Mrs. Shewell and W. W. Perrey insisted, by their answer, that Harris had no power under the will, either with or without the consent of Mrs. Perrey and Mrs. Warrington, to make the deposit mentioned in the bill, and that the Plaintiff ought to be considered as holding the deeds as a trustee for the persons interested in the testator's estates, and ought to be compelled to deliver them up for the benefit of those persons.

The question was whether the security made by the deposit of the deeds was good as against any of the parties beneficially interested under the will, except Mrs. Perrey and Mrs. Warrington.

Mr. Knight and Mr. Walker, for the Plaintiff. The bill is filed in order to obtain the benefit of the security given to the Plaintiff; and the question is as to the extent of that security. That it would prevail against the life-estate of Mrs. Warrington there can be no doubt: for the testator gave the residue of his real and personal estate in trust for Mrs. Warrington for her life, for her separate use, and she was privy and consenting to the transaction and signed the memorandum. The only question, therefore, is whether the security [493] is binding on the inheritance or *corpus* of the property to which the deeds relate?

The first passage in the will clearly creates a charge of the testator's debts on his real estates. If then the property to which the deeds relate had been part of the testator's original estates, there can be no doubt that Harris, in respect of that charge, would have had a right to mortgage that property for payment of the testator's debts. The property, in fact, was not part of the testator's original estates; but it was purchased with part of the produce of those estates; and, as those estates were subject to the charge of debts, the property purchased with their proceeds must become subject to the same charge. The property, too, was conveyed to Harris upon the trusts and for the purposes of the will; and one of those trusts and purposes was the payment of the testator's debts. The memorandum also states expressly that the £600 was lent to Harris and Mrs. Perrey, as the executor and executrix of the testator, for the purpose of effecting the trusts of his will. [THE VICE-CHANCELLOR. Is there any evidence that at the time of the transaction in 1829 there were no debts remaining unpaid?] There is no such evidence, nor is there any evidence that at the time when the deposit was made there were no such debts; and if there had been any such evidence, it would not have been sufficient to deprive the Plaintiff of the benefit of his security; for, as the will contains a general charge of debts, it must have been also shewn that the Plaintiff, when he lent his money, *knew* that no debts remained unpaid. By that general charge he was exempted from the necessity of ascertaining that there were debts remaining unpaid. *Shaw v. Borrer* (1 Keen, 559).

[494] The power of sale contained in the will authorizes the trustees to sell from time to time. That power was intended to be ancillary to the purposes of the will: and a power to sell includes a power to mortgage.

Mr. K. Parker appeared for the Defendant Harris.

Mr. Jacob and Mr. Spurrier, for the Defendants Mr. and Mrs. Shewell and William Wareing Perrey. The Plaintiff Ball may have a claim to the estate to which

the deeds relate as against Mrs. Warrington; but the question is whether he has any claim to the *corpus* of the estate, that is, whether he has any claim as against the heir and next of kin of the testator.

It has been said that the will contains a general charge of debts: it is uncertain, however, whether the Court would now hold that the introductory words in this will do charge the real estates. But admitting, for the sake of the argument, that the words relied on do create a charge of debts, yet they do not confer on Harris a power to sell the estates: for, if an estate is devised to a trustee in trust for A., B. and C., subject to a charge of debts, the rule is that the charge does not give the trustee power to sell the estate, but only gives him a power to give receipts for the purchase-money which will be good as against the creditors. The charge exempts the purchaser from liability to the creditors, but it does not confer a right to sell the estate as against the *cestui que trusts*. It is true that Harris had a power of sale, but that power did not arise until the claims of all the creditors were satisfied. The power of sale was given, not for payment of debts, but to enable the trustee, with the consent of the parties interested, to change the investment of the testator's [495] property. The Plaintiff had information that Harris had had in his hands funds for the purchase of estates for the trust; and, consequently, that all the creditors were satisfied. When we look at the conveyance to Harris (1) we see that the charge is not transferred to the new estate; but the purchase is made for the uses and trusts of the will, that is, the uses and trusts expressly declared by the will, or, in other words, the uses and trusts to which the residue is subjected. The word "residue" means that portion of the estate which remains after payment of debts and legacies; and the trusts of the residue attach on a fund which is free both from debts and legacies.

The questions as to the sale of the original estates, and as to the sale of an after-purchased estate, are totally different. A creditor would not have followed the after-purchased estate, except under very special circumstances, that is, unless he had shewn that there were no other assets that could be made available to the satisfaction of his demand. The Plaintiff had notice [496] that there had been sufficient assets in the hands of Harris to enable him to buy more land; at the least, therefore, he was bound to inquire whether the money which he lent was wanted to pay the testator's debts; and unless it turns out, on inquiry, that some part of the money was applied for that purpose, the security is not binding on any persons except those who signed the memorandum.

Mr. Stuart, for the Defendants, Mr. and Mrs. Warrington and Miss Thompson. This case is perfectly new in this respect, namely, that the deeds which were the subject of the deposit relate to property purchased by the trustee in the execution of the trusts of the will. The transaction with Ball did not take place until three years and a half after the testator's death: what reason could there be for supposing that there were any debts then remaining unpaid? The property to which the deeds relate must have been considered, at one time, as clear property. [THE VICE-CHANCELLOR. Harris might have made the purchase under the impression that all the debts had been paid; although it afterwards turned out that that was not the case: or it might have been prudent in him to make the purchase, although he was uncertain whether all the debts had been paid or not.] There is no pretence for charging Mrs. Warrington as having made an appointment. The advance was not made to her, but

(1) The bill stated the conveyance as it is set forth in the text; but, in fact, it recited the will as follows:—Whereas Richard Perrey, late, &c., by his last will and testament, &c., after bequeathing an annuity and several legacies as therein specified, gave and devised all the residue and remainder of his estate and effects, both real and personal, unto his friends Thomas Leathom, of, &c., and the said William Harris, their heirs, &c., upon the trusts and for the several ends, intents and purposes by the said testator, in and by his said will expressed and declared of and concerning the same. Then followed a recital of the power to invest the monies to be received under the trusts of the will in the purchase of lands, and to sell the lands so purchased; and that Harris, with the consent of Mrs. Perrey and Mrs. Warrington, and in exercise of the said power enabling him in that behalf, had agreed with Hughes for the purchase of the premises in Texteth Park.

to Harris and Mrs. Perrey as the executor and executrix of the will; and she merely consented to a deposit of the deeds.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The estate which was purchased after the testator's death must be taken, for all intents and purposes, as if [497] it had been devised by the will; and it is manifest that Harris, who had the legal fee, was competent to mortgage that estate to any person who would advance money for the benefit of the testator's estate.

If there had been some fact existing at the time when the deposit was made, of which Ball might have had notice, it might be proper to direct an inquiry; but the form of the second suit (1) shews that the fact of which it is said that Ball might have had notice was a fact of which no one could possibly have had notice.

Where a trustee represents that he wants money for the purposes of the will, and deposits deeds for securing the money, the mortgage is perfectly good, except that the depositary has not got the legal estate.

Declare that the title-deeds relating to the estate in question in this cause having been deposited by the said Defendant William Harris, with the consent of Mary Perrey deceased and the Defendant Mary Shewell Warrington, in the hands of the Plaintiff, the Plaintiff is entitled to be considered, in this Court, as if he was a mortgagee of the premises therein comprised. Refer it to the Master to take an account of what is due to the Plaintiff for principal money advanced on the deposit and for interest thereon, and to tax the Plaintiff his costs of this suit; and, upon the Defendants or either of them paying to the Plaintiff what shall be found due to him for principal, interest and costs as aforesaid, within six months after the Master shall have made his report, at such time and place, &c., it is ordered that the [498] Plaintiff do deliver up all deeds and writings in his custody or power relating thereto, upon oath, to the said Defendants, or any or either of them, or to whom they shall appoint: but declare that, in default of such payment, the Plaintiff will be entitled to the said premises free and clear of and from all right, title, interest and equity of redemption of, in and to the same, and to have an absolute conveyance in fee thereof accordingly; and in that case it is ordered that all proper parties do execute such conveyance to the said Plaintiff, his heirs and assigns, the same to be settled by the said Master. Refer it to the Master to appoint a receiver of the rents and profits of the estate, &c. And this decree is to be binding on the Defendant, the infant, unless she, on being served with a *subpena* to shew cause against the same, shall, within six months after she shall have attained her age of 21 years, shew unto this Court good cause to the contrary.(2)

[499] LUCAS v. COMERFORD. Nov. 8, 1790.

[S. C. 8 L. J. Ch. (N. S.) 131; 1 Ves. jun. 235; 30 E. R. 318; 3 Bro. C. C. 166; 29 E. R. 469. Overruled, *Moore v. Greg*, 1848, 2 Ph. 717; 41 E. R. 1120; *Cox v. Bishop*, 1857, 8 De G. M. & G. 825; 44 E. R. 608. See *McCreight v. Foster*, 1870, L. R. 5 Ch. 607, n.]

This case is reported in 1 Ves. jun. 235, and 3 Bro. C. C. 166; and the decision in *Flight v. Bentley* (reported *ante*, vol. 7, p. 149) was grounded upon it. That decision was alarming, in its consequences, to the public, and more especially to persons in trade, who are in the habit of taking deposits of leases to secure debts due to them: and, moreover, it was not satisfactory to the profession; and, therefore, the case of *Moore v. Choat* (reported *post*, p. 508) was brought before the Court, although it was precisely similar, in all its material particulars, to *Flight v. Bentley*.

Doubts having been entertained as to the correctness of the reports of *Lucas v.*

(1) This was a suit instituted by Miss Thompson and W. W. Perrey, for the purpose of having the testator's will established and the trusts of it carried into execution.

(2) According to *Scholefield v. Heafield* (reported *ante*, p. 470, but decided after the above case) the day to shew cause ought not to have been given to the infant.

The above decision was affirmed by the Lord Chancellor in M. T. 1838.

Comerford, the leading counsel for the Defendant in *Moore v. Chout* procured a copy of the former case to be made from Reg. Lib.; and the reporter has been enabled, by his kindness, to give the following account of it.

The bill was, in substance, as follows:—

F. Atkinson, being seised in fee of four messuages and a wharf, in Lambeth, by an indenture of the 28th of September 1773, demised them to R. Stapleton, for 71 years from the following day, at the annual rent of 14 guineas for the first 10 years, at a peppercorn rent for the 11th year, and at the annual rent of 12 guineas for the remainder of the term: and Stapleton, for himself, his heirs, executors, administrators and assigns, covenanted with Atkinson, his heirs and assigns, amongst other things, that, in the 11th year of the [500] term, he, his executors, administrators or assigns would, at their own expense, take down the demised messuages and build four others in their place, and also repair the wharf, and keep them in repair during the remainder of the term. Stapleton entered into possession or receipt of the rents and profits of the demised premises, and afterwards became insolvent and absconded, and subsequently died, having appointed the Defendants Steele and Bourke his executors. In March 1776 the Defendant Comerford entered into possession or receipt of the rents and profits of the premises, *having obtained an assignment thereof* from Stapleton. In May 1782 the Plaintiff agreed with Atkinson to purchase the premises subject to the lease, and paid the purchase-money: and, by lease and release, of the 28th and 29th of that month, Atkinson conveyed the premises to the Plaintiff and his heirs, subject to the lease. Soon after the execution of the conveyance, the Plaintiff authorized G. East to receive the rent of the premises, as his agent; and East received the 14 guineas a year from Comerford, and, for some time, regularly paid over the rent to the Plaintiff: but, about March or April 1784, he absconded, and thereupon the Plaintiff authorized T. Salusbury to receive the rent for the residue of the term. Salusbury applied to Comerford for the rent, but Comerford assured Salusbury that he had paid the rent to East up to Midsummer 1784, and offered to pay 14 guineas, which he pretended was the rent from Midsummer 1784 to Midsummer 1785; and Salusbury, being unacquainted with the purport of the lease, and, particularly, not knowing that the rent reserved from Michaelmas 1784 for the residue of the term was only 12 guineas a year, received the 14 guineas, and on the 14th of July 1785 gave Comerford a receipt for that sum, as a year's rent from Midsummer 1784 to Mid-[501]-summer 1785; and Salusbury soon afterwards passed his accounts with the Plaintiff, when the Plaintiff discovered the mistake, and thereupon applied to Comerford to rectify it, and to produce the receipt for the money which he pretended he had paid to East; and also to rebuild the messuages according to the covenant in the lease, and to pay to the Plaintiff the reserved rent accrued due according to the terms of the lease: but Comerford refused to comply with the Plaintiff's requests, and insisted that he was not absolutely entitled to the benefit of the lease, but was only a mortgagee in possession, and was not bound by any of the covenants, and particularly that he was not bound to rebuild the premises: but the Plaintiff charged that Comerford was bound to perform the covenants, or, at least, *during his actual possession and enjoyment of the premises*; and that, according to the terms of the lease, the lessee and his assigns were to pay the rent of 14 guineas during the first 10 years of the term, which expired at Michaelmas 1783, and, for the 11th year, a peppercorn rent only, and, during the remainder of the term, the rent of 12 guineas, and that, in the 11th year, the lessee, his executors, administrators or assignees, were to pull down and rebuild the premises; and that Comerford, *as assignee in possession of the lease* or otherwise claiming the benefit thereof, was bound by the covenants therein contained, and ought to pay the rent and perform the covenants on the assignee's part to be performed: that Comerford, *claiming the benefit of the lease*, ought to be compelled specifically to perform the covenant for rebuilding the messuages, and that Steele and Bourke, as Stapleton's executors, or some other persons or person were or was entitled to the said beneficial interest in the lease subject to some mortgage or security to Comerford, and ought to perform the covenants out [502] of Stapleton's assets: that Comerford ought to be charged with the covenants *as assignee of the lease*, and if not, yet, at least, he ought to be answerable for the rents and profits of the premises since he had been in possession, and ought, *out of such rents and profits*, to perform the

covenants; and that such rents and profits had greatly exceeded any money which was due to him from Stapleton, and the same, from March 1776 to March 1788, amounted to £1200 and upwards.

The bill prayed that Comerford might be decreed specifically to perform the covenant to rebuild the messuages; or, if he should not be deemed bound to perform the covenants as assignee of the lease, then that he might be decreed to account for the rents and profits of the premises received by him, and to apply the same in performance of such covenants, as far as the same would extend, and to make good the deficiency, or to relinquish all benefits arising from the lease; and that Steele and Bourke might be decreed, out of Stapleton's assets, to perform such covenants so far as the same should not be performed by the means aforesaid; and, in case they should not have assets for that purpose, then that the lease might be delivered up, and that the fair rent and value of the premises from the commencement of the lease might be accounted for; and for further relief.

Comerford, by his answer, admitted the seizin of Atkinson, the granting of the lease, and the entry into and the continuance in possession of the premises by Stapleton, until the Defendant was put into possession thereof. He said that, in March 1776, he lent Stapleton £100, and thereupon, by a deed dated the 28th of that month, Stapleton bound himself to the Defendant, in the [503] penalty of £200, for the repayment of the £100 with interest, on the 28th of March 1777, and covenanted with the Defendant that the demised premises and the indenture of lease should be subject and liable to and charged with the payment of the £100 and interest, and, about the same time, deposited the lease with the Defendant, and put him in possession and receipt of the rents of the premises, in order that he might repay himself the £100 and interest out of the rents; and that the Defendant had been ever since in the possession and receipt of the rents and profits of the premises, as the mortgagee thereof; that Stapleton never made any conveyance or assignment of the premises to the Defendant, nor was the Defendant, nor did he consider himself to be the owner thereof, nor had he any right or interest therein except as mortgagee thereof in manner before mentioned. Comerford then admitted the insolvency and death of Stapleton, the conveyance of the premises to the Plaintiff, the allegations respecting East and Salusbury, and that the Plaintiff did apply to the Defendant to pull down and rebuild the messuages according to the covenant in the lease; and that, not being owner of the premises, and having no other right or interest therein than as such mortgagee as aforesaid, he refused to comply therewith; and he insisted that he was not bound to rebuild the messuages, and that he was not in any manner bound by the covenant; but he was willing to pay the arrears of the rent reserved by the lease; and he insisted that he ought not to be compelled specifically to perform the covenant to pull down and rebuild the messuages.

Steel and Bourke, in their answer, said that Stapleton died insolvent, and that they had not nor were ever likely to have any assets of his wherewith to satisfy any [504] claim or demand which the Plaintiff might have against them as the executors of Stapleton, in respect of the lease, if any such claim he had; they renounced all beneficial or other interest, if any such they ever had, in or to any lease of the premises; and they said that, if Atkinson or the Plaintiff had received from Comerford any rent in respect of the premises, they had acknowledged and accepted him as tenant thereof, and he was the only person to whom the Plaintiff could resort, and from whom he could have the relief prayed by his bill.

Comerford, by his further answer, said that he was only mortgagee in possession of the premises, and was not bound to rebuild the same; *but he denied that he pretended that he was not bound by any other covenants in the lease, inasmuch as he was ready and willing and submitted to perform and fulfil the same as long as he should remain in the actual possession and enjoyment of the premises.* He said that he was willing to account for the rents and profits of the premises since he had been in the possession and receipt thereof; and insisted that he ought and was at liberty to apply the same towards discharge, in the first place, of the interest, and then of the principal due to him; that the rents and profits received by him amounted, in the whole, to £121, 10s., or thereabouts, after deducting taxes and repairs, and had not been sufficient to pay the rent reserved by the lease and the principal and interest due to him.

The decree directed Steele and Bourke to assign the lease to Comerford at Comerford's expense, and that he should execute a counterpart thereof, the assignment to be settled by the Master in case the parties differed [505] about the same; and that the Plaintiff should pay the costs of Steele and Bourke, and have them over again from Comerford, and that Comerford should pay the Plaintiff's costs; and any of the parties were to be at liberty to apply.

The following note of *Lucas v. Comerford*, copied from Sir S. Romilly's manuscripts, is published by the permission of Mr. John Romilly.

Francis Atkinson, being seised in fee of four houses at Lambeth, demised them by indenture, dated 28th September 1773, to Richard Stapleton, his executors, administrators and assigns, for a term of seventy-one years, at the rent of £14 for the first ten years, at a peppercorn rent for the eleventh year, and the rent of £12, 12s. for the residue of the term. In the lease there was a covenant by Stapleton for himself, his executors, administrators and assigns, that he would, in the eleventh year of the term, pull down the houses on the premises and rebuild four other houses on the land, of the value therein named. Atkinson afterwards conveyed the estate, subject to this lease, to the Plaintiff. Stapleton, the lessee, being indebted to Comerford in the sum of £100, gave him a bond for that sum, and in the bond was contained a covenant that these premises should be charged with the debt: and Stapleton delivered the lease to Comerford. Soon afterwards Stapleton died insolvent, and his administrators suffered Comerford to take possession of the estate, and he had been ever since in the receipt of the rents and profits of it.

The Plaintiff filed this bill against Comerford and the administrators of Stapleton, stating the above facts, [506] and praying that Comerford might be decreed specifically to perform the covenant to rebuild, or, in default of that, that satisfaction might be made to him out of the personal estate of Stapleton. Comerford, by his answer, submitted to perform the other covenants in the lease, but insisted that he was not bound to perform the covenant to rebuild.

Mitford and Richards, for Plaintiff, contended that, if there had been a legal assignment of the lease from Stapleton to Comerford, Comerford would be compellable, in this Court, specifically to perform the covenant to rebuild; that the Court would compel specific performance of such covenant appeared by the case of *The City of London v. Nash*, 1 Vez. 12, and 3 Atk. 512, in which Lord Hardwicke says that the Court will decree a specific performance of a covenant to rebuild,⁽¹⁾ though not of a covenant to repair; and that Comerford was an equitable assignee, and therefore subject, in this Court, to every burthen to which a legal assignee would be subject.

LORD CHANCELLOR. I don't feel myself inclined to follow the doctrine of Lord Hardwicke. I don't see how this Court is to conduct the building of a house any more than the repairs of it. The only relief I can give is to compel the Defendant, Comerford, to take an assignment of the lease from the administrators of Stapleton, and then leave the Plaintiff to bring his action; for though I am not sure that the Plaintiff would not [507] be able to recover at law, even though there were no actual assignment, and that the Court would not, upon the Defendant's answer, preclude him from saying that he was not an assignee of the lease, yet I think this Court ought not to leave him in that situation; and that the Plaintiff is entitled, under the prayer for general relief, to have a decree to compel Comerford to accept an assignment, and the other Defendants to assign. It is quite impossible that Comerford should not be subject to this covenant; he cannot take the interest in the estate and refuse the burthen.

Mansfield, for Defendant Comerford. I don't think it will be worth our while to take an assignment; we had better give up our debt.

LORD CHANCELLOR [Thurlow]. If you did you must account for the rents you have received, for you have not a title to anything but subject to the prior engagement to rebuild; but I think you are not now at liberty to refuse to accept an assignment. If you had had a legal assignment you must have been bound by the

(1) "If a man promise me to make me a house which he does not do, I shall have remedy by *subpoena*."—Brooke, Conscience, p. 14. 5 Vin. Ab. 535, p. 1; *Mosely v. Virgin*, 3 Ves. 184.

covenant; and, having an equitable assignment, you are to be considered exactly in the same light as if you had a legal assignment.

Decreed that the administrators of Stapleton should execute an assignment of the lease to Comerford.

[508] MOORES v. CHOAT. Feb. 19, 20, 1839.

[S. C. 8 L. J. Ch. (N. S.) 128; 3 Jur. 220. Followed, *Cox v. Bishop*, 1857, 8 De G. M. & G. 825; 44 E. R. 608. See *M'Creight v. Foster*, 1870, L. R. 5 Ch. 607, n.]

Equitable Mortgage. Deposit. Lease. Administration. Personal Representative. Parties.

A deposit of a lease by way of equitable mortgage does not render the depositary liable for the rent and covenants.

Bill by a lessor against an equitable mortgagee of the lease and a third party, to whom letters of administration to the deceased lessee had been granted, limited to attend, supply, substantiate and confirm the proceedings in the suit or in any other suits concerning the premises until a final decree should be made and fully completed, praying that the depositary might be decreed to take an assignment of the lease. *Semble*, that the letters of administration did not give the third party any interest in the term or in any of the assets of the deceased; and, consequently, that the suit was defective in respect of parties.

By an indenture, of the 27th of August 1829, the Plaintiff demised to L. Andrews two messuages in Poplar, Middlesex, for 21 years, from the 24th of June then last, at the yearly rent of £46; and Andrews, for himself, his heirs, executors, administrators and assigns, covenanted with the Plaintiff, his executors, administrators and assigns, to pay the rent, rates and taxes, and to keep the premises in repair.

On the execution of the lease, Andrews entered into possession of the premises, and he continued in possession until his death. He died on the 18th of March 1837, intestate and insolvent; and in July 1838, when the bill was filed, £249, 11s. 6d. were due for rent of the premises accrued in his lifetime and since his death; and the premises were greatly out of repair. In November 1837 the Plaintiff applied to Andrews's widow to deliver up the lease and possession of the premises; and he then discovered that, in December 1830, Andrews deposited the lease with George Mash, as a security for £55 lent to him by Mash. In November 1831 Mash died, having appointed the Defendant Choat, and W. Lock, deceased, his executors; and they proved his will. In February 1837 Lock died. On Mash's death [509] Choat, who was the acting executor, took and had, ever since, retained possession of the lease, as a security for the £55, the whole of which remained due from Andrews's estate to Choat, as the surviving executor of Mash. In March 1838 the Plaintiff's solicitor gave notice to Choat that, unless he delivered up the lease, the Plaintiff would hold him personally responsible for the rent and covenants. In April 1838 Choat's solicitor wrote to the Plaintiff's solicitor, stating that Choat never had been in possession of the premises, and that, if the Plaintiff would pay £10 in part of the debt due to Mash's estate, the lease should be given up; this offer, however, was not accepted, and consequently Choat refused to deliver up the lease.

In June 1838 letters of administration to Andrews, limited, as the bill stated, "to attend, supply, substantiate and confirm the proceedings that should or might thereafter be had in this suit, or in any other causes or suits which might be, thereafter, commenced or carried on in this Court or any other Court or Courts, between the said parties or any other parties, touching and concerning the premises, until a final decree should be had and made therein, and the said decree carried into execution, and the execution thereof be fully completed, but no further or otherwise," were granted to the Defendant Sharp, who, as the bill alleged, thereby became the legal personal representative of Andrews, and could make a valid and effectual assignment of the lease and the term thereby granted to Choat.

The bill prayed that Choat might be decreed to pay the £249, 11s. 6d. to the Plaintiff, and to put the premises in repair; and, if necessary, that he might be decreed to take an assignment of the lease, and that the [510] Plaintiff might be at liberty to bring one or more action or actions against him, on the covenants in the lease, and that he might be restrained from setting up as a defence thereto that no assignment of the lease had been made to Mash; and that he might pay the costs of the suit and of the assignment.

Choat demurred for want of equity, and because Andrews's real representative and Lock's personal representative were not made parties to the suit. The two latter causes of demurrer were not much insisted on; but two other causes were assigned *ore tenus*, namely, that the person in possession of the premises was not made a party; and because there was no personal representative of Andrews who had any interest in the term, or in his personal estate in general.

Mr. Jacob and Mr. Rogers, in support of the demurrer. It does not clearly appear by the bill who is in possession of the premises; but it is proposed that that person, whoever it may be, should live rent free; as the bill asks that Choat may be decreed to pay the rent. [THE VICE-CHANCELLOR. It is to be inferred, from the bill, that Andrews's widow is in possession of the premises; for the bill states that, after Andrews's death, the Plaintiff applied to his widow to deliver up to the Plaintiff the possession of the demised premises. If she was once in possession, she must be taken to be still in possession.] Choat is the executor of Mash; but it does not clearly appear whether or not the Plaintiff means to contend that Choat is personally liable to him. If the liability was incurred by taking the deposit, then it would fall on Mash's assets; but if it arose on Choat's subsequent refusal to deliver up the lease, then it must [511] fall on Choat personally. The Plaintiff seems to think that the liability was incurred by the refusal to deliver up the lease; as he prays that Choat may pay the rent, but does not ask that he may pay it out of Mash's assets. If that is right, then a similar liability would attach on solicitors who claim a lien on their clients' deeds and papers. The executor of a lessee is not liable to the landlord except to the amount of assets possessed by the executor, or rents received by him; but in this bill there is no allegation either of assets possessed or of rents received by Choat.

The Plaintiff's counsel will rely on the case of *Flight v. Bentley* (*ante*, vol. 7, p. 149). That case was decided without any great argument, upon the authority of *Lucas v. Comerford* (3 Bro. C. C. 166; 1 Ves. jun. 235, and *ante*, pp. 499, 505); and it is in fact a mere echo of that case; but the Court was not well informed what the facts in *Lucas v. Comerford* really were; for that case appears to have been represented to the Court, as if there was no distinction between it and *Flight v. Bentley*. We have procured a copy of *Lucas v. Comerford* from Reg. Lib., from which it appears that it differs in one or two important particulars from *Flight v. Bentley*, and also from the present case; and we shall be able to shew that the Defendant there had placed himself in a position very different from that of the Defendant either in *Flight v. Bentley* or in the present case. It does not appear from the report in Ves. jun. that the Defendant had taken possession of the premises; but that fact does appear from the report in Brown. [THE VICE-CHANCELLOR. I suppose that Lord Thurlow alludes to that fact when he refers to what was stated in the answer. [512] His Lordship says, that he rather thinks upon reading the answer, that the Plaintiff's could recover at law without the assignment. The report in Ves. jun. contains a remarkable statement, namely, that the Defendant admitted that he was bound to perform the other covenants of the lease, but insisted that he was not bound to rebuild. How was the Court to deal with a person who thus attempted to split a lease? In that case, too, the Defendant had continued to pay the rent for a considerable length of time; and the bill charged that, as he was in possession of the lease and claimed the benefit of it, he ought to pay the rents and perform the covenants, at least during his actual possession and enjoyment of the premises; and that he ought to be charged with the covenants in the lease as assignees thereof; and if not, yet, at all events, he ought to be answerable for the rents and profits of the premises since he had been in possession thereof, and ought out of such rents and profits to perform the covenants; and that such rents and profits had greatly exceeded

any money that was due to him from the depositor. And then the bill prayed that, if Comerford should not be deemed bound to perform the covenants as assignee of the lease, he might be decreed to account for the rents and profits of the premises received by him, and to apply the same in performance of such covenants, as far as the same would extend, and to make good the deficiency, or to relinquish all benefits arising from the lease. It is obvious that there was a great deal of justice both in those charges and in the prayer of the bill. It did not, as is the case here, seek to make a Defendant who had taken possession of a mere piece of parchment responsible for the rent and covenants. Comerford had been in the actual pernaney of the profits; and Lord Thurlow would not allow him to take [513] the profits and keep the landlord out, without taking on himself the obligations of the lease. There was great moral justice in that decree; although the principle of it may be questionable in one or two particulars; for Lord Thurlow decreed the representatives of Stapleton to execute, and Comerford to take, an assignment of the lease. That is the only instance in which this Court has, on the application of a Plaintiff, decreed an assignment between two Defendants, in pursuance of a dealing between those Defendants exclusively. It is the only case in which a third person has been allowed to enforce performance of a contract between two others. According to the report in *Ves. jun.*, his Lordship is made to say: "As he has a title in equity to have a legal conveyance, I must consider him as having it." It is a strong doctrine to say that a party who has a title to a legal conveyance is to be considered as having it; but it has never been held, either before or since, that a party who has a title to a legal conveyance is to be considered as having it, except *as between the parties to the contract* and their representatives.

That part of the decree which directs the assignment to be made seems to have been but lightly considered; for Stapleton's executors, by whom the assignment was to be made, disclaimed all interest in the lease, the existence of which they treated as doubtful. Besides, it does not appear whether the assignment was to be absolute or by way of mortgage. A deposit of a deed for securing a debt is only a contract for a mortgage, and a mortgage of a lease is always made by experienced persons, not by assignment, but in the form of an under-lease; and it is made in that form for the express purpose of protecting the mortgagee from being liable to the landlord under the covenants in the original lease. [514] What pretence then was there for compelling the depositary to take an assignment of the lease? If there had been an express agreement for an assignment, the landlord could not have enforced it. Even where a contract has been entered into between two persons for the benefit of a third, that third party cannot enforce it. *Ex parte Peele* (6 Ves. 604), *Garrard v. Lord Lauderdale* (ante, vol. 3, p. 1), *Walwyn v. Coutts* (ante, vol. 3, p. 14; and 3 Mer. 707), *Colyear v. The Countess of Mulgrave* (2 Keen, 81), *Ex parte Williams* (Buck. 13).

The consequences of holding that the equitable mortgagee is to be liable to the landlord for the rent and covenants will be most extensive; for there must be a mutuality between them, and the landlord must be liable to the equitable mortgagee for the covenants on the landlord's part. Again; if an assignee assigns over, he is no longer liable; if then he agrees to assign or mortgage his lease, is it to be considered as a legal assignment, for the purpose of releasing the assignor as well as making the equitable assignee liable? The landlord cannot have the benefit both ways; but if the equitable assignment gives him a remedy against the assignee, it must take away his remedy against the assignor.

There is another part of the decree in *Lucas v. Comerford* which seems rather extraordinary. Comerford was ordered to pay the costs of the assignment and the costs of the executors of the mortgagor; whereas he ought not to have been ordered to pay those costs at all; or, if he was ordered to pay them, he ought to have been directed to add them to his debt.

[515] In *Wilkins v. Fry* (1 Mer. 244; see 266) Sir W. Grant, M.R., seems to consider that an equitable assignee of a lease does not become liable to the rent and covenants of the lease. There the assignees of the bankrupt had only an equitable interest; and His Honor says: "But supposing that, with regard to assignees in general, it were a matter of doubt whether they, having once taken to the bankrupt's lease, could get rid of the liability to be sued by afterwards parting with that lease;

yet these assignees never were, at any moment, liable to be sued upon any one of the covenants in the lease; because it never could be alleged, as against them, that all the estate, right and interest of the bankrupt in the premises came to and vested in them, which it is necessary to declare in order to maintain an action, against an assignee, upon a covenant. They take nothing from the bankrupt but a mere equity of redemption; for he himself had, before his bankruptcy, assigned away the whole legal estate." That proves that the parties who are equitably interested in a lease are not the parties whom the landlord has a right to sue. How can it be contended that an equitable mortgagee becomes entitled, immediately, to the entire interest of the mortgagor, when he has no right even to require an assignment? He may file a bill for a foreclosure, according to some authorities, or for a sale, according to others. (*Parker v. Housefield*, 2 Myl. & Keen, 419; *Brocklehurst v. Jessop*, ante, vol. 7, p. 438.) But, whichever course he takes, the mortgagor may pay him off; for the Court always directs, in the first instance, an account to be taken and payment to be made of what is due to him; and, in default of payment, it decrees either a sale or a foreclosure. If it decrees a [516] sale, he never can become the owner; and, if it decrees a foreclosure, he does not become the owner until he has perfected his decree. What species of ownership then has an equitable mortgagee? In *Metcalf v. The Archbishop of York* (1 Myl. & Craig, 547; see 557) the Lord Chancellor says: "It was then said, for the Defendants, that all equitable charges rest on specific performance. This is by no means so. The equitable incumbrancer has totally different remedies. What right has an equitable mortgagee by a deposit of deeds to ask for a legal mortgage?" If the equitable mortgagee of a lease has a right to ask either for a sale or for a foreclosure, and the mortgagor has a right to pay him off, what right has the landlord to step in and say to the mortgagor: "I do not regard your option, but will compel you to take an assignment?" or what right has he to deprive the mortgagor of his right to pay off the mortgagee?

In *Sparkes v. Smith* (2 Vern. 275) the Court dismissed a bill filed by a lessor to compel a mortgagee who had taken a legal assignment of the lease to perform the covenants in the lease, on the ground that the mortgagee never had been in possession or receipt of the rents of the premises. The case of *Jenkins v. Portman* (1 Keen, 435; see 454) is very complicated in its circumstances; but it goes no further than *Lucas v. Comerford* and *Flight v. Bentley*. The only important part of it is that in which Lord Langdale, M.R., says: "It does not appear to me that the fact of a mortgagee by assignment of a leasehold interest taking actual possession is more important in equity than it is at law."

[517] Next, as to the want of parties.

As the bill seeks to charge Choat in his character of executor of Mash, he has a right to insist that the representatives of Lock, his co-executor, should be before the Court; and he also has a right to have the representatives of Andrews made parties, in order to give effect to his remedy over.

And, moreover, the person in possession of the premises ought to be a party; for, according to *Lucas v. Comerford*, that person is primary liable to the Plaintiff; and, if the Defendant is decreed to pay the rent (as the bill prays he may be), he will have a remedy over against that person. Besides, when we go to repair the premises, the person in possession may treat us as trespassers, as we have not got any legal title.

Again; the bill asks that Choat may be decreed to take an assignment of the lease; but there is no person before the Court who can assign the term. The letters of administration which have been granted to Sharp do not vest in him any estate or interest in the property of the intestate. He could not bring an action to recover a shilling of the assets. The Ecclesiastical Court might have granted to Sharp letters of administration limited to the term; and then he would have had an interest in the lease; or the Plaintiff, as a creditor of the intestate, might have obtained a general administration to him. But the administration that has been granted merely entitles the administrator to appear as such before this Court. The words: "Until a final decree shall be had and made therein and the said decree carried into execution, and the execution thereof be fully completed, but no further or otherwise," only designate the time [518] during which his office is to continue. The administrator is not to be active in carrying the decree into effect; but he is to appear before this Court as

administrator, until the decree shall have been made and the execution of it completed ; and then his office is to cease. Should the decree affect any of the property of the intestate, then some other administrator must be appointed. Besides, it is important that the general administrator should be before the Court, as there may be assets to pay the rent.

Mr. Knight Bruce and Mr. Chandless, in support of the bill. The facts stated in the extract of *Lucas v. Comerford* from Reg. Lib. are omitted in the reports of that case, because they were immaterial to the decision. It has been said that, in that case, Comerford was in possession of the premises and admitted that he was bound to perform some of the covenants in the lease, but insisted that he was not bound to perform the covenant to rebuild, and that those were the grounds of the decision. But if we look at the report in Ves. jun. we see that Lord Thurlow founds his judgment on a principle which has nothing to do with either of those facts. His Lordship declares that he will not take any notice of the covenants, and rests his judgment on this principle, namely, that as Comerford had a title in equity to a legal conveyance, the Court must consider him as having it. The circumstance of Comerford being in possession was immaterial ; for, at law, if a lease is assigned, the assignee is liable for the rent and covenants, although he may not be in possession. In *Flight v. Bentley* the depositary was not in possession ; nor did that case differ, in any material circumstance, from the present. The next case is *Jenkins v. Portman*. There, as well as in *Flight* [519] v. *Bentley*, possession by the equitable incumbrancer was not considered as a material ingredient ; but he was held to be liable, whether he was in possession or not. If a creditor of a lessee chooses to take a deposit of the lease as a security for the money due to him and refuses to deliver up the lease, the landlord is entitled to consider him, to all intents and purposes, as an assignee. The landlord has nothing to do with the relative rights between the depositor and the deposittee ; all that he has to do is to find out who is the assignee of the lease.

Then there are four other causes of demurrer assigned : two on the record, and two *ore tenus*. One of those causes is that the representative of Lock is a necessary party. But may not a party who has a demand against the estate of a testator confine his remedy to the surviving executor, and claim the benefit of the assets so far as that executor has possessed them ? Besides, the bill alleges that Choat was the acting executor, that he took possession of the lease, refuses to deliver it up, and claims the benefit of it ; and the bill seeks to charge him personally as being the holder of the lease.

Another cause of demurrer is that the real representative of Andrews is not a party. It does not, however, appear that Andrews left any real estate ; and the bill alleges that he died insolvent.

Then with respect to the two causes of demurrer assigned *ore tenus*. It was said that the person in possession of the demised premises ought to have been made a party to the suit. But the bill does not suggest that anyone is in possession of those premises. [THE VICE-CHANCELLOR. The Plaintiff states that, after Andrews's death, he applied to his widow to deliver up [520] possession of the premises. Is it not then reasonable to infer that she was in possession ? And if she was once in possession, she must be taken to be still in possession unless the contrary is shewn.] A statement that a person has been requested to deliver up possession of the premises cannot be taken on the argument of a demurrer at least, as an allegation that the person applied to is in possession of the premises : and if the widow is in possession of the premises, she has no legal right to deal with the possession. The party who would have that right would be the general administrator to the intestate. The Ecclesiastical Court would not grant a general administration to us, as we were Plaintiffs in this suit. *Cawthorn v. Chalie* (2 Sim. & Stu. 127). We did apply for letters of administration limited to the term, but the Court would not grant them, as the term was not a mere trust term. When it becomes necessary to deal with Andrews's property, the Ecclesiastical Court will grant a more extended administration. Choat, as a creditor of Andrews, might have obtained general letters of administration to his estate : but the letters of administration that have been granted were the only ones that we could obtain ; and, consequently, the demurrer which is grounded on the limited nature of the administration cannot be sustained. [THE VICE-CHANCELLOR.

You ask that Choat may be decreed to pay the £249, 11s. 6d. That, of course, means out of the assets of Andrews; for the greater part of that sum accrued due in his lifetime.] We say that Choat is personally liable for the £249, 11s. 6d. as holding the lease and refusing to deliver it up. *Burton v. Barclay* (7 Bing. 745), *Tremeere v. Morison* (1 Bing. N. C. 89), *Nation v. Tozer* (1 Crompt. Mees. & Ros. 172).

[521] THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is, in substance, a rehearing of *Flight v. Bentley*; and I really must say that I feel that the decision in that case cannot be supported; and how it came to be made, in the manner in which it stands in the report, (1) I am at a loss to comprehend. What renders it [522] more remarkable is that I, long ago, made a comparison between the two reports of *Lucas v. Comerford* in Vesey and in Brown; and in the margin of my copy of Brown's Report, I made a note of the circumstances of that case as they were to be collected from the two reports. That note is as follows:—"It appears, from the report in 1 Ves. jun. 235, that the Defendant by his answer admitted that he was bound to perform the other covenants in the lease, but insisted he was not bound to rebuild the houses: and Lord Thurlow seems to have made his de-[523]-cision on that admission."

(1) As some doubt seems to be expressed as to the accuracy of the report of *Flight v. Bentley*, the reporter begs to observe that Mr. Knight Bruce and Mr. Rogers, who were opposed to each other in *Moore v. Choat*, were two of the counsel in *Flight v. Bentley*, but neither of those gentlemen, in arguing *Moore v. Choat*, called in question the correctness of the report of *Flight v. Bentley*.

The following is a copy of the decree in that case:—

"This Court doth declare that the Defendants John Falshaw Pawson and John Woolmer are liable to the covenants of the indenture of lease in the pleadings mentioned, bearing date the 17th day of November 1824: and this Court doth order that the Plaintiff's bill do stand dismissed out of this Court, as against the Defendants Thomas Allan and Edward Smith, the assignees of James Postlethwaite in the pleadings named, with costs to be taxed by the Master of this Court in rotation: and it is ordered that the Plaintiff's supplemental bill do also stand dismissed out of this Court, against the Defendants thereto, with costs to be taxed by the said Master: and this Court doth order and decree that the said Defendants do pay to the Plaintiff the sum of £50, the amount of the two quarters' rent of the premises comprised in the said lease from Midsummer 1832 to Christmas 1832: and it is ordered that it be referred to the Master of this Court in rotation to take an account of the rents and profits of the said premises since Christmas in the said year 1832, received by the Plaintiff, or by any other person or persons by his order or for his use, or which, without his wilful neglect or default, he might have received, he, by his counsel, submitting to such account: and it is ordered that it be referred to the said Master to inquire whether the Plaintiff has properly laid out and expended any and what sum or sums of money in the repairs of the said premises, having regard to the covenants of the said lease: and it is ordered that the amount of the said rents and profits so received by the said Plaintiff, or which, without his wilful neglect or default, he might have received, be deducted from the rent which has become due from the said Defendants, John Falshaw Pawson and John Woolmer, since Christmas 1832: and it is ordered that the balance thereof, together with what the said Master shall find to have been properly laid out and expended by the said Plaintiff, in the said repairs as aforesaid, be paid by the said Defendants to the said Plaintiff: and it is ordered that it be referred to the Master to tax the Plaintiff his costs of these suits: and it is ordered that such costs when so taxed be paid by the said Defendants, J. F. Pawson and J. Woolmer, together with what the Plaintiff shall so pay, unto the said Defendants Thomas Allan and Edward Smith, the assignees of the said James Postlethwaite, for their costs of this suit, and also so much of what he shall so pay to the said Defendants David Evans, Edward Wilson, James Brand, and Moses Asher Goldsmid, the assignees of the Defendant John Bentley, for their said costs as have been incurred up to and inclusive of the filing of their answer. And, for the better taking the said accounts and discovery of the matters aforesaid, the parties are to produce before the said Master, upon oath, all books, &c.: and any of the parties are to be at liberty to apply to this Court as there shall be occasion."

There was also another important fact in that case, which is omitted in the report in Ves., but is mentioned in the report in Brown, namely, that the Defendant was in possession of the premises comprised in the lease. I cannot comprehend how, with those circumstances affecting the case of *Lucas v. Comerford*, the decision in *Flight v. Bentley* ever came to be made; and I must say that that decision, as it appears in the report, is supported neither by *Lucas v. Comerford* nor by any principle recognized by this Court.

I understand the law to be as it has been stated by Mr. Jacob, namely, that if a lessee contracts to sell his lease, and another party contracts to purchase it of him, it would be contrary to the established principles of a Court, either of law or equity, to say that thereupon any right or equity arose, to the landlord, either to compel the purchaser to take an assignment of the lease, or to compel the seller to assign it. No such case ever arose: for no equity could arise to the landlord to interfere, in consequence of such a contract between the lessee and the intended assignee. The depositary of a lease for securing a debt has a right to file a bill for a foreclosure and to have the lease assigned to him, or, if he has an agreement for a sale, he may file a bill for a specific performance: but he is not bound to do either; and, until he exercises his option, or takes possession of the tenements comprised in the lease, he stands, to all intents and purposes, in the character of an entire stranger to the tenancy, and the landlord has no right whatever to interfere with him.

In *Lucas v. Comerford* there was a complete constitution of debt; and there was a covenant by the lessee that the lease should be subject to the debt. The Defendant, too, was in possession of the demised premises, and, by his answer, he admitted his liability to perform some of the covenants in the lease, but insisted that he was not bound to perform the covenant to rebuild the houses: and Lord Thurlow, on a review of all the circumstances of that case (not one of which exists here except the deposit) made a decree which gave to the landlord the benefit to be derived from investing the depositary of the lease with the character of legal assignee, which, to a certain extent, the depositary had before, for he was in possession of the premises, and had submitted to perform some of the covenants in the lease.

My opinion is, on general grounds, that this is a case in which the Court cannot interfere against Mr. Choat: and *Lucas v. Comerford* is no authority for any such interference, as the two cases differ so materially from each other in their circumstances.

Two causes of demurrer have been assigned *ore tenus*; and though I think that there is some weight in them, it is unnecessary for me to pronounce any decision respecting them, as it would not affect the question of costs; for as there was the case of *Flight v. Bentley* in print, which may have misled the Plaintiff, I think it right to allow the demurrer on the record without costs.

As I understand the case of *Jenkins v. Portman*, Lord Langdale might have made his decision just as he did if *Flight v. Bentley* had never existed; and, therefore, I decide this case without meaning to interfere with the decision in *Jenkins v. Portman*.

[525] DUCKLE v. BAINES. July 7, 10, 1837.

Agreement. Heir. Vendor and Purchaser.

A., when tenant for life only of an estate, agreed to sell the fee to B. B. devised the estate to C. A. some years afterwards acquired the fee, and conveyed the estate to B. Held, that it did not pass by B.'s will.

In 1807 Robert Duckle contracted, in writing, with John Payne for the purchase of an estate in Lincolnshire for £8000. One moiety of that sum was paid by Robert Duckle, and the other moiety by Thomas Duckle, in pursuance of a verbal agreement between them that Thomas Duckle should be considered as the purchaser of a moiety of the estate.

At the time when the contract between Payne and Robert Duckle was entered into the former had a life interest only in the estate, nor did he acquire any larger

interest until some time in the year 1816. In 1813 Thomas Duckle devised all his estates to his sons, the Plaintiff John Duckle, and Thomas Duckle the younger, equally, as tenants in common in fee. In 1816 John Payne and Sarah, his wife, William Payne, John Payne the younger, Henry Payne, Thomas Payne, Elizabeth Payne, Sarah Payne the younger, and Maria Payne(1) joined in levying a fine and executing a deed to lead the uses thereof, by which the estate was conveyed and assured to John Payne the elder, in the usual manner to bar dower. In February 1819 John Payne the elder appointed and conveyed the estate to Robert Duckle in like manner. In May 1820 Thomas Duckle the elder died, without having taken a conveyance of the moiety of the estate agreed to be purchased by him, leaving the Plaintiff John Duckle, his eldest son, his [526] heir at law. In 1833 Thomas Duckle the younger died, having devised one-fourth of the estate to the Defendant Thomas Duckle Baines, subject to a legacy of £1500 to the Defendant Ann Duckle.

The bill alleged that Thomas Duckle the elder had no interest in the estate vested in him at the date of his will, and that Robert Duckle was a trustee, of one moiety thereof, for the Plaintiff as the heir at law of Thomas Duckle the elder, and praying that Robert Duckle might be decreed to convey one moiety of the estate to the Plaintiff in fee.

Robert Duckle admitted the contract between himself and Thomas Duckle the elder, and submitted to convey one moiety of the estate as the Court should direct.

Mr. Knight, Mr. Jeremy and Mr. Loftus Wigram, for the Plaintiff, said that Thomas Duckle the elder, at the time when he made his will, could have no devisable interest in the moiety of the estate which he had contracted to purchase, inasmuch as, at that time, Payne, the vendor, had no such interest in the estate; and that, if Robert Duckle the elder had any devisable interest, the form of the conveyance to Robert Duckle would have revoked the devise. (See Sugd. Pow. 8th edit. 170.)

Mr. Wakefield and Mr. Girdlestone, for the Defendants Thomas Duckle Baines and Ann Duckle, said that the question was not whether Payne, at the time when he agreed to sell the estate to Robert Duckle, had a good title, but whether the contract between him and Robert Duckle was not a binding contract: that a party [527] may validly contract to sell a larger interest in an estate than he has at the date of the contract, and that he may enforce a specific performance of the contract, if he can make out a title at any time before the suit instituted by him for that purpose is finally disposed of. *Boehm v. Wood* (1 Jac. & Walk. 419). *Paton v. Rogers* (Madd. & Geld. 256).

Mr. James Russell, for Robert Duckle.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, until 1816, Payne, the vendor, did not himself acquire any interest in or power over the estate which enabled him to dispose of the fee, and therefore, at the time when he contracted to sell the estate to Robert Duckle, and when Thomas Duckle the elder made his will, Payne was incapable of conferring any such interest or power upon any other person; and, consequently, the moiety of the estate which Thomas Duckle the elder agreed to purchase did not pass by his will, but the Defendant Robert Duckle was a trustee of that moiety for the Plaintiff, his heir at law.

[528] POOLE v. MARSH. July 11, 1837.

Parties. Ejectment.

Where a bill is filed to restrain an ejectment, the tenant must be made a party, unless the landlord has been admitted to defend the action.

The Defendant having brought an ejectment against the Plaintiff's tenant, the Plaintiff, before he had made himself a Defendant to the action, filed a bill to restrain it, but did not make the tenant a party; and on that account the Defendant demurred.

(1) It did not appear what interest these parties had in the estate.

Mr. Jacob, in support of the demurrer, referred to *Lawley v. Walden* (3 Swans. 142).

Mr. Knight and Mr. G. Richards, in support of the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have always considered it to be the practice to make the tenant a party to a bill to restrain an ejectment, except where the landlord has been admitted to defend the action.

[529] *COOKSON v. COOKSON. July 11, 12, 1837.*

[Not followed, *Cox v. Willoughby*, 1880, 13 Ch. D. 863.]

Conversion. Partners and Partnership. Pre-emption.

A. carried on trade upon land of which he was seised in fee. Afterwards he took one of his sons into partnership for 24 years, and conveyed to him, in fee, certain shares in the land; and, by their articles of partnership, they covenanted that the land should, at all times thereafter, be held as partnership property, and be considered and treated as part of the joint stock of the trade; and it was provided that if either partner died or retired during the 24 years, his co-partner might purchase his share at the sum stated to be its value in the last yearly accounts. In the course of the 24 years £1700 was expended, out of the partnership funds, in building on the land. After the expiration of the 24 years, and until A.'s death, he and his son continued to carry on their trade on the land without entering into any new agreement. Held, that the son's right of pre-emption as to his father's share of the stock, including the land, expired with the term of 24 years, and that, all the debts of the partnership having been paid, A.'s share of the land retained its original character and descended to his heir.

Isaac Cookson the elder, previously to the year 1803, carried on the business of a bottle manufacturer at Newcastle-upon-Tyne, and used, solely for the purposes of his trade, certain freehold messuages, warehouses, buildings, parcels of ground and other hereditaments, in and near Newcastle, of which he was seised in fee, subject, as to part, to a mortgage for £3500 and interest. In 1803 he took his son, the Defendant Isaac Cookson the younger, into partnership with him, and agreed to give I. Cookson the younger six 32d parts of the stock, property and effects of the business and of the profits thereof as from the 1st of January 1803, and to convey to I. Cookson the younger six 32d parts of the before-mentioned hereditaments, discharged of the £3500 and interest; and it was also agreed between them that the hereditaments should continue to be used as a manufactory for carrying on the trade, and should be considered as part of the joint stock of the business. The father and son accordingly became partners together for 24 years, as from the 1st of January 1803; and by indentures of lease and release, dated the 8th and 9th of October 1804, the father, in consideration of natural love and [530] affection for his son, conveyed to his son in fee, freed from the £3500 and interest, six undivided 32d parts of the hereditaments which were described as being then used as a glass bottle manufactory: and by articles of co-partnership, dated the 14th of January 1805, after reciting that it was the intention of the parties that the six 32d parts of the hereditaments should be conveyed to and vested in the son, his heirs and assigns, and that the remaining twenty-six 32d parts should remain vested in the father, his heirs and assigns, but, in both instances, to be *had, taken and enjoyed as part of the joint stock in the partnership business*; and that the father and son had carried on trade in partnership as manufacturers of glass bottles, in and upon the hereditaments, from the 1st of January 1803, and had agreed to continue partners in that business from that day for the term of 24 years: it was witnessed that, in pursuance of the aforesaid intentions of and agreements between the parties, and for carrying the same more completely into execution, they covenanted with each other that they had, since the 1st of January 1803, been, and they and their respective executors and administrators would be and continue partners in the before-mentioned business for 24 years from the 1st of January 1803; the joint

trade to be carried on at Newcastle with such joint stock or capital as the partners for the time being should from time to time deem expedient: and that the parties should, at all times during the continuance of the co-partnership, and at the ceasing, dissolving or other eventual determination thereof, hold, enjoy and be interested in the joint stock and trade, and all monies, goods, wares, merchandizes, specialties, commodities, debts and other effects which should from time to time be in or belonging to the joint stock and trade, and all gains and profits to arise therefrom, in [531] the shares before mentioned: and that all sums of money, charges and disbursements, that should at any time thereafter be necessary to be laid out in and about the joint trade, stock and dealings, should, at all times during the partnership, be allowed and sustained by and out of the whole joint stock and trade, and the gains and profits thereof, so as each of the parties should pay his share thereof in the proportions aforesaid; and that, in case of the death of either of the partners during the co-partnership, his executors, administrators or assigns should be entitled to his share and proportion of all the joint stock and effects in manner therein and hereinafter mentioned, and without any right of survivorship in the other of them; and that books should be provided in which entries should be made of all particulars of all monies received and paid, and of all goods, wares and commodities bought and sold, received in and delivered out, and of all other matters and things conducing to the manifesting the state and affairs of the partnership; and that the partners should, on the 1st of January in every year, account together and fully state a true and particular account in writing of their joint stock and trade, and all monies, goods, debts and effects belonging thereto, and of all debts then due for or on account of the same, so as it might plainly appear what the state and condition of the joint stock and trade then was, and should enter in the journal the particulars of the residue or balance of every such account; and that, at the expiration of the co-partnership, the partners should make up, settle and sign a final account of the joint stock and trade, and all monies, debts, goods, specialties, profits and effects then belonging thereto, and also of and concerning all debts, sum and sums of money, losses, charges, damages and expenses which should be by the partners due [532] or owing to any person or persons, or which the partners should have suffered or sustained; and that, as soon as conveniently might be after such final account should be settled and signed, payment should be made of all debts or sums of money which should be then due from the partnership, to any person or persons whomsoever, on account of the joint trade, and that payment, division, partition and delivery should be made by and between the partners, at their common office or such other place as they should agree upon, of all the stock, monies, goods, wares, merchandizes and effects which might then belong to the partnership, in proportion to their respective shares in the stock and trade; and that it should be lawful for either of the partners, before the expiration of the 24 years, to assign or transfer, in his lifetime, or to bequeath at his decease, his shares unto a son or sons, and that such son or sons should, upon such assignment being made or such bequests taking effect, become a partner or partners in the joint trade, in the proportion or proportions of the share or shares or part or parts so assigned or bequeathed, but subject to the covenants, clauses, and agreements in the articles contained; and that if, at any time before the expiration of the 24 years, either of the partners should be desirous to sell and dispose of his share or shares in the joint stock and trade other than to a son or sons, or in case any partner should die before the expiration of the term without having bequeathed his share of the joint stock and trade to a son or sons as aforesaid, then the partner so desirous to sell and dispose of such share or shares as aforesaid, or the executors or administrators of the partner so dying without having bequeathed his share of the joint stock and trade to a son or sons as aforesaid, should give 20 days' notice, of such desire or death, to the other or surviving partner who might, if he should [533] think fit, purchase, accept, or take such share or shares or so much and such part or parts thereof as should not then have been assigned or bequeathed to a son or sons as aforesaid, unto him, at such price as the full value of the same share or shares or such part or parts thereof as aforesaid, should amount to, according to the yearly account, made and subscribed as therein mentioned, for the year ending the 1st day of January next preceding such notice; but in case no such account should then have

been made and signed, then the share or shares of the said freehold hereditaments and premises should be so purchased and taken at a proportionable part of the sum at which the same hereditaments and premises were valued in the last yearly account which should then have been subscribed by the partners, and the other stock, debts and effects, at such sums as the same should then be actually worth; and, in case there should be any doubt or difference respecting the value of the said stock, debts and other effects, then the same should be ascertained by arbitrators; and that the party so giving notice as aforesaid should, upon payment of the purchase-money, grant, assign and release, unto the party so accepting and purchasing such share or shares, his executors and administrators, all his or their part or parts, share or shares, right, interest and demand whatsoever, from the day of such purchase, of and in the joint stock and trade, and the monies, goods, wares, debts (other than such debts as thereafter mentioned), gains and other effects and estates whatsoever which, at the time of such notice, were in or belonging to the partnership, or jointly owing or belonging to the partners upon account of the joint trade and stock; and, in case either of the partners, or the executors or administrators of a deceased partner, should, in consequence of such notice, sell and dispose of his share or [534] shares in the stock and trade as aforesaid, then all such bad and desperate debts as should not have been reckoned as good, and, as such, cast up and included in the yearly account to be made and stated as aforesaid, should, with all convenient speed, be divided or distributed among the party or parties so giving and receiving such notice, in proportion to their respective shares and interests in the joint stock and trade; and that, thereupon, the parties so giving and receiving such notice as aforesaid should give unto each other and their respective executors and administrators full power and authority to sue for, get in and recover his and their debts allotted to them respectively; and that in case neither of such partners, after such notice as aforesaid, should be willing to become the purchaser of the shares and interests of the other of them so minded to sell or dying, then it should be lawful for the party giving such notice to sell and dispose of his share and interest in the stock and trade to any person or persons of general fair character, and that the person or persons who should become the purchaser or purchasers of the share or shares so sold should be admitted into the partnership, but under and subject to the same covenants, clauses and agreements as were contained in the articles: and that the partners, or their respective executors, administrators or assigns, should not sell or dispose of his and their shares of the joint stock and trade or any part thereof, otherwise than as aforesaid. And the articles further witnessed that the parties thereto, in pursuance of the agreements and for the considerations therein mentioned, did thereby, for themselves respectively, and for their respective heirs, executors, &c., covenant with each other and their several heirs, executors, &c., that the freehold hereditaments should, *at all times thereafter, be held and accepted as partnership property, and be* [535] *considered and treated as part of the joint stock of the partnership trade, according to the several shares and interests of the partners therein.*

In 1818 I. Cookson the elder agreed to give to his son three other 32d shares in the business, and also in the freehold premises; and, in pursuance of that agreement, indentures of lease and release, dated the 1st and 2d of January 1818, were made between them, and thereby, after reciting the indentures of the 8th and 9th of October 1804, and that I. Cookson the elder had paid off the £3500 and interest, and that he was then seised in fee-simple of twenty-six 32d shares in the hereditaments and premises, and that he had agreed to convey three of those 32d shares to his son; it was witnessed that, in consideration of his natural love and affection for his son, he conveyed those three 32d shares to his son in fee: and by another indenture, dated the 3d of January 1818, after reciting the indentures of the 8th and 9th of October 1804, the articles of co-partnership and the indentures of the 1st and 2d of January 1818, and that it was the intention of the parties that the three 32d shares of the freehold premises should be vested in the son, his heirs and assigns, and that the rest of the father's shares should remain vested in him, his heirs and assigns, but, in both instances, *to be had, taken and enjoyed as part of the joint stock in the partnership trade or business*: it was witnessed that the father, in consideration of his natural love and affection for his son, assigned to his son, his executors, &c., three 32d parts

of the joint trade or business and the capital, stock, monies, goods, wares, merchandizes, specialties, commodities, utensils, materials, debts, and all other the effects, matters and things belonging thereto, under and subject, nevertheless, to such regulations, restrictions [536] and agreements as were contained in the articles; and the father and son thereby covenanted with each other that they, their executors and administrators, should, immediately after the date of the now stating deed, be interested in the joint trade or business and the capital, stock, monies, goods, wares and merchandizes, specialties, commodities, utensils, materials, debts, and all other the effects, matters and things which then were or should, from time to time, be in or belonging thereto, and also all gains and profits thereof, and should be liable and accountable for all losses, damages, expenses, purchases, payments, claims and demands concerning the same, in the shares following (that is to say), the father in twenty-three 32d parts, and the son in the remaining nine 32d parts.

The father and son continued to carry on the business under the articles (with such variation in their shares as before mentioned) until the 1st of January 1827, when the term of 24 years expired. In the course of that term £1700 and upwards were expended, out of the funds of the partnership, in erecting new buildings and making other improvements upon the premises. After the expiration of the term the father and son continued to carry on the business in partnership together, without entering into any new articles, in the same manner as they had done during the term; and, from the commencement of the partnership, they held and used the freehold premises for the purposes of their trade alone; and the estimated value of those premises was entered in the books and accounts of the partnership as part of the capital or joint stock, and was treated and considered in all respects as part thereof.

I. Cookson the elder died intestate on the 13th of December 1831, leaving John Cookson, his eldest son, [537] his heir, and six other children who, with their elder brother, were his next of kin. John Cookson, Isaac Cookson and one of the other children took out administration to their father. All the debts due from the trade at the intestate's death were paid; and Isaac Cookson the younger remained in possession of the stock, including the land, and continued to carry on the trade on his own account.

The bill was filed by the intestate's five youngest children, against their brothers John and Isaac, praying that it might be declared that the intestate's twenty-three 32d shares in the freehold premises formed part of the stock-in-trade of the partnership at the intestate's death, and that, as such, John Cookson had no beneficial interest therein as the intestate's heir; and that the whole of the trading concern might be sold and the proceeds be divided between the intestate's estate and the Defendant Isaac Cookson, according to their respective shares and interests therein; and that it might be declared that the Defendant Isaac Cookson had no right of pre-emption as to his father's shares in the trading concern, including the freehold premises.

Sir W. Horne, Mr. Burge and Mr. Purvis, for the Plaintiffs. The articles recite that it was the intention of the parties that the freehold premises should be had, taken and enjoyed as part of the stock of the partnership; and the parties covenant that those premises shall, at all times thereafter, be held and accepted as partnership property, and be considered and treated as part of the joint stock of the partnership trade. It was impossible for the parties to have expressed more clearly their [538] intention to convert the land into personalty. The articles also provide for the case of a partner wishing to retire from the partnership or dying; and they stipulate that his share of the stock, that is, of all the partnership property blended together, whether real or personal in its nature, should be offered for sale by the retiring partner or the executors of the deceased partner, as the case might be, to the continuing or surviving partner, at the sum stated to be its value in the yearly account signed on the 1st of January next preceding; but, if no such account should have been signed, then that the retiring or deceased partner's share of the land might be taken by his co-partner at a proportionable part of the sum at which the land was valued at the last yearly account, and his share of the *other* stock, debts and effects, at the sum which it should be then actually worth. During the whole of the partnership the

land was used, exclusively, for the purposes of the trade, and the value of it was entered in the books and accounts of the partnership as part of the stock, and it was treated as such in every other respect; and all the other stipulations in the articles were strictly abided by.

In 1818 the father gave to the son three additional shares in the partnership; and certain deeds were then executed for the purpose of vesting those shares in the son: in every other respect, however, those deeds were in perfect conformity with the original articles. Moreover, the deed of the 3d of January 1818 recites, expressly, that it was the intention of the parties that the three 32d shares of the freehold premises should be vested in the son, his heirs and assigns, and that the remaining twenty three shares therein should remain vested in [539] the father, his heirs and assigns, but, in both instances, to be had, taken and enjoyed as part of the joint stock of the partnership business.

Whatever difference there may be between this case and any of the decided cases, that difference is in favour of the proposition which we contend for. The land was acquired and used for the purposes of the trade; a right of pre-emption was given to the surviving or continuing partner; in the case of a partner dying, the persons who were to deal with his share were his personal, not his real, representatives; and, in order that there might not be any possibility of doubting as to the intention of the parties, an express covenant was inserted in the articles, that the land should be held as partnership property, and be considered and treated as part of the joint stock of the partnership. *Townsend v. Devaynes* (1 Mont. on Partnership, Appen. 97; and 1 Roper, on Husband and Wife, Jacob's edit. 346, note); *Ripley v. Waterworth* (7 Ves. 425; see *Randall v. Randall*, ante, vol. 7, p. 271). In this latter case the land was not purchased by the partners for the purposes of trade, but was devoted by the original owner to those purposes; and it was held on that ground to have been converted into personalty. So, in this case, I. Cookson the elder, who was the original owner of the land, devoted it to the purposes of the trade, and, on taking his son into partnership with him, he and his son bound themselves to hold it, not in its original character, but as personal estate. [THE VICE-CHANCELLOR. Is there any stipulation in the articles of 1805 that, when the partnership ceases, the land shall be sold?] [540] There is no stipulation exactly in those terms; but there is an express provision by which a right of pre-emption as to the shares of a deceased or retiring partner is secured to the surviving or continuing partner. In *Ripley v. Waterworth* an option to purchase the shares of a deceased partner in the freehold estate was given to the survivors, and it was inferred from that circumstance that the parties intended to convert the freeholds into personalty. It may be said that the provision as to the right of pre-emption did not remain in force after the expiration of the original term of 24 years; but if the parties continued to trade upon the old premises, just in the same manner as they did before, is it not to be inferred that they meant the original articles to remain in force in every particular? [THE VICE-CHANCELLOR. How can it be contended that the stipulation in the articles, as to what was to be done in the event of either of the partners dying during the term of 24 years, is applicable where neither of the partners died until after the expiration of the term? Is there any case in which it has been decided that real estate, in its original nature, has changed its quality, where it was neither purchased out of the partnership funds, nor was required to be sold for partnership purposes, after the termination of the partnership, that is, where it was not required to be sold for payment of debts, or for any of the other purposes of the partnership?]

Mr. Knight, for the Defendant John Cookson. There is no such case.

Mr. Jacob and Mr. Wilbraham, for the Defendant Isaac Cookson. We have to contend, first, that the land was converted, absolutely, into personalty, by the articles; and, secondly, if it was not, that our client still has the option to purchase his father's shares in it, and that, when he exercises that option, it will be converted into personalty. *Townley v. Bedwell* (14 Ves. 591). If a party has, by contract, bound himself to submit to a sale of his land, he has converted it into personalty. Isaac Cookson the younger had not the slightest intention of acquiring real estate as such; he acquired it for the purpose of carrying on the trade; and his father must be held to have done the same. If land is acquired and used for the purposes of

trade, it becomes as much part of the stock as if it had been purchased out of the funds of the partnership.

The articles begin with reciting that it was the intention of the parties that the land should be had, taken and enjoyed as part of the joint stock; and, at the end of the instrument, there is an express covenant that at all times thereafter it should be held and accepted as partnership property, and be considered and treated as part of the joint stock of the trade. That covenant is the only instance in which the heirs are mentioned in the operative part of the deed, and they are there mentioned only for the purpose of being precluded from making any claim to the land: as partnership property, they were to have nothing to do with it. The first stipulation in the articles is that the father and son, and their respective executors and administrators, should continue partners for 24 years. It was not a partnership which was to be dissolved by the death of either of them; but they and their executors and administrators were to continue partners for the 24 years. If then the father had died during the first 12 years of the term, his share in the [542] partnership property, including the *corpus* or inheritance of the estate, would have devolved upon his executors or administrators; and, during the remaining 12 years, the estate must have remained in the trade, subject to all the debts, losses and other contingencies of the trade, and subject to be sold in order to pay those debts and losses and also any balance that might be, eventually, found due to the son. The articles then provide that all sums of money, charges and disbursements whatsoever that should at any time thereafter be necessary to be laid out in and about the trade, should, at all times during the continuance of the partnership, be allowed and sustained out of the stock. The land, therefore, was devoted to all the partnership liabilities. It is then provided that, in case of the death of either of the partners during the term, *his executors or administrators* shall be entitled to his share of all the joint stock. What is that but a declaration that the land shall be personal property? It is dedicated, *in toto*, to the partnership demands, and then it is said that on the death of either of the partners his share shall go to his executors or administrators. The articles next point out what is to be done at the expiration of the term. The partners are to make out an account of all the assets of the partnership (including, of course, the land, which was before declared to be part of the assets) and also an account of all the debts, losses, &c., of the partnership; and then payment is to be made of all debts due to any person or persons whomsoever on account of the trade. So that the whole property of the partnership is to be applicable to satisfy the demands of every person upon the partnership, which, of necessity, includes what might be found due to one of the partners. Perhaps it may be said that the winding up of the partnership is not to take place by sale, in the ordinary [543] way, but by division, *partition* and delivery. Now what division or partition of the land could be made at the office of the partnership? Besides, it might turn out that the assets were less than the debts due from the partnership; and then either partner would have a right to say that the land, as well as the rest of the stock, should be sold for payment of the debts. In *Cook v. Collingridge* (Jac. 607; see 620) the articles of partnership provided that, upon the expiration of the partnership term, the stock-in-trade should be divided, in specie, amongst the partners: but Lord Eldon said that that was not practicable: and, therefore, the partnership must be wound up in the ordinary way, that is, by a sale of the stock. Moreover, in this case, it became important in the course of the trade to make additional buildings and other improvements upon the land; and the money expended for those purposes came out of the partnership funds. The additions and improvements were made for the benefit of the trade, not for the benefit of the heir; and the increased value of the land became part of the profits of the trade. How then is each party to have his share of the money so expended, except by selling the property and each party drawing out his share of the proceeds? Then the articles provide that if, during the term, either partner should be desirous of selling his share to any person except a son, or should die without having bequeathed his share to a son, the partner so desirous to sell his share, or the *executors or administrators* of the deceased partner, shall give notice of such desire or death to the other partner, and the sale of the deceased partner's share in the inheritance of the land is to be carried into effect and completed by *his executors*

or administrators. We submit, therefore, as the land was subjected, by the [544] articles, to the rights of executors or administrators, to the expenditure, debts and losses of the partnership, to a power of sale given to the executors or administrators and to the payment of the balances due to the partners, and, as the affairs of the partnership could not be wound up without a sale, that it was converted by the articles into personalty; and, if it was once converted, it cannot be reconverted without the consent of both parties.

The parties continued to carry on the trade after the expiration of the term of 24 years. That was a prolongation of the term; and, as they carried on the trade in the same manner, precisely, as they had done before, all the provisions of the articles attached upon them. If the land was not converted by the articles, it will be converted as soon as Isaac Cookson the younger shall have exercised his option to purchase his father's share.

Mr. Knight and Mr. Mathews appeared for the Defendant John Cookson; but

THE VICE-CHANCELLOR [Sir L. Shadwell] without hearing them, said: The question is whether, for all purposes whatever, the shares which Isaac Cookson the elder had in his freehold estate are to be considered as personal estate.

In the first place, those cases can hardly be said to bear upon the subject, the foundation of which is, in effect, that freehold tenements were purchased for the benefit of the partnership out of the partnership assets: because Isaac Cookson the elder was, originally, solely seised in fee of the freehold tenements in question; and in the year 1804 he voluntarily conveyed to his son six 32d parts of those freehold tenements, and afterwards he executed the instrument of the 14th of January 1805, [545] which formed the articles of partnership, upon which, alone, the question can be said to turn. Before the partnership expired, that is, in the year 1818, by deeds of the 1st and 2d of January in that year, Mr. Isaac Cookson the elder conveyed three other 32d parts of the same freehold tenements to his son: and then another instrument was made, dated the 3d of January 1818, which, in effect, declared what should be the state of the partnership, as between the father and son, with reference to the three shares which had newly accrued to the son.

Now, in this case, the whole benefit which the son took proceeded from the father by way of bounty exclusively; and there was no application of partnership assets to the purchase of the land in question for the purposes of the partnership. But the articles of the 14th of January 1805, after reciting the preliminary matter, and that I. Cookson the elder was seised in fee-simple of the other twenty-six undivided 32d parts or shares in the premises, proceed as follows:—"And whereas it is the intention of the parties hereto that the six 32d parts or shares of and in the said hereditaments and premises comprised in the said recited indentures should be conveyed to and vested in the said Isaac Cookson the younger, his heirs and assigns, and that the remaining twenty-six 32d parts or shares thereof and therein should remain vested in the said Isaac Cookson the elder, his heirs and assigns, but, in both instances, to be had, taken and enjoyed as part of the joint stock in the partnership trade or business." Then the parties proceed to declare that they will be partners for the term of 24 years from the 1st of January 1803; and there are the usual clauses which do not appear to me to affect the case; and there are other clauses directing yearly accounts to be taken. Then there is the [546] clause providing for what shall be done at the expiration of the partnership; and it seems to me that that clause and the last clause of all in these articles are the only ones which it is necessary to consider; because the clauses which relate to what was to be done if, at any time before the expiration of the term of 24 years, either of the parties should be desirous to sell his share, or should die without having bequeathed his share to a son, are clauses which apply only to the specific case which is there pointed out, and do by no means, even by reference, apply to the case which did happen, namely, to the case that the original term of 24 years did actually expire, and that the father and son continued to carry on the partnership business without any new stipulation until the death of the father in 1831. It seems to me that the effect in law was this, namely, that inasmuch as, when they continued to carry on the partnership after the expiration of the original term, without entering into any new stipulations, the stipulations that were in the old articles did apply, as far as they could; but the stipulation with respect to the purchase of a deceased

partner's share could not apply; inasmuch as that stipulation had reference only to the contingency of one of the partners dying during the continuance of the term; and, therefore, the only material clause is that which directs what was to be done at the expiration of the partnership. That clause provides that, at the expiration of the partnership, the partners should meet and account together, and that all debts due from the partnership should be paid, and that then true payment, division, partition and delivery should be made, by and between the partners, at their common office or such other place as they shall agree upon, of all such stock, monies, goods, wares, merchandizes and effects which might then belong to the partnership, in proportion to their re-[547]-spective shares. Now, in the case of *Cook v. Collingridge*, to which Mr. Jacob referred, the case was not incumbered with the difficulty of there being any freehold tenement as part of the partnership property; but the partners had leaseholds and a variety of chattel property, of all sorts and descriptions, things of a personal nature, and things almost of an indescribable nature, contracts with customers and so on; and the articles of partnership there directed that the property should be divided, received and taken by the parties according to their respective interests; and Lord Eldon observed, with great reason, that it was very difficult to apply the exact language of that sentence to some of the particulars of which the partnership property consisted; so that nothing could be directed except a sale. In this case, I do not lay stress on the word *partition* as pointing to any particular mode of dealing with the real estate. There is, however, a direction that there shall be payment, division, partition and delivery; and, if the state of the partnership assets were such as that it was not necessary to sell the whole, but it was possible to divide some things by delivery, there seems to be no reason why that mode should not be adopted, and the other things not capable of delivery might be sold, and the produce divided. But what strikes me as the law applicable to the case is this, namely, that law which Sir William Grant laid down in *Bell v. Phyn* (7 Ves. 453). In that case persons who were in partnership as merchants joined with another person in buying an estate as tenants in common, the merchants buying 2-3ds and the other party buying 1-3d; and Sir W. Grant says: "Suppose this was partnership property, I doubt whether the consequence is a conversion. There was no occasion to call for it [548] for any of the purposes of the partnership. It remains clear. Each might have entered into the enjoyment of his share. Then suppose all die, why is it to be considered personal property—something different from what it really is, as between the real and personal representatives?" So it appears to me in this case; when the partnership terminated, it is not suggested that there was any necessity for a sale of a particle of the assets for the purpose of paying the partnership debts. The consequence therefore is that that which unquestionably was originally freehold property will remain freehold property in the two different parties, that is, that the share of I. Cookson the elder will descend to his heir or go according to his will; and Isaac Cookson the younger will retain his nine 32d shares as freehold estate; and so with respect to many other articles which may belong to the partnership, but which it may not be necessary to sell; they may be divided between the father's estate and the son in proportion to their shares.

Then it was said that the clause at the end of the articles must be taken as shewing that, for all intents and purposes and for all time, the effect of this dealing between the father and son was to make the father's twenty-six 32d shares personal property. Now that clause is as follows:—"And it is hereby further witnessed that the said Isaac Cookson the elder, and Isaac Cookson the younger, in pursuance of the agreements and for the considerations hereinbefore mentioned and contained, do hereby, for themselves respectively, and for their respective heirs, executors and administrators, covenant, promise, declare and agree to and with each other, and their several heirs, executors and administrators, that the hereditaments and premises hereinbefore mentioned to be vested in the parties hereto as aforesaid shall, at all times [549] hereafter, be held and accepted as partnership property, and be considered and treated as part of the joint stock of the aforesaid partnership trade, according to the several shares and interests of the said partners therein, as hereinbefore mentioned and contained."

Now I understand that covenant as having a very distinct meaning, namely, that

during the partnership, and, if necessary for partnership purposes, after the expiration of the partnership the shares which the father and the son had respectively should be considered as personal estate: but it would be quite absurd to say that that covenant shall be so extended as that, though the partnership expired, and though the land was not required to be sold for partnership purposes, it should have the effect of making that which was unquestionably land in its own nature absolutely personal estate, not for any beneficial purpose to the father or to the son, but for the purpose of making a sort of unnatural and unnecessary conversion of real assets into personal as between the real and personal representatives of the two partners respectively. This would be a nonsensical construction in my opinion: and that the parties did not so consider it is pretty evident from the way in which the remaining 26 shares of the father were dealt with. For, when you look at what took place in 1818, you find that the father then agreed, voluntarily, to increase the shares of the son in the partnership and in the freehold property; and the conveyance was made as upon the former occasion, commencing with a recital that the father was seised in fee-simple of twenty-six 32d shares: and then he is made to convey three of his shares, just in the same manner as if he was holding, unfettered by any stipulation whatever, the twenty-six 32d shares which remained vested in him.

[550] The parties then have another deed of the 3d of January 1818, in which the conveyance of the three additional shares is recited, and they go on to declare that the additional shares shall be held subject to the stipulations which existed in the former articles of partnership.

In the first place, therefore, there was no purchase of the land out of partnership assets for partnership purposes, and there are no stipulations, in the articles of partnership, which, upon a fair construction, can be said to have this effect, namely, as between the real and personal representatives of Mr. I. Cookson the elder, of converting the real estate into personalty, and it was not necessary, for any partnership purpose, that there should be any conversion.

Therefore, my opinion is that the original character of the shares remaining in Isaac Cookson the elder continued after his death, and, consequently, that his heir at law is entitled to them.

[551] OWDEN v. CAMPBELL. April 26, 28, July 17, 1837.

Husband and Wife. Pleading. Parties. Misjoinder. Will. Construction. Legacy.

Husband and wife ought not to join as Co-plaintiffs in a suit relating, exclusively, to the wife's separate property.

Testatrix gave to her executors such a sum of money as, at her decease, would purchase £2500 three per cents., and directed them to invest it in their names, and to pay the dividends to A. for life. She then gave several pecuniary legacies, and directed all the above-mentioned legacies to be paid within three months after her death. The executors were unable to get in the assets until four years after the testatrix's death, at which time the three per cents. had risen. Held that the direction for payment of the legacies did not apply to the first bequest; but that A. was entitled to have the full sum of £2500 stock purchased, and to be paid the amount of the dividends from the testatrix's death.

The testatrix in this cause gave to her executors such a sum of money as, at the time of her decease, would purchase £2500 three per cent. consols, and directed them to invest it in that stock, in their names, and to pay the dividends to Mrs. Owden for her life, for her separate use; and that, after Mrs. Owden's decease, the said principal sum of £2500 should sink into her residuary estate: and, after giving several pecuniary legacies, she directed that all the above-mentioned legacies should be paid within three months after her decease: and she gave the residue of her estate, and, after Mrs. Owden's decease, the sum of £2500 stock to her executors.

The testatrix died in 1830. At that time a fund which constituted nearly the whole of her assets was the subject of litigation in the Court of Chancery; and it did

not become available to the purposes of her will until the litigation terminated in 1834.

In December of that year the bill in this cause was filed by Mr. and Mrs. Owden against the executors, [552] praying that the executors might be decreed to purchase the £2500 consols out of the testatrix's assets, and to pay the dividends to Mrs. Owden for her life, for her separate use.

Mr. Knight and Mr. Mathews, for the Defendants, said that, as the suit related, exclusively, to Mrs. Owden's separate property, her husband ought not to have been joined with her as a Plaintiff in the suit; but the bill ought to have been filed by Mrs. Owden, by her next friend, and her husband ought to have been made a Defendant: and they contended that, on account of the misjoinder, the bill ought to be dismissed. *Sigel v. Phelps* (ante, vol. 7, p. 239), *Hughes v. Evans* (1 Sim. & Stu. 185), *Reeve v. Dalby* (2 Sim. & Stu. 464).

Mr. Jacob and Mr. Lynch, for the Plaintiffs, said that Mr. Owden admitted the right of his wife, and prayed, expressly, that the dividends of the £2500 stock might be paid to her for her separate use: that suits respecting the rights of married women were always instituted by them and their husbands jointly, except where the husband claimed adversely to his wife, which was not the case here. (Mitf. Treat. 3d edit. 22; 4th edit. 28.) *Smyth v. Myers* (3 Madd. 474), *Mallack v. Gallon* (3 P. W. 352), *Stinson v. Ashley* (5 Russ. 4). In *Simons v. Horwood* (1 Keen, 7) the Master of the Rolls did not consider that the joining of the husband and wife, as Co-plaintiffs, in a suit relating to the wife's separate property, was an objection to making a decree, but that it was an objection to making a decree in favour of the husband. *Laird v. [553] Tobin* (1 Molloy's Rep. 543). In *Ferris v. Foley* (not reported) an objection similar to the present was made, but the Lord Chancellor expressed an opinion against it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is manifest, if there is a contest between the husband and wife, that the interest of the wife requires that her husband should be made a Defendant. But here the objection is taken by the Defendants and not by the wife, and the question is whether the interest of the Defendants does not require that the husband should be made a Defendant. A suit by husband and wife is the suit of the husband; and, if the bill is dismissed, or a decree is made adverse to the claims of the wife, the wife may file a fresh bill by her next friend, in which case the Defendants would be doubly vexed. The question, therefore, is whether the suit ought not to be so constructed as that, if the bill should be dismissed or a decree should be made adverse to the wife, she would be bound by it. As, however, it has been said that the Lord Chancellor has expressed an opinion upon the point, I will ascertain what that opinion is before I decide upon the objection.

April 28. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have conversed with the Lord Chancellor upon the objection that was raised in this case, and as to the opinion which his Lordship was said to have expressed upon the point. His Lordship said he had no recollection that he had expressed any such opinion; so far from it that he was rather disposed to hold that, if husband and wife join as Co-plaintiffs in a suit relating [554] exclusively to the wife's separate property, the bill ought to be dismissed, as the husband has no interest in the subject-matter of the suit.

In this case, however, I do not feel disposed to order the bill to be dismissed; although I am of opinion that the record has been improperly constructed. Therefore, on the Plaintiffs paying the costs of the day, I will give leave to amend the bill by striking out the name of the husband as a Plaintiff, substituting a next friend to the wife and making the husband a Defendant.(1)

(1) See *Raffety v. King*, 1 Keen, 601; *Wake v. Parker*, 2 Keen, 59. In *England and Wife v. Downs* (Rolls, 15th March 1839), an objection similar to that in the above case was raised by the answers of the Defendants Downs and Alexander, and insisted on, at the hearing, as a ground for dismissing the bill. The Master of the Rolls refused to dismiss the bill, but ordered that, on the Plaintiff, Mr. England, giving security for the costs already incurred, and for any additional costs that might be occasioned in consequence of the amendment after mentioned, Mrs. England should be at liberty to amend the bill by striking out her husband's name, adding a next

July 17. The bill having been amended as above mentioned, the cause again came on to be heard.

The three per cent. consols had risen in price since the testatrix's death ; and [555] Mr. Jacob and Mr. Lynch contended that, nevertheless, Mrs. Owden was entitled to have £2500 of that stock purchased, and also to be paid the amount of the dividends which would have accrued thereon, in case the purchase had been made immediately after the testatrix's death.

Mr. Knight and Mr. Mathews said that the legacy in question was a gift, not of £2500 consols, but of a sum of money the amount of which was to be regulated by the price of consols at the time of the testatrix's death, that is, of such a sum of money as, at the testatrix's death, would have purchased £2500 consols ; and that Mrs. Owden was entitled to interest at four per cent. on that sum from the end of a year, or, at the earliest, from the end of three months after the testatrix's death.

Mr. Willcock, for the Defendant Mr. Owden.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is impossible to read this will without perceiving that the testatrix meant that the dividends of the £2500 stock should become payable to Mrs. Owden from the day of her death, and that there should be always standing, in the name of her executors, such a sum of stock as would be sufficient to produce those dividends. Any dealing, therefore, with the assets, which would produce less than that amount of stock, would not provide that fund which the testatrix meant should be always standing in the names of her executors.

The direction to pay the legacies within three months after the testatrix's death does not apply : for there was no payment to be made to Mrs. Owden, once for all ; [556] but the executors were to purchase £2500 three per cents., and were to continue to pay the dividends to Mrs. Owden during her life.

At the end of her will the testatrix says : "As to all the rest, residue and remainder of my estate and effects, and, after the decease of the said Caroline Owden, as to the said sum of £2500 three per cent. consolidated Bank annuities," &c. Therefore, from first to last, she keeps in view that there was always to be, as part of her personal estate (subject to the payment of the dividends to Mrs. Owden), a sum of £2500 three per cents. purchased with part of her assets. The consequence is that (subject to the payment of the legacy duty) Mrs. Owden is entitled to have £2500 three per cents. purchased, and also to be paid the amount of the dividends that would have become due on that sum in case it had been purchased immediately after the testatrix's death.

[557] HOLME v. WILLIAMS. March 22, 1839.

Debtor and Creditor. Infant Heir or Devisee. Construction of 11 Geo. 4 and 1 Will. 4, c. 47.

Where it is necessary to resort to the real estates of a deceased debtor for payment of his debts, the Court may direct the money to be raised by mortgage instead of sale, and may also direct the infant heir or devisee of the debtor to convey the estates to the mortgagees.

This was a creditor's suit : and, on the cause coming on for further directions, it was said that it would be beneficial to the devisees of the deceased debtor's estates (some of whom were infants) that the money required for payment of debts should be raised by mortgage instead of sale of the estates : but a doubt was expressed as to whether the Court could, under 11 Geo. 4 and 1 Will. 4, c. 47, s. 11, direct the infant

friend and making her husband a Defendant (the amendment to be made within two months after the order should have been drawn up), and that the Defendants Downs and Alexander should have the costs of the day : as, however, the question as to the validity of trusts for separate use was pending before the Lord Chancellor in *Tullett v. Armstrong* and other cases, the order was directed not to be drawn up until the last day of the following term.

devises to join in conveying the estates to the *mortgagee*, inasmuch as that Act does not, in express terms, authorize the Court to direct infants to convey estates, except where they are decreed to be *sold* for satisfaction of debts.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that a mortgage was, at law, a conditional sale, and therefore he was of opinion that he had jurisdiction, under the Act, to decree the estates of deceased debtors to be mortgaged for satisfaction of their debts, and also to direct their infant heirs or devisees to convey the estates to the mortgagee.

Mr. Puller, for the Plaintiffs.

Mr. Wright, for the Defendants.

[558] BROOKS v. HAIGH. *March 25, 1839.*

Practice. New Orders. Injunction.

Plaintiff obtained the common injunction for stay of execution, and soon afterwards served the Defendants with notice of a motion to stay trial. On the evening before the motion was to have been made, the Defendant filed his answer, to which the Plaintiff excepted, and then obtained an order, as of course, to refer the answer *instantly* for insufficiency. Held, that the order was regular.

On the 16th of March 1839 the Plaintiff obtained the common injunction for stay of execution in an action brought by the Defendants; and shortly afterwards he served the Defendants with notice of a motion, to be made on the 20th, to extend the injunction to stay trial. On the evening of the 19th the Defendants filed their answer. The Plaintiff excepted to it, and, on the 22d, obtained an order, *as of course*, for referring the answer *instantly* for insufficiency. The Plaintiff now moved to discharge that order for irregularity.

Mr. Jacob and Mr. Mylne, in support of the motion, said that the meaning of the words "unless in injunction causes," in the 5th Order of 1828, was that, in injunction causes, the old practice with respect to referring answers for insufficiency should remain unaltered; that, where a Defendant filed his answer in time to prevent the Plaintiff from obtaining the common injunction and the Plaintiff excepted to the answer, he was at liberty to refer the answer *instantly*; that if the Plaintiff was in possession of the common injunction, and the Defendant, on putting in his answer, moved to dissolve it, and the Plaintiff shewed exceptions for cause, then a special order was made to refer the answer *instantly*; but if, as in the present case, the Plaintiff was in possession of the common injunction and there was no shewing of cause, the Plaintiff was not at liberty to refer the answer *instantly*; *Candler v. Partington* (Madd. & Geld. 102; 1 Smith's Prac. 281); there Sir John Leach, V.-C., said: "Here the Plaintiff is in possession of the injunction, and the special reason for the reference *instantly* has no application to the present case; and the order is therefore irregular and must be discharged." At all events, the motion to refer the answer *instantly* ought to have been made upon notice.

Mr. Knight Bruce and Mr. Geldart, for the Plaintiff, said that this case was within the spirit and reason of the rule by which Plaintiffs in injunction causes are allowed to refer answers *instantly* for insufficiency; that the reason of the rule was to prevent Defendants in injunction causes from gaining time, by putting in insufficient answers; that, in this case, the common injunction was not obtained until after the declaration in the action had been delivered, and consequently it did not stay trial; that the Plaintiff was entitled to stay the trial of the action when the answer came in; and he would be entitled to an order for that purpose as soon as he should shew that the exceptions had been allowed; that the injunction in *Candler v. Partington* gave the Plaintiff everything that he wanted for the purpose of avoiding delay; but that was not the case here; and, therefore, the expression used by Sir John Leach in that case did not apply; that a Plaintiff in an injunction cause was entitled to the benefit of the exception in the Fifth Order, where the injunction obtained was incomplete, that

is, where it did not give the Plaintiff all the advantage that he could be, by any possibility, entitled to. *Munnings v. Adamson* (ante, vol. 1, p. 510).

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case bears no analogy to the case in which a Defendant, after putting in his answer, obtains an order [560] *nisi* to dissolve the injunction and the Plaintiff shews exceptions for cause against the order being made absolute. Both parties are then before the Court; and consequently the order to refer the answer *instantly* is made in the presence of both of them.

I have always understood that it is a motion of course in injunction causes to refer answers *instantly*; but the reason for doing it does not exist where the common injunction would stay all proceedings in the action. *Prima facie*, however, the common injunction does not stay all proceedings, as the Plaintiff at law may proceed to trial: the common injunction, therefore, is one which is not so complete as it may be made by extending it to stay trial. Consequently, the reason assigned by Sir John Leach in *Candler v. Partington* for referring answers *instantly* does exist in this case; for here the Plaintiff is not in possession of the injunction to stay trial. Therefore the principle of that case is entirely in favour of the Plaintiff; and my opinion is that the order sought to be discharged is right; and the present application must be refused with costs.

[561] MACKINLEY v. SISON. July 13, 1837.

[S. C. 1 Jur. 558.]

Power. Appointment. Construction. Will. Publication.

Testator gave to trustees a sum of three per cents. in trust for his daughter for life, and, after her decease, in trust for such persons and for such purposes as she should, either by deed, or by her will signed and *published* by her in the presence of and attested by two witnesses, appoint, and, in default of appointment, in trust for her children; but, if she should leave no child, then in trust for the testator's other daughters and their children. The daughter, by her will, which was expressed to be signed and sealed only, but which was attested by three witnesses, gave several pecuniary legacies, and directed them to be paid out of the monies invested in *her name in the four per cent. Government securities*. The daughter died unmarried. She had no four per cents. standing in her name, nor was there any property to satisfy the legacies, except the three per cents. standing in the names of the trustees of her father's will. Held, that the power was not confined to the daughter's children, but was general; and that her will was a due execution of it.

Thomas Burnett, by his will, dated the 21st of October 1819, gave his residuary estate to trustees, in trust to invest the same or the proceeds thereof in real or Government securities in their names, and to pay the dividends and interest thereof to his wife for her life, and, after her decease, as to the sum of £50 long annuities, then standing in the testator's name, upon trust to pay the dividends or annual produce thereof to such person or persons as his daughter Eliza Sison, then the wife of William Sison, should, notwithstanding her then or any future marriage, by any note or writing signed by her, appoint, and, after her decease, upon trust to transfer the capital of such long annuities to such person or persons, for such intents and purposes, and in such parts, shares and proportions, manner and form, and with, under and subject to such conditions and restrictions, as his said daughter, whether sole or married, by any deed or deeds, instrument or instruments in writing, to be by her sealed and delivered in the presence of and to be attested by two or more credible witnesses, or, in and by her last will and testament in writing, or any writing or writings purporting to be or being in the nature of her last will and testament, to be [562] by her signed and *published* in the presence of and to be attested by the like number of witnesses, should direct or appoint, give or bequeath the same; and, in default of such direction or appointment, gift or bequest, or in case of any such which should not amount to a complete disposition of the whole of such long annuities, then, as to the whole or so

much and such part thereof as should be so unappointed or undisposed of as aforesaid, in trust for all and every the child or children of his said daughter by her then or any future husband, who, being a son or sons, should live to attain the age of 21 years, or, being a daughter or daughters, should live to attain that age or be previously married, in manner and in the shares and proportions therein mentioned; and, as to such further part of the residue of the aforesaid stocks, funds and securities as should, at the then current price of the market, be of the value of £2000 sterling, upon trust, after the decease of his wife, to pay and apply the dividends and interest thereof for the separate use of his daughter, Mary Ann Burnett, during her life, independently of any husband with whom she might intermarry, in the same manner as was thereinbefore directed with respect to the dividends and annual produce of the £50 long annuities thereinbefore directed to be paid and applied unto and for the sole and separate use and benefit of his daughter Eliza Sison; and, after the decease of his daughter, Mary Ann Burnett, the testator directed the trustees to stand possessed of the capital of the last-mentioned stocks, funds and securities, under and subject to the like power of direction, limitation and appointment by the said Mary Ann Burnett, whether sole or married, and, in default of and subject to such direction, limitation or appointment, upon the like trusts for all and every her child and children who, being a son or sons, should [563] live to attain the age of 21 years, or, being a daughter or daughters, should live to attain that age or to be married, and in the same manner, in all respects, as were thereinbefore mentioned with respect to the £50 long annuities bequeathed for the benefit of Eliza Sison and her child or children. And, after making similar bequests in favour of his two other daughters and their children, the testator provided that in case any of his daughters should die without having a son who should attain 21, or any daughter who should attain that age or be married, then not only the original share or shares thereby provided for such daughter or daughters, but also the share or shares accrued under that clause, should be held by his trustees upon the same trusts and subject to the same directions for the benefit of his other daughters and their children as were thereinbefore declared with regard to the original shares thereby provided for his daughters and their children respectively.

The testator died on the 13th of October 1821. His widow died on the 20th of October 1833. The trustees of his will set apart £2279, 10s. three per cent. consols (being equivalent at the widow's decease to £2000 sterling) to answer the bequest contained in his will in favour of Mary Ann Burnett.

Mary Ann Burnett died unmarried in March 1837, having made a will in the following words:—

"I, Mary Ann Burnett, spinster, do declare this to be my last will and testament, and do hereby bequeath my property as follows:—To my sister, Eliza Sison, the sum of £200: to my two sisters, Emma Charlotte Burnett and Caroline Mary Frances Burnett, each, the sum of £300 sterling: to my four brothers, Duncan [564] Pringle Burnett, Henry Peter Dickason Burnett, William Hope Whidby Burnett and Charles Mountford Burnett, each and respectively, the sum of £200 sterling: to my niece, Eliza Burnett, the sum of 19 guineas: to Marianne Burnett, the wife of my brother, Charles Burnett, the sum of 19 guineas: to my friend, Louisa Meynell Travis Belcombe, the sum of £100 sterling: to my friends, Emma Evans and Amelia White, each, the sum of 19 guineas. All these above-mentioned bequests to be paid out of the monies invested in my name in the four per cent. Government securities. I hereby appoint Henry Peters Dickason Burnett and Louisa Meynell Travis Belcombe to be joint executors and residuary legatees. Signed and sealed this 4th day of December in the year of our Lord 1833, Mary Ann Burnett. Witness, James Terthewey, Mary Williams, Robert Buleock."

Mary Ann Burnett was not, either at the date of her will or at her death, possessed of or entitled to, nor had she any power to appoint or dispose of, any four per cent. stock or other Government securities, nor had she any property whatsoever to satisfy the bequests contained in her will, except the £2279, 10s. three per cent. consols standing in the names of the trustees of her late father's will.

The bill was filed by two of the trustees of the testator's will against the other trustee, and also against Mary Ann Burnett's surviving sisters and the other legatees or appointees under her will: and the questions were,

First, whether under her late father's will, she had a general power of appointment over the £2279, 10s. [565] three per cents., or only a power to appoint that fund amongst her children, in case of her leaving any?

Second, whether if she had such general power, her will was a due execution of it?

Mr. W. R. Ellis, for the Plaintiffs.

Mr. Wigram, for the claimants under the will of Mary Ann Burnett, contended that she had a general power of appointment over the £2279, 10s. stock, and that she had duly exercised that power: for, first, she had no stock to which the words "the monies invested in my name in the four per cent. Government securities," could refer, except the stock in question, and, therefore, her will contained a sufficient reference to the fund over which she had the power; and secondly, that though her will was not expressed to be published, yet she had done what amounted to publication, for in the body of it she had declared it to be her will, and had signed it in the presence of the witnesses. *Lempriere v. Valpy* (ante, vol. 5, p. 108; see 119), *Doe v. Burdett* (4 Adol. & Ell. 1).

Mr. Knight and Mr. G. Richards, for the testatrix's surviving sisters, said that under the first part of the testator's will the power given to his daughters was certainly general, but by the subsequent part, which must be taken with the preceding part, the power was confined to the children of the daughters. In *Bristow v. Warde* (2 Ves. jun. 336), words quite as general as those in the present case were held to give a particular power. There, in the first part of the deed, the power was given in general terms, but, as the property was given in default of appointment to the children of the marriage, the [566] Lord Chancellor held that the children were the only objects of the power. In this case, not only are the shares of the daughters given to their children in default of appointment, but there is a proviso in the subsequent part of the will which declares that if any of the daughters should die without having a son who should attain 21, or a daughter who should attain that age or be married, the shares, as well original as accrued, of such daughters, should be held by the trustees upon the same trusts for the benefit of his other daughters, and of their respective children as were thereinbefore mentioned, with respect to the original shares thereby provided for his daughters and their children respectively.

The next question is whether the property, the subject of the power, has been so described by the testatrix as to make her will operate upon it. She has directed her bequests to be paid out of the monies invested in her name in the four per cent. Government securities. She had, however, no stock in the four per cents. or in any other fund standing in her name. The stock over which she had the power of appointment consisted of three per cent. consols, and remained in the names of the trustees of her father's will. The testatrix, therefore, has not duly pointed out the fund which she was empowered to dispose of.

Lastly, the power was to be exercised by a will signed and published in the presence of two or more witnesses; but the will in question was merely signed and sealed by the testatrix. We submit, therefore, that the power has not been duly exercised, and, consequently, that the parties to whom the stock is given over in default of appointment, under the original will, are entitled to it.

[567] Mr. C. H. Maclean appeared for one of the trustees who was made a Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is plain that the clause in the father's will by which the power is created contains no restriction whatsoever as to the persons who were to be the objects of it; and it was very reasonable that the father should give such a power to his daughter, as it would have enabled her to make a beneficial arrangement on her marriage, by appointing the fund to her husband in consideration of his making a settlement upon her. By the express words of the father's will, the gift over to the children is to take effect only in the event of there being no appointment, gift or bequest by the daughter, in pursuance of the power: and the benefit intended for the children is in no degree inconsistent with the power. The subsequent proviso is merely a modification of that which was to take place in case of there being no appointment.

I was much struck with that part of the judgment in *Bristow v. Warde*, in which

Lord Rosslyn says: "The articles were made in order to secure a provision for the intended wife and the issue of the marriage. That is the object of all marriage articles; particularly here, where equal sums were brought in, by both parties, to be settled for the family: but it was contended that the power here is indefinite as to its objects. It would be a forced construction of articles to hold that a provision to be made for children, in default of appointment to be equally distributable, in the case of an appointment, should be subject to his debts; which would be the necessary consequence of holding that he had an indefinite power of appointing, only providing for the jointure of the [568] wife: for if he had that indefinite power, it would be assets; he might appoint to anyone; his creditors could affect it; and, if he executed his power for the children, the children must take it subject to the debts of the father. It is not the natural frame of such a settlement, nor is it the construction of the words of this. It is clear the power of appointment is not indefinite; but is confined to the issue." Now I cannot help observing that, upon referring to the articles which are stated in the commencement of the report, it appears to me strange to say that the construction to which his Lordship alludes was not the natural construction of the words of the instrument. It is plain, however, that the construction which his Lordship put upon the articles was adopted by him, mainly on the ground that the nature and purposes of the instrument required it.(1) The case of *Bristowe v. Warde*, therefore, is not applicable to the present case.

The next question is as to the execution of the power. The father's will requires that the power shall be exercised by his daughter, either by a deed or instrument in writing to be by her sealed and delivered in the presence of and to be attested by two or more witnesses, or by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses. Now I find no legal definition or explanation of the meaning of the term "publication," and, therefore, if it appears that a testatrix [569] has produced her will to witnesses and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence. I am of opinion, therefore, that the power has been duly exercised in point of form.

The last question is whether the testatrix has sufficiently described the fund upon which her power was intended to operate. By her will she has given a variety of pecuniary legacies, and has directed them to be paid out of the monies invested in her name in the four per cent. Government securities. Now there were no four per cent. Government securities standing in her name: but the bill alleges and the answers admit that the testatrix had not, at the time of making her will, or at her decease, any right, title or interest in, or any power of appointing or disposing of, by will or otherwise, any Bank annuities, stocks, funds or Government or other securities except the £2279, 10s. three per cent. consols standing in the names of the trustees, nor had she, either at the time of making her will, or at her death, or at any other time, any property, of any kind or description whatsoever, to satisfy the bequests in her will, save the £2279, 10s. three per cents. As, therefore, the testatrix had no property to pay the legacies given by her will, except the fund which had been appropriated by the trustees under her father's will, my opinion is that the description contained in her will, though erroneous, sufficiently points out the subject upon which she meant her power to operate; and therefore the execution of the power is good both in form and substance.

(1) Sir Edward Sugden, in his observations on the case referred to, adds in a note: "This case, however, must not be considered as establishing a general rule." See *Treat. Pow.* 4th edit. 463.

[570] VESTRIS v. HOOPER.(1) June 7, 1837.

Practice. Bankrupt. Dismissal.

Plaintiff filed a bill and obtained an injunction to restrain the Defendant from proceeding against her at law. Afterwards the Plaintiff became bankrupt, and the Defendant served her assignees with notice of a motion that they might file a supplemental bill within a certain time, or that the bill might be dismissed. No supplemental bill was filed, but the assignees consented to an order of dismissal. The Plaintiff was not served with notice of the motion to dismiss; and, on that account, the order was discharged.

The bill was filed for an injunction to restrain the Defendant from proceeding with an action which he had commenced against the Plaintiff. The injunction was subsequently obtained. Pending the suit the Plaintiff became bankrupt; upon which the Defendant served the assignees with notice of a motion that the bill might be dismissed, unless they should file a supplemental bill within a certain time. A supplemental bill, however, was not filed; but the assignees consented to an order for dismissing the bill. The Plaintiff was not served with notice of the motion upon which that order was obtained, and, on that account,

Mr. Knight and Mr. G. Richards, for the Plaintiff, moved to discharge the order for irregularity.

Mr. Jacob and Mr. Goodeve, for the Defendant, contended that, as the Plaintiff had become bankrupt, it was not necessary to serve her with notice of the motion to dismiss, but that her assignees were competent to consent to the dismissal of the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, although the Plaintiff had become bankrupt, she had an interest in sustaining the suit; for the Defendant might decline to go in under the fiat, and might elect to proceed against her personally, and therefore she ought to have been served with notice of the motion to dismiss.

Order of dismissal discharged.

[571] WARD v. AUDLAND. July 14, 1837.

[S. C. C. P. Coop. 146; 47 E. R. 441. For subsequent proceedings, see 8 Beav. 201; 50 E. R. 79; 16 M. & W. 862.]

Voluntary Settlement.

A. assigned choses in action and other personal chattels to a trustee, in trust for himself for life, and, after his death, for his nephew and niece. Some years afterwards he made a will, bequeathing the settled property to other persons. After his death the trustee and *cestui que trusts* filed a bill against the executors and the legatees, praying that the deed might be established, that an account might be taken of A.'s personal estate, and that the executors might deliver over the residue to the trustee. The bill was dismissed. But, if the bill had been filed by the trustee alone for indemnity against conflicting claims, or by the *cestui que trusts* alone, to have the benefit of the deed, the Court would have granted relief. *Semble.*

By an indenture, dated the 7th of July 1826, and expressed to be made between W. Whitelock of the first part, William Turner Ward and Margaret, his wife, and Mary Hervey, widow, of the second part, and Joseph Ward of the third part, after reciting that Whitelock was then possessed of or interested in divers sums of money out at interest upon securities, and also of and in household goods, furniture, plate, linen and china, and of a policy of insurance upon his own life, and of other personal

(1) *Ex relatione.*

estate and effects, and being desirous of making a provision for William Turner Ward and Margaret, his wife, and Mary Hervey (his nieces and only near relations), had proposed to assign and transfer all his personal estate and effects for their benefit, after his death, in manner thereafter mentioned; Whitelock, in consideration of his natural love and affection for his nieces, and for their advancement and maintenance in life, assigned to Joseph Ward, his executors, administrators and assigns, all and singular his household goods, furniture, plate, linen and china, live and dead stock, effects, books, prints and pictures, and also all sums of money then due or owing to him, or which might at any time thereafter become due or owing to him, with all policies and other securities for the same, and all other the personal estate and effects whatsoever, whereof he then was, or at any time thereafter, [572] might be possessed of, interested in or entitled unto, and in whose hands, custody or power the same, or any of them, were then or might thereafter come or be, together with the several mortgages and all other securities, deeds, evidences and writings whatsoever relating to the premises in his custody or power which he could come by without suit; to hold the premises thereby assigned to J. Ward, his executors, administrators and assigns, to the use and benefit of Whitelock for his life, and, after his decease, then as to one moiety thereof, to the use and behoof of W. T. Ward and Margaret, his wife, their executors, &c., absolutely, and, as to the other moiety thereof, to the only absolute use and behoof of Mary Hervey, her executors, &c., absolutely, subject nevertheless to the proviso following, that is to say, that in case W. T. Ward and Margaret, his wife, or Mary Hervey, should die in Whitelock's lifetime leaving issue them surviving, then the part or share of them or her so dying, of and in the estate and effects thereinbefore limited to the parent or parents so dying, should go to the said issue in equal shares as tenants in common, if more than one, and, if only one such child, then to such only child, his and her executors, &c., absolutely: and in case W. T. Ward and Margaret, his wife, or Mary Hervey, should die in Whitelock's lifetime without leaving such issue them or her surviving, then that the part or share of the effects thereinbefore limited to or for the use of them or her so dying should go to the survivor of W. T. Ward and Margaret, his wife, and Mary Hervey, their and her executors, &c. And Whitelock granted, bargained, sold and assigned to J. Ward, his executors, &c., all the hereditaments of or to which he was seised or entitled in mortgage, or which were vested in him by way of mortgage for any term of years, in fee or otherwise, and [573] particularly described in the several indentures of mortgage; to hold the same unto J. Ward, his executors, &c., for the remainder of the several terms of years (1) created by such indentures, but subject to such right of redemption as was subsisting under the same, and subject also to the trusts in the now stating indenture declared concerning the sums of money secured by such mortgages. And Whitelock declared that J. Ward's receipts should be good discharges for the principal money and interest, stocks, funds, debts and sums of money due or belonging to him: and he appointed J. Ward his attorney to sue for, recover and receive all the debts, sums of money and personal estate and effects so due or belonging to him, and to sign receipts for the same in his name: and he covenanted with J. Ward for the further assignment and transfer of the premises by himself, his heirs, executors and administrators and all persons claiming under him.

This deed was executed by Whitelock and J. Ward; and, immediately afterwards, Whitelock delivered it to J. Ward, who had kept possession of it ever since.

Mary Hervey died in Whitelock's lifetime. Whitelock died in June 1836. After his death it was discovered that he had made a will, dated the 5th of July 1833, and commencing as follows:—

"I will, order and direct all my just debts, funeral and testamentary expenses to be fully paid and satisfied by my executors hereinafter named. I give, devise and bequeath unto the Reverend Wm. Fisher Audland and Robert Moser, gent., and to their heirs, executors, administrators and assigns, according to the several natures and tenures thereof respectively, all my estate, right, title and interest of and in all the several closes, [574] inclosures and parcels of land called the Rookings, situate in Underbarrow in the county of Westmoreland, together with the principal money and

interest secured to me thereon by mortgage, also the sum of £300 in the three per cent. consolidated Bank annuities, *now standing in my name* in the books of the Governor and Company of the Bank of England, with all my estate and interest therein and thereto, also all my right and interest of and in any instrument or policy of assurance by which my life is insured in the Norwich Union Life Insurance Society Office in the sum of £1000, and also the said sum of £1000 thereby secured, and all other the sums which shall or may become payable or be recoverable and be received upon or by virtue of the said policy of assurance, and all benefit and advantage thereof, upon the several trusts and to and for the several ends, intents and purposes hereinafter declared concerning the same. I give and bequeath all my household goods and furniture, plate, linen and china, books, prints and pictures, clothes and wearing apparel, and all other the residue of my estate and effects whatsoever and wheresoever, and of what nature and kind soever the same may be, of which I may be possessed or entitled unto, in possession, reversion, remainder or expectancy at the time of my decease, and not hereinbefore disposed of, unto the said William F. Audland and Robert Moser, their executors and administrators, upon and for the several trusts, intents and purposes hereinafter declared concerning the same." The testator then declared trusts in favour of William Whitelock Hervey and Dorothy Ann Hervey, the children of his niece, Mary Hervey; and he appointed Audland and Moser executors of his will.

The testator's personal property was much more than sufficient to pay his funeral and testamentary ex-[575]penses and debts. It consisted of the particulars mentioned in his will and of cash in his house and at his banker's.

The mortgage mentioned in the will was a mortgage in fee of a customary estate; and the deeds relating to it as well as the policy of insurance were in the testator's custody, and after his death his executors took possession of them. Both the mortgage and policy were dated prior to the deed of July 1826.

The bill was filed by Joseph Ward and W. Turner Ward and Margaret, his wife, against Audland, Moser, W. Whitelock Hervey and Dorothy Ann Hervey; and after stating that the executors had possessed themselves of the testator's personal estate to an amount more than sufficient to pay his funeral and testamentary expenses and debts, and charging that the deed of July 1826 was valid, and in no way defeated or invalidated by the will; it prayed that the deed might be established and the trusts carried into execution; and that an account might be taken of the testator's personal estate which had been possessed by the executors, and also of his debts and funeral expenses, and that the residue might be ascertained, and that the executors might be decreed to deliver up the same to Joseph Ward.

The cause was heard as a short cause.

Mr. Cooper and Mr. K. Parker, for the Plaintiffs, contended that the deed, though voluntary, was not revoked by the will, but that the executors of the settlor ought to make over the settled property to Ward, the trustee; they admitted, however, that the property was subject to the payment of the settlor's debts. [576] *Boughton v. Boughton* (1 Atk. 625), *Fillers v. Beaumont* (1 Vern. 100), *Uniacke v. Giles* (2 Molloy, 257; see also *Sear v. Ashwell*, 3 Swans. 411, note; and *Bolton v. Bolton*, *Ibid.* 414, note).

Mr. Jacob and Mr. Walker appeared for the Defendants Audland and Moser, and Mr. G. Richards, for the Defendants William Whitelock Hervey and Dorothy Ann Hervey, but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said that there was no equity for the Court to interfere, but what the Plaintiffs got by their deed they might maintain by their deed.(1)

Bill dismissed with costs.

(1) The Plaintiffs appealed to the Lord Chancellor from the above decision. (See C. P. Cooper's Reports, 146.) The Appellants abandoned their claim to the £300 consols, because that sum had not been transferred by the settlor to Ward the trustee; but they contended that they were entitled to the mortgage, the fruits of the policy and the furniture, &c. At the commencement of the argument there is the following passage, which it is submitted is supported by authority: "It must now be considered as the settled rule, with regard to voluntary deeds, that, where the right of the

[578] HYDE v. PRICE. HART v. CRADOCK. July 14, 15, 1837.

Interest. Annuity. Judgment Debt.

In 1795 an annuity was granted for the grantor's life, and was secured by a bond and by a warrant of attorney, on which judgment was entered up. The grantor died intestate in 1810, at which time the annuity was greatly in arrear. The grantor's assets consisted solely of a fund in Court which had been accumulating from the grantor's death. No administration was taken out to the grantor until 1834. Held, that the grantee was entitled to be paid the arrears of the annuity, with interest at five per cent. from the death of the grantor.

Many of the provisions of 3 & 4 Will. 4, c. 42, though made with reference to proceedings at law, will be adopted by this Court.

On the 19th of June 1779 Wm. Price and Mary, his wife, having agreed to live separate from each other, a deed of separation was executed by them and other parties. By a deed, dated the 20th of January 1794, William Price, in lieu of the provision made for his wife by the former deed, assigned £2500 stock to a trustee, in trust to apply the dividends for her maintenance and support, during the joint lives of

Plaintiff rests merely in contract, where no estate passes but there is merely an agreement as to convey land, to transfer stock, to assign a bond debt or other chose in action, this Court will not interfere. This is the principle upon which the recent decisions in different branches of the Court have proceeded. But the case is widely changed where there has been actually a conveyance of the land, a transfer of the stock or an assignment of the chose in action; there the *cestui que trust* may sustain a suit against the trustee, and the trustee may file his bill to have protection and indemnity against conflicting claimants." It was also contended that the furniture, though retained by the settlor, passed by the deed, as the retainer was consistent with the [577] deed. See *Ellison v. Ellison*, 6 Ves. 656; *Pulvertoft v. Pulvertoft*, 18 Ves. 84; *Fortescue v. Barnett*, 3 Myl. & Keen, 36. The Lord Chancellor said he regretted that he could not put the parties in a situation to have their rights decided, but that he saw no way of doing it, looking at the state of the pleadings before him; that, if the Plaintiffs were right in their facts and their law, they were in error as regarded the form of the suit; that the bill was not one by which a trustee called upon the Court, by reason of the difficulty arising from the nature of the trust and the conflicting claims of parties, to lend him its aid and protection; that, had the bill been one of that kind, making the *cestui que trusts* Defendants instead of making some of them Co-plaintiffs, and stating that the trusts could not be carried into execution without the assistance of equity, inasmuch as the executors and the persons claiming beneficially were quarrelling amongst themselves, the Court might have done something; it might have directed some inquiries before the Master, which would have eventually enabled it to give suitable relief. The bill claims the residue, and the Plaintiffs feel themselves bound to admit that whatever they are entitled to is only after the debts shall be satisfied. On that head inquiry would be requisite. It might be contended that the property assigned is not subject to debts incurred since the date of the deed. Information might be requisite as to whether there were debts when the deed was made 12 years ago and the amount. But, as this bill cannot enable the Court at any period to decide on the merits, it is useless to consider what, if it had been properly framed, assuming the facts and arguments on the Plaintiffs' behalf are correct, the inquiry ought to have been. According to those arguments the trustee can recover at law. Why does he come here, then, for the recovery of mere choses in action and personal chattels, for that is the object of the bill in its present shape? What aid does he want from this Court? Why does he not bring his action at law? The bill is equally defective if looked at as the bill of the *cestui que trusts*. In such a bill as that the trustee would be, of course, the principal Defendant. The Vice-Chancellor's decree dismissing the bill must be confirmed, except that it must be without prejudice to the institution of any other suit.

himself and his wife; and in case John Price, their son, should survive his mother, then in trust, after her decease, to transfer the stock to him; but in case he should die before, then in trust, after the decease of Mrs. Price, to transfer the stock to William Price, his executors, &c.

By an indenture of the 25th of May 1795, Mary Price and John Price, in consideration of £560 (which was raised for purchasing a commission in the Army for John Price), granted to William Hyde an annuity of £70 during their joint lives and the life of the survivor, and charged it upon the £2500 stock; and for further securing the annuity they, at the same time, executed to Hyde a bond in the penalty of £1200, and also a warrant of attorney for confessing judgment against them, at his suit, for the same amount.

[579] In August 1795 Mary Price and John Price, in consideration of £240, granted to Thomas Shearcroft an annuity of £30 during their lives and the life of the survivor, and charged and secured it in the same manner as the former annuity. In Trinity term 1795 judgment was entered up on both the warrants of attorney.

Hyde's annuity being in arrear, he, in June 1796, filed the bill in the first cause against Mr. and Mrs. Price, John Price, Shearcroft and the trustee of the deed of January 1794, praying that the £2500 stock might be transferred to the Accountant-General, and the dividends applied in payment of the arrears and future payments of his annuity.

In June 1797 the cause was heard before Lord Alvanley, M.R., who dismissed the bill so far as it sought payment of the annuity, out of the stock, during the life of Mrs. Price, inasmuch as no trust was created by the deed of 1794 for her separate use, and therefore she had no dominion over the dividends of the stock, but the trust created by that deed was for her maintenance and support, in which her husband had an interest as well as herself. His Lordship, however, held that the grants of the annuities were good so far as they affected the contingent interest of John Price; and that, if he survived his mother, the fund would be amenable to the annuities. The decree therefore directed the bill to be dismissed so far as it sought payment of Hyde's annuity out of the fund during Mrs. Price's life; that the fund should be transferred to the Accountant-General, and that the dividends should be paid to the trustee of the deed of 1794, to be applied by him for the maintenance of Mrs. Price during her [580] life, with liberty for her, if she survived her husband, and also for Hyde and William Price, after her death, or any other person interested in the fund, to apply to the Court as they should be advised. (See *Hyde v. Price*, 3 Ves. 437.)

In October 1798 William Price died. In 1801 John Price left this country and went to Cape Coast Castle in Africa, where he died in June 1802. In March 1810 Mrs. Price died at Ghent, intestate. William Price had made a will, but it contained no disposition of his residuary estate, and, consequently, the £2500 stock, which formed part of the residue, became divisible between Mrs. Price and John Price under the Statute of Distributions.

Hart, the Plaintiff in the second cause, was the personal representative of Hyde's residuary legatee, and, as such, was a creditor upon the estates of Mrs. Price and John Price, in respect of the arrears of the annuity of £70; and, in that character, he had applied to the Ecclesiastical Court for letters of administration to Mrs. Price and her sons, but without success. On the 4th of February 1834 (up to which time there had been no personal representative of either Mrs. Price or her son) letters of administration to Mrs. Price, and, on the 14th of March following, letters of administration to her son, were granted to Mr. Maule, the Solicitor to the Treasury, on behalf of the Crown.

The fund in Court had gone on accumulating ever since Mrs. Price's death.

In May 1834 Hart filed his bill against Cradock (who was the personal representative of William Price), Brown [581] and wife, who were the personal representatives of Shearcroft, and Temple, who was the personal representative of Hyde, but had refused to take any steps to recover the arrears of the annuity of £70. The bill alleged, as a reason for the late institution of the suit, that the Plaintiff, sometime ago, applied to the Ecclesiastical Court for letters of administration to Mrs. Price and her son, but was unable to obtain them, and that there had been no personal representative of either of them, until the letters of administration were granted to Mr.

Maule; and it prayed that an account might be taken of what was due in respect of the annuity of £70 and the interest accrued thereon, such interest to be calculated from time to time as the annuity became due, or in such other manner as to the Court should seem just; and that what should be found due might be paid to the Plaintiff out of the personal estate of John Price, including his interest in the £2500 stock (1) and the accumulations thereof: and that the suit might be deemed and taken to be supplemental to the suit of *Hyde v. Price*, and that the last-mentioned suit might be revived.

On the 11th of February 1835 the cause was heard before Sir John Leach, M.R., and it was then insisted, on behalf of Mr. Maule, that the claims of the Plaintiff and of the Defendants Brown and wife were barred by the Statute of Limitations; but His Honor held that the statute did not begin to run until the letters of administration to John Price were granted, and declared that the Plaintiff was to be considered as a creditor of John Price, in respect of the securities granted to Hyde; and referred it to the Master to take an account of what was due to the Plaintiff for principal and interest on such securities, and to certify how much was due for [582] principal and interest, up to the time of making his report, to the Plaintiff and the Defendant William Brown and Mary, his wife, in respect of the annuities of £70 and £30, with liberty to state special circumstances.

The Master reported that judgments were entered up on the warrants of attorney, in Trinity term 1795, for £1200 and £480, being the penalties of the bonds given to Hyde and Sheareroft respectively; and that the arrears of their annuities, up to Mrs. Price's death, amounted, respectively, to £1035, 8s. 4d. and £437, 10s.; and that those sums were due to Hart and Brown and wife respectively.

To this report Hart and Brown and wife excepted, on the ground that the Master ought to have allowed interest, on the sums reported due, at five per cent., or, at the least, at four per cent., from Mrs. Price's death.

Mr. Jacob and Mr. G. Richards, for the Plaintiff, and Mr. Cooper and Mr. Simpson, for the Defendants Brown and wife. Hyde, being unable to obtain payment of his annuity, filed his bill to establish it as against the dividends of the £2500 stock and the contingent interest of John Price in the capital of that fund. Hyde was not guilty of any *laches*; for his annuity was granted in 1795, and he filed his bill in 1796. The Court, however, dismissed the bill, so far as it sought to affect Mrs. Price's life interest, on the ground that the provision made for her by the deed of 1794 was intended for her maintenance and support; but, as the annuity was charged on John Price's interest, the fund was ordered into Court. John Price died in 1805, and Mrs. Price in 1810, and Mr. Price being then dead without having disposed of [583] his reversionary interest in the stock, one-third of the capital belonged to Mrs. Price's estate, and two-thirds to John Price's estate. There was no other property out of which the annuities could be paid. Hart applied for letters of administration to John Price, but was unable to obtain them; and no administration to John Price was taken out until 1834, when Maule took it out on behalf of the Crown. The consequence is that the fund remained in Court, and has gone on accumulating ever since Mrs. Price's death. The Master has found certain sums to be due for arrears of the annuities, and we claim interest on those sums from Mrs. Price's death, which, it must be observed, the decree expressly directed the Master to allow. But we do not claim interest on the sums reported due as being arrears of annuities. In March 1810 the annuities ceased to exist, and the sums in question then became ordinary debts secured by bonds and judgments. Where actions are brought on judgments, juries, almost universally, give interest in the shape of damages, unless there has been *laches* on the part of the creditor. Here there has been no *laches*; for the fund which constitutes the whole of the debtor's assets has remained in Court, and no administration was taken out to the debtor until 1834. *Thomas v. Edwards* (3 Anst. 804) *McClure v. Dunkin* (1 East, 436). There, interest was given beyond the penalty of the bond. If a creditor obtains interest on a judgment debt when he is Plaintiff in an action, he ought to be allowed it when he is Plaintiff in a suit in equity. Where the decree is in the common form and directs the Master to compute interest on such of

(1) John Price left no property except his share of this fund.

the debts as carry interest, he can compute interest on those securities only which, on the face of them, carry interest; but the case is [584] different where, as in this case, a single creditor files a bill and prays to be paid his principal and interest. The present is not a suit in the common form: it has for its object the payment of the debts of these two creditors, and of no others. It is a contest simply between those two creditors and the personal representative of the debtor. In such a case this Court will give interest on a judgment debt, as a Court of law would have done, the property out of which the debt is to be paid having been so situated that no diligence on the part of the creditor would have enabled him to obtain payment at an earlier period. *Stileman v. Ashdown* (2 Atk. 477), *Atkinson v. Atkinson* (1 Ball. & Beatt. 238). The latter case is another instance in which interest was given beyond the penalty of the bond. *Gaunt v. Taylor* (3 Myl. & Keen, 302) was a common creditor's suit, and the ordinary decree was made for taking an account of debts. The Master had allowed a judgment creditor interest on his debt, upon which the Plaintiff excepted to the report; and Sir John Leach, M.R., allowed the exception. In that case the judgment was obtained only in 1830, so that there had been no great delay in paying the debt; and the action was brought against the executors, and not against the debtor himself. The Master of the Rolls, however, seems to have considered that, in some cases, the Master ought to allow interest on a judgment debt. His Honor says: "A judgment debt is satisfied, both at law and in equity, without the payment of interest, *unless an action be brought, on the judgment*, to recover damages. If an action at law were brought on a judgment, and it was afterwards sought to restrain the action by injunction in equity, I am of opinion that such injunction should not [585] be granted without imposing upon the debtor the condition of paying that interest which, without the interference of the Court of Equity, the creditor would, in such case, recover at law in the shape of damages; and this appears to have been the reason why interest on the judgment was given by the Court of Exchequer in the case of *Thomas v. Edwards*. In this case, however, no action at law has been brought on the judgment so as to found the claim for interest; and the exceptions to the Master's report must therefore be allowed." Here the Plaintiff stands precisely in the situation contemplated by the Master of the Rolls in *Gaunt v. Taylor*. The principle is the same both at law and in equity; and whether the judgment creditor proceed by action at law or by bill in equity must be wholly immaterial.

Besides, the fund itself, which is the only property of the debtor, has gone on accumulating, and has nearly doubled itself; and yet it is said that our debt is to remain the same. The bill, too, prayed for interest; and there is a special direction in the decree to compute how much is due for principal and interest on the securities.

Supposing, however, that we are not entitled to interest according to the old law, we are entitled to it under the recent statute, 3 & 4 W. 4, c. 42. The 28th section of that Act enacts: "That, upon all debts or sums of money payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, [586] if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment." This Act has a retrospective operation: it refers to all actions to be brought for the recovery of debts, whether due before the passing of the Act, or to become due afterwards; and this Court must necessarily adopt the alteration which this statute has introduced at law.

The following cases also were cited in the course of the argument: *Booth v. Leicester* (1 Keen, 247), *Lawson's case* (ante, vol. 3, p. 299), *Bann v. Dalzell* (3 Carr. & Payne, 376), *Duke of Bedford v. Coke* (2 Vez. 116), *Grosvenor v. Cooke* (1 Dick. 305), *Gibson v. Egerton* (Ibid. 408), *Kettleby v. Kettleby* (2 Dick. 514), *Creuze v. Hunter* (2 Ves. jun. 157), *Deschamps v. Vanneck* (Ibid. 716), *Mackworth v. Thomas* (5 Ves. 329), *Moore v. Macknamara* (1 Ball. & Beatt. 309), *Berrington v. Evans* (1 Younge, 276), *Legatt v. Shewell* (Gillb. Rep. 141), *Batten v. Earnley* (2 P. W. 163), *Ferrers v. Ferrers* (Ca. temp. Talb. 2), *Stapleton v. Conway* (1 Vez. 427), *Morris v. Dillingham* (2 Vez. 170), *The Drapers' Com-*

pany v. Davis (2 Atk. 211), *Newman v. Auling* (3 Atk. 579), *Robinson v. Cumming* (2 Atk. 409), *Grant v. Grant* (3 Russ. 598 ; and *ante*, vol. 3, p. 340), *Shepherd v. Macreth* (2 H. Black. 284), *Anon.* (1 Salk. 154), *Elliot v. Davis* (Bunb. 23), *Bodily v. Bel-*[587]
lamy (2 Burr. 1094), *Lord Lonsdale v. Church* (2 T. R. 388), *Anderson v. Dwyer* (1 Scho. & Lef. 301), *Duwall v. Terrey* (Show. P. C. 15), *Jewlwine v. Agate* (*ante*, vol. 3, p. 129), *Morse v. Faulkner* (3 Swanst. 429), *Kirwane v. Blake* (4 Bro. P. C. 532), *Godfrey v. Watson* (3 Atk. 517), *Hillhouse v. Davis* (1 M. & S. 69).

Mr. Bacon, for the Defendant Temple.

THE SOLICITOR-GENERAL and Mr. Wray, for the Defendant Maule. Mr. Maule is a party to the second suit only : but neither in that suit nor in the suit of *Hyde v. Price* is any notice taken of the judgments. [THE VICE-CHANCELLOR. Nothing is said about either of the judgments in the suit of *Hyde v. Price* ; but the bill in *Hart v. Cradock* mentions the Plaintiff's warrant of attorney ; and the decree declares that the Plaintiff is to be considered as a creditor of John Price in respect of the securities granted to W. Hyde, and refers it to the Master to take an account of what is due to the Plaintiff for principal and interest on such securities : the words of the decree, therefore, include the Plaintiff's judgment.] The first suit was entirely disposed of. The second suit, though alleged to be supplemental to the first, has nothing whatever to do with it. The second suit seeks payment of the arrears of the annuity out of the whole personal assets of John Price : the original suit sought to charge a particular fund only ; and it is by mere accident that the Plaintiff has a right to go against a share of that fund.

[588] John Price had not only rendered his interest in the fund liable to pay the annuity, but he had also rendered himself liable : consequently there was a right of action against him in 1801, and on his death in 1802 there was a right of suit against his assets. It was said that he died without assets ; but in 1801 he had become entitled to a share of the fund as next of kin of his father, and in 1810 his interest in that share vested in possession, and, at all events, the Plaintiff might then have instituted this suit. It is alleged that there was no personal representative of John Price ; but the Plaintiff does not explain why there was none from 1810 to 1834. All that he says is that he, *some time ago*, applied for letters of administration to John Price, but that the Ecclesiastical Court refused to grant them to him : the Court surely would have granted letters of administration for the purposes of the suit.

In this case there has been no delay or dilatory proceeding on the part of the debtor ; but all the delay has been on the part of the creditor ; and, consequently, this is not a case in which the Court will give interest on a judgment debt.

The direction to take an account of what was due for principal and interest was inserted in the decree as a matter of course. The Court could not mean to adjudicate upon so important a point, without having anything before it to warrant that adjudication : and such a direction does not authorize the Master to allow interest unless the party is fairly entitled to it. *Hamilton v. Houghton* (2 Bligh, 169). Interest is never given on a judgment debt where, as in this case, the special circum-[589]-stances are irrespective of the conduct of the creditor. Besides, the parties who have excepted to the report do not ask for interest on the sums for which their judgments were entered up, but for the sums for which they say their judgments were to stand as securities. The principle upon which interest is given on a judgment is that, after judgment recovered, *transit in rem judicatam* ; and, if a party is driven to bring an action on his judgment, it is competent to the jury to give him interest, in the name of damages, on what has been improperly withheld from him. But this is not a case for giving interest ; for the judgments in question are not judgments that have decided what is due to the parties : they are judgments for collateral matters, and were intended merely to enable the parties to recover what they might establish to be due to themselves *aliunde*. In *Deschamps v. Vanneck* (2 Ves. jun. 716) Lord Loughborough, C., refused to give interest on a judgment upon assets *quando acciderint*, although that is the very case in which a Court of Equity would give interest on a judgment, if it could. In *Thomas v. Edwards* (3 Anst. 804) the party did not choose to let the cause go to trial, but applied to a Court of Equity for relief ; and, in such a case, interest will be given on a judgment debt. So also where the debtor has

occasioned improper delay, by bringing a writ of error, interest will be given. In *Gaunt v. Taylor* (3 Myl. & Keen, 302) Sir John Leach refused to give interest on the judgment. His Honor says: "At law a judgment does not carry interest; but interest may be recovered at law in the shape of damages, by an action on the judgment. Interest will also be given, at law, on a judgment at law, when the effect of the judgment has [590] been impeded by a course of dilatory and vexatious proceedings on the part of the debtor. It appears, by the authorities which have been cited, that equity, in this respect, follows the law; and, as a general rule, a judgment creditor is not allowed interest on his judgment debt in the Master's office. The same vexatious course of proceeding which would entitle the creditor to interest at law will certainly entitle him to interest on his judgment in equity." *Berrington v. Evans* (1 Younge, 276) is an authority to the same effect. It would be ridiculous to say that in this case there have been any dilatory or vexatious proceedings on the part of the debtor. The parties excepting to the report have never been delayed or impeded from obtaining satisfaction of their demands out of the assets of John Price; and the Court cannot allow interest on their debts without overruling the decision in *Gaunt v. Taylor*.

The recent statute (3 & 4 W. 4, c. 42) does not at all contemplate judgment debts. Its object is merely to allow juries to give interest, where parties have contracted, by some written instrument, to pay money on a certain day, and the instrument is silent as to interest. It does not at all alter the law with respect to judgment debts.

Mr. Jacob, in reply, said that, by the Act, juries were empowered to allow interest on debts payable by virtue of some written instrument; that the Plaintiff's debt was payable by virtue of a deed, a bond and a warrant of attorney; that, although the Act referred to proceedings at common law only, yet Courts of Equity would adopt its provisions by way of analogy; and that, when Courts of Equity were paying debts out of [591] assets, they were not administering equity but common law.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I should be very unwilling to let my judgment rest merely upon the words which are found in the decree.

The decree declares that Hart is to be considered a creditor in respect of the securities granted to William Hyde in the pleadings mentioned, and refers it to the Master to take an account of what is due to the Plaintiff for principal and interest on such securities; and then it directs the Master to calculate and certify how much is due for principal and interest from the estate of John Price, up to the time of making his report, unto the Plaintiff and the Defendants, and W. Brown and Mary, his wife, in respect of the several annuities of £70 and £30 in the pleadings mentioned; and the Master is to be at liberty to state special circumstances.

Although I do not rely upon the words in the decree, which direct interest to be calculated, yet it is impossible not to see that the counsel who framed the minutes on the one side, and who accepted them on the other, must have taken it for granted that interest would appear to be due on the securities that were given for the annuities. But, without resting upon that, I have to observe that the decree declares that Hart is to be considered a creditor of John Price in respect of the securities granted to Hyde in the pleadings mentioned; and although, in point of fact, the pleadings in the cause of *Hart v. Cradock* did not mention the security of the judgment, yet they mentioned that which, almost as a matter of course, produces a judgment; for they mentioned that a warrant of attorney was given by John [592] Price to Hyde: and why was it given except that judgment might be, if necessary, entered upon it? It appears, too, from the Master's report, that a judgment was entered up, not only on behalf of Hyde, but also on behalf of Shearcroft, under whom the Defendants Brown and wife claim.

Then what are the circumstances of the case with respect to the position of the fund. The fund came into possession on the death of Mrs. Price in 1810; and, previous to that time, by reason of the proceedings in the first suit of *Hyde v. Price*, the fund had come into Court; and, consequently, from the time of her death the fund produced dividends which were accumulated in this Court.

The question is a question solely between two persons who claim as creditors and a person who is merely a dry legal administrator; and there is no conflict between the persons who make the claim on the exceptions and other creditors; which, I

think, makes a very material difference with respect to a portion of the Plaintiff's demand, which may depend upon the discretion of the Court.

It appears that the annuities are wholly in arrear, not one farthing has ever been paid, and that the fund has gone on increasing for many years; and it is asked, as against the finding of the Master, that the parties excepting may be allowed interest on the arrears of the annuities.

I will first consider the case with reference to the law as it stood before the passing of the Act of 3 & 4 W. 4, c. 42. That law is correctly stated in the judgment which was [593] given by Sir John Leach in *Gaunt v. Taylor*. His Honour says: "At law a judgment does not carry interest, but interest may be recovered at law, in the shape of damages, by an action on the judgment." It seems to be but reasonable that if interest might be recovered at law, if an action were brought on the judgment, it ought also to be recoverable in a case where the position of the assets would not render an action on the judgment advisable, but would make a bill in equity the proper remedy. In this case the bill was filed in the beginning of the year 1834. Then, supposing that the late Act had not been passed, there is that step taken which is equivalent to the bringing of an action; for, if an action could have been brought at law, under such circumstances as affect this case, it would have been extremely reasonable to allow the jury to give interest upon the judgment by way of damages: and it appears to me to be contrary to the plain justice of the case (if this Court is to exercise a discretion) that it should not allow these parties interest on the amount of the arrears of the annuities.

The case, however, is put in a more favourable position for the exercise of that discretion in favour of the claimants, by reason of the fact that the Act of the 3 & 4 W. 4, c. 42, was in force when the bill in the second suit was filed. By the 28th section of that Act it is enacted that, &c., &c. This is a remedial Act, and I cannot help thinking that it is absolutely necessary for this Court to adopt many of the provisions of it as well as of the 27th chapter of the same session, changing, of course, the mere formal language, and adapting it to the practice of this Court. I think that if, after this statute had passed, an action could have been brought on the judgment, [594] there would be no question, but any Judge would have allowed the jury to exercise their discretion upon the point of interest.

My opinion, upon the whole, is that the Master has taken a very narrow view of the case, and that the exceptions taken to the disallowance of the interest must be allowed.

It also seems to me that I must treat this as a legal demand. It is not like the case of a Court of Equity dealing with a legacy or any other subject of an equitable nature; but it is a mere debt, and I think that, as such, interest at 5 per cent. should be allowed from the decease of Mrs. Price.

[594] CLOUGH v. DIXON. July 17, 1837.

[S. C. affirmed, 3 My. & Cr. 490; 40 E. R. 1016 (with note). For subsequent proceedings, see 10 Sim. 564.]

Executors and Administrators. Devastavit. Feme Coverte.

A. and B., the wife of C., took out administration to an intestate. A. and C., with the knowledge of B., and for the purpose of distribution amongst the next of kin, sold out stock belonging to the intestate, and paid the proceeds into a bank, to the joint account of A. and C.; and they agreed that all cheques on the bank should be signed by them jointly. Soon afterwards all the next of kin (except one who was abroad, but was expected to return shortly) were paid their shares, and a sum was reserved in the bank to answer the share of the absent party. C. died, and 10 months afterwards A. drew out the reserved sum and absconded. Held, that C.'s estate was answerable for the loss; but the question as to B.'s liability was reserved.

On the 29th of November 1829 Ann Dixon died intestate as to her residuary estate (which consisted principally of stock in the funds), leaving two children and nineteen grandchildren her next of kin. Letters of administration to the deceased were granted to her children, T. R. Dixon and Emily, the wife of John Bond. [595] Dixon and John Bond, in right of and with the consent of his wife, possessed themselves of the intestate's estate, and sold out the stock, and in May 1831 they paid the proceeds into Child's banking-house to their joint account, with a view to the same being distributed amongst the next of kin; and it was agreed between them that all cheques to be drawn upon Child & Co. should be signed by them jointly. In the course of a few months all the next of kin except Louisa Renell Clough, the wife of John Clough, were paid their distributive shares by cheques signed as before mentioned. Mr. and Mrs. Clough being expected to return shortly from India, the sum of £1348 was allowed to remain in Child's bank to answer Mrs. Clough's share. On the 15th of December 1831 Bond died. In October and November following, Dixon drew out the £1348, and early in 1834 he absconded.

Mr. and Mr. Clough, having changed their plans, did not arrive in England until the 15th of December 1833. In June following they filed the bill in this cause against Mrs. Bond, her late husband's executors, and Dixon (who was out of the jurisdiction) praying for payment of Mrs. Clough's share, and seeking to charge Mrs. Bond and her late husband's executors with the sum drawn out by Dixon.

Mr. Knight and Mr. Walker, for the Plaintiffs. Almost the whole of the intestate's property was, at her death, invested in the funds, where it was secure and produced dividends. It was afterwards sold out and placed in a bank, where it was insecure and produced no interest; and it was placed at the disposal of the administrator and of the husband of the administratrix; and, consequently, it was not under the protec-[596]-tion of the personal representatives. *Salway v. Salway* (2 Russ. & Myl. 215). That was a prodigiously strong case; for there the protection of the fund was increased; but here it was diminished. In that case the receiver was held to be liable because the fund was not under the legal protection.

Mrs. Bond concurred in obtaining the administration and in the disposal of the funded property. It was a *devastavit* on her part to place the assets under the control of Dixon and her husband. She was aware that the money had been paid into Child's, but, neither in her husband's lifetime, nor even after his death, did she take any step to place the fund in a state of security. As the Plaintiffs were in India, their share ought to have been invested in stock. *Macdonnell v. Harding* (*ante*, vol. 7, p. 178), *Adair v. Shaw* (1 Scho. & Lef. 243).

Mr. Whitmarsh and Mr. Whitmarsh, jun., for the executors of Mr. Bond. The greatest care was taken by Mr. Bond to secure the fund. It was paid into Child's bank to the joint account of Bond and Dixon; and it was agreed that all cheques to be drawn on the bank should be signed by them jointly. The stock was necessarily sold out, and the money placed in the bank for the purpose of distribution. The distribution immediately commenced, and the next of kin, except Mrs. Clough, were paid their distributive shares. She and her husband were then expected to return shortly from India; but they changed their plans and did not return until the end of 1833. In *Macdonnell v. Harding* the payment to the bankers [597] was an unnecessary act: but here the residue could not have been distributed without selling the stock and paying the money into the bank, and, therefore, those acts were necessary to the winding up of the intestate's affairs.

Mr. Jacob, for Mrs. Bond. The Plaintiffs seek to charge Mrs. Bond with what was received, not by her, but by her husband. She was a married woman when the administration was granted: she did not marry first and then take out administration.

The fund was properly paid into Child's, in the names of Bond and Dixon; for Bond was, practically, the administrator during his life; and the money was properly placed in the names of the parties who were to have the management and disposal of it. It is like the case of an executor appointed for a limited period, as, for instance, during the minority of another; in such a case the money of the deceased ought to be placed in the name of the executor for the time being. At all events, it is premature to attempt to charge Mrs. Bond, until the usual accounts have been taken.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It was contended, on behalf of Bond's

executors, that he had protected the fund to the best of his power. But when he paid the fund into Child's banking-house to the joint account of himself and Dixon, he did an act by means of which the whole fund, immediately on his death, came under the control of Dixon. It does not differ, in substance, from his having handed over, as the last act of his life, the whole fund to Dixon. Bond's estate, therefore, is clearly answerable for the money which was drawn out by Dixon.

[598] I have, however, considerable doubt whether, in a case like the present, where the Plaintiff claims as one of the next of kin of the intestate, the Court can make Mrs. Bond responsible for the *devastavit* which was the act of her husband.

Then the question is whether Mrs. Bond is liable, because, after the death of her husband, she took no step to remove out of the power of her co-administrator that fund which her husband had placed in his power. I doubt whether the Court could proceed against her in respect of her non-action: and, therefore, it seems to me that all that I can do at present is to decree an account to be taken of the assets received by Mr. and Mrs. Bond and Dixon, or any of them, and to declare that the executors of Mr. Bond are answerable, out of his assets, for the sum of £1348 which was drawn out of Child's bank by Dixon, with interest at four per cent. from the time it was drawn out: and I shall reserve the question as to the liability of Mrs. Bond, until after the Master shall have made his report. That question ought to be reserved in the very words in which the question is reserved in *Adair v. Shaw*.

I do not think that the reasoning of Lord Redesdale is satisfactory, where he says that a married woman, an executrix, would be responsible to the creditors of the testator, after the coverture, for a *devastavit* committed by her husband during the coverture. (See 1 Scho. & Lef. 257. The decision in the case reported above was affirmed by the Lord Chancellor. See 3 Myl. & Craig, 490.)

[599] WARREN v. TAYLOR. July 25, 1837.

Evidence.

A. and B. were co-partners. A. retired, and B. took C. into partnership with him. That partnership was dissolved, and then B. became bankrupt. Held, that B. was not a good witness to prove an agreement alleged by A. to have been made with him by B. and C. to indemnify him against the debts of the first partnership.

The Plaintiff and one Wood had been co-partners in trade. The Plaintiff retired, and thereupon Wood took the Defendant Taylor into partnership with him, and it was alleged that Wood and Taylor, in consideration of the Plaintiff relinquishing his share of the business, agreed by parol to give the Plaintiff their joint and several bond to indemnify him against the debts due from the firm of Warren & Wood. The partnership between Wood and Taylor was afterwards dissolved; and Wood became bankrupt; but it did not appear that he had obtained his certificate. The bill was filed to compel a specific performance of the agreement to give the bond of indemnity.

Wood had been examined as a witness to prove the agreement; but on the hearing of the cause,

Mr. Jacob and Mr. Lowndes, for the Defendant, objected to his evidence, on the ground that it tended to diminish a liability to which he was then subject.

Mr. Cooper and Mr. James Russell, for the Plaintiff, said that Wood's evidence did not tend to benefit his estate, inasmuch as his liability would remain the same whether a debt due from the firm of Warren & Wood were proved by the creditor against Wood's estate, or whether Warren or Taylor paid it; for they would be entitled to stand in the place of the creditor and prove the amount under the *fiat*; and consequently the extent of Wood's liability would remain the same, and the [600] only difference would be with respect to the person to whom he was liable.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It seems to me that so far as Wood's evidence tends to throw liability on Taylor it tends to exonerate Wood; and if it exonerates him it cannot be received.

[600] SHARPLEY v. PERRING.(1) July 29, 1837.

Practice. Injunction.

Where an injunction has been obtained to restrain an action brought by a *cestui que trust* in the name of his trustee, a special application may be made to dissolve it; and it is not necessary to obtain an order *nisi*, and then to move to make it absolute.

The bill was filed against a *cestui que trust* and his trustee to restrain an action brought by the former in the name of the latter.

The injunction having been obtained,

Mr. Jacob now made a *special* motion to dissolve it.

Mr. G. L. Russell, *contrà*, said that the usual order for dissolving the injunction *nisi*, ought to have been obtained first, and then a motion ought to have been made to dissolve it absolutely.

Mr. Jacob, in reply, contended that, under the circumstances of the case, a special application was regular: and

THE VICE-CHANCELLOR [Sir L. Shadwell] so ruled.

[601] BLUNDELL v. WINSOR. August 1, 1837.

[S. C. 6 L. J. Ch. (N. S.) 364; 1 Jur. 589. See *Ex parte Aston*, 1859, 5 Jur. (N. S.) 616.]

Joint Stock Company. Fraud.

A joint stock company formed for working gold mines in North America, the shares of which might be increased to an unlimited extent, and were made assignable at the discretion of the holders, was held to be illegal and fraudulent; and a demurrer to a bill filed by one of the shareholders against the others for the purpose of carrying into effect a dissolution of the company was allowed.

The Plaintiff was one of the members of a company or partnership called "The Anglo-American Gold Mining Association," and the Defendants, who were 23 in number, were the other members.

The bill stated that in November 1833 the Plaintiff, together with the Defendant John Penman, and George Alfred Muskett and several other persons, formed themselves into a co-partnership, society, or company under the title or denomination before mentioned, and that by an indenture, dated the 1st of November 1833, and made between Penman of the first part, Muskett of the second part, the several other persons whose names and seals were thereunto set and affixed (except Penman, Muskett and the Defendant Thomas Bridges) of the third part, and Thomas Bridges of the fourth part, after reciting that the parties of the first, second and third parts had lately agreed to form a company for the purpose of working gold mines in the United States of America: it was witnessed that, for the purpose of establishing and regulating the company, and in order to ascertain, define and settle the rights, interests and liabilities of the several parties interested in respect thereof, it was agreed that the parties of the first, second and third parts, and all persons who should thereafter become subscribers to or interested in the capital of the company, and who were thereby described as shareholders, should, so long as they possessed any share of the capital of the company, be and continue, until dissolved under the provisions thereafter in that behalf contained, [602] a company or partnership under the name before mentioned; that the object of the company should be the working of gold mines in the United States of America, and the reduction and sale of that precious

metal and all other valuable products of the mines; that Penman should be superintendent of the company, Muskett, trustee and treasurer, and he and Penman directors; that the capital should be £6000, which should be considered as divided into 60 shares of £100 each, and be numbered from 1 to 60 (all which shares had been taken and subscribed for by the parties of the first, second and third parts); that it should be lawful for the shareholders, at a meeting to be called for that purpose, *at any time and from time to time to increase the capital to any amount that might be agreed upon by creating an additional number of £100 shares*, such additional shares to be numbered from 60 progressively forward; *that the shares, as well original as additional, should and might be assigned and disposed of by deed or will or otherwise to any other person or persons at the discretion of the holders thereof*, but no shares should be divisible into any fractional part; that an instalment of £25 per cent. should be paid upon each share to the trustee and treasurer immediately before the execution of the deed; that the trustee and treasurer should be at liberty to require payment of all future instalments at such times and in such manner as he should think proper; that Penman, in consideration of his services as superintendent of the company, should be entitled to one-fourth part of the gains and profits thereof, before any division should be made among the shareholders; that during the first three years of the existence of the company, such period to be calculated from the commencement of its operations in America, the three-fourths of the gains and profits, after providing for [603] the share agreed to be allowed to Penman, should be divided into two equal parts, one whereof should be employed in extending the operations of the company according to Penman's directions, and the other of such parts, together with the entirety of the gains and profits after the expiration of the three years and after making the allowance to Penman, should be divided among the shareholders, according to the number and amount of their shares; that Penman should be the superintendent of the company, and should be bound by the several rules, regulations and provisions next hereinafter contained (that is to say) inasmuch as the parties of the second and third parts *had been mainly induced to become shareholders in consequence of the representation made by Penman that there were gold mines in various parts of the United States of America* which might be taken and profitably worked by the company, and that he was competent and willing to superintend the working of the mines and the general management of the company's affairs in America, it was agreed between the parties thereto that Penman should, as soon as conveniently might be after the execution of the deed, repair to the United States and endeavour to obtain an eligible situation for carrying on the operations of the company, and that, for the purpose of enabling them to commence operations, the trustee and treasurer might forthwith advance him £600, and, in order to carry on such operations, Penman should be at liberty to draw upon the trustee and treasurer for such sums as he might from time to time require; that Muskett should be the trustee and treasurer of the company; that an absolute and entire dissolution of the company might take place by a resolution of the majority of the shareholders present at three successive meetings to be held for that purpose, the last of which [604] meetings should appoint three of the shareholders, of whom the trustee and treasurer for the time being should be one, for the purpose of carrying such dissolution into effect, and the affairs of the company should be thereupon wound up, and the assets of the company, after satisfying their debts and liabilities, should be divided among the shareholders in proportion to their shares, and any special meeting of the shareholders duly convened for that purpose might declare the accounts of the company finally closed and the assets fully administered, and the superintendent, trustee and treasurer, *and all other parties released and discharged from all future liabilities and engagements, actions, suits, claims and demands, under or by virtue or in consequence of the deed, or of any other deed or engagement entered into by them in connexion with or reference to the affairs of the company, and that the superintendent, trustee and treasurer and all other parties should be released and discharged according to such resolution*, and on the terms and under the modifications thereof: and the parties of the first, second and third parts covenanted with Bridges (who was thereby made trustee of the covenant on behalf of the shareholders) to pay the instalments on their respective shares, and to observe all the rules and regulations of the deed, so far as the same related to their shares therein, or to their rights, privileges or liabilities as shareholders.

The bill then stated that, pursuant to the provisions of the deed, 60 shares of £100 each were subscribed for and taken by various persons, and that £100 was paid upon each share; that, shortly after the date of the deed, Penman proceeded to North Carolina as superintendent of the company, and there commenced the operations of the company, and that, to enable him so [605] to do, Muskett, from time to time, supplied him with money out of the funds of the company; that in September 1834 Muskett resigned his office of trustee and treasurer, and that, at a meeting held on the 29th of that month, 140 new shares were created, and the Plaintiff and the Defendants Smith and Magnus were appointed directors, trustees and treasurers in the room of Muskett; that Muskett's accounts had been finally settled and closed, and he had been duly and absolutely discharged from all liability in respect of his office of trustee and treasurer; that Penman, in carrying on the affairs of the company in America, contracted for the purchase of several mines and shares of mines, and incurred liabilities on the part of the company to a very large amount, and, in consequence thereof, the shareholders, in December 1835, became greatly dissatisfied with his conduct; that, at a meeting held on the 17th of December 1835, Penman was removed from his office as a director and superintendent of the company, in consequence of his having drawn bills of exchange on the Plaintiff, on account of the company, far exceeding the amount of the subscribed capital, and also for having expressed his intention of withholding the company's property unless an exorbitantly large sum was paid to him; that, in the latter end of 1836, the capital of the company was increased by the issue of 11 new shares, all of which were duly paid for; that, after the dismissal of Penman, it was discovered, on investigating the affairs of the company, that the claims on the company greatly exceeded the amount of the assets, and that it would be for the interest of the shareholders that the company should be dissolved; that, at meetings held in March 1837, it was resolved by a majority of the shareholders present that the company should be dissolved, and that the Plaintiff and the Defendants, Hea-[606]-thorn and Smith, should be appointed trustees for carrying the resolution into effect according to the provisions of the deed of settlement: that all the capital of the company had been expended, and the objects of the company had totally failed, and no gains or profits had been realized by their operations: that there were 211 shares in the capital of the company, and that, on the day on which the dissolution was finally resolved upon, those shares were held by the Plaintiff and by the Defendants, and that there was not any other person who, at the time of the filing of the bill, was in any manner interested in or liable in respect of the affairs of the company as a shareholder thereof or otherwise as a partner therein; that the Plaintiff had been, from time to time, called upon to satisfy the demands of the creditors of the company; that the Defendant, Winsor, had brought an action against the Plaintiff and the Defendants, Smith and Penman, for the recovery of £300 claimed to be due to him in consequence of Penman having engaged him as clerk to the company; that the Plaintiff was totally unable to carry into effect the complete and proper dissolution of the company; and that, if the accounts of the dealings and transactions of the company were taken, a sum exceeding £300 would be found due from Winsor to the company.

The bill prayed that the company might be declared to be dissolved, and that the property and effects of the company might be sold, and that an account might be taken of all the debts that were due from the company from the formation thereof, and of all their dealings and transactions, and that the monies to be realized by the sale of the property and effects of the company might be applied, so far as the same would extend, in payment of such debts; that Winsor and the several other [607] Defendants who were shareholders in the company might be decreed to contribute their respective shares of the losses of the company, and that the affairs of the company might be wound up, and that Winsor might be enjoined from prosecuting his action.

Winsor demurred to the bill,

First, for want of equity;

Secondly, because Muskett was not made a party: and

Thirdly, because those persons who had formerly been, but, at the time when the company was dissolved, had ceased to be shareholders, were not made parties.

Mr. Knight and Mr. Cole, in support of the demurrer. First. The association in question is plainly illegal. The parties have arrogated to themselves a corporate character, and have made their shares assignable without any control on the part of the partners at large. In all legal partnerships the admission of new partners is made subject to restriction and control. The Bubble Act (6 Geo. 1, c. 18) has been repealed by 6 Geo. 4, c. 91: but when that Act was in force all associations were considered to be within it, where the parties assumed to act in a corporate character, or made their shares transferable without restriction. That Act did only what the common law had done before, except that it imposed certain penalties; and all undertakings that were within it were void at common law. The 6 Geo. 4, c. 91, by which the Bubble Act is repealed, recites at follows:—"And whereas it is expedient that so much of [608] the said recited Act as is above set forth should be repealed; and that the said several undertakings, attempts, practices, acts, matters and things aforesaid should be adjudged and dealt with in like manner as the same might have been adjudged and dealt with according to the common law, notwithstanding the said Act." That recital was introduced by Lord Eldon when the bill was in the House of Lords. (See *George on Joint Stock Companies*, 80.) It appears, from the language of the deed and of the bill, that no gold mines had been discovered in North America when the company was formed; but that the members trusted to the representations of Penman: the bill also states that all the capital of the company has been expended, that all the objects of the company have entirely failed, and that no gains or profits have ever been realized: the undertaking, therefore, was clearly a bubble. *The King v. Dold* (9 East, 516), *The King v. Webb* (14 East, 406; see 415), *Buck v. Buck* (1 Campb. N. P. C. 547; see note), *Kinder v. Taylor* (Collyer on Partnerships, 762), *Josephs v. Pebrer* (3 Barn. & Cress. 639), *Ellison v. Bignold* (2 Jac. & Walk. 510), *Duregier v. Fellows* (5 Bing. 248).

Secondly. Muskett and the other persons who have assigned their shares ought to have been made parties to this suit. The bill prays for an account of all the debts due from the company from the time of its formation. That account cannot be taken, nor can the other relief prayed by the bill be granted in the absence of the shareholders who have assigned their shares. Those shareholders still continue liable to pay the debts that [609] were due from the company at the time when they assigned their shares, and also to contribute to the present shareholders for such of those debts as they may have already paid or may hereafter pay. *Glassington v. Thwaites* (2 Russ. 458).

Mr. Jacob and Mr. W. T. S. Daniel, in support of the bill. No case has been cited to shew what the law was before the passing of the Bubble Act. That Act has been repealed; but what was the use of repealing it if the law was to remain the same as it was before the repeal? The case of *Walburn v. Ingilby* (1 Myl. & Keen, 61; see 76) was decided after the Bubble Act had been repealed; but Lord Brougham, C., at the commencement of his judgment, says that the demurrer could not be sustained on any notion of common law illegality. In that case the number of shares was 20,000; here there are but 211 shares and but 23 shareholders. Is that number so large as to make the company a nuisance? At the time when the Bubble Act was passed, there was, as appears by the preamble, a great number of companies in existence which were fraudulent; and the Act declares them to be a nuisance because they were fraudulent, not because the shares were assignable without the privity of the other partners. It is a principle of our law to make all property assignable; and there is no reason why the members of a partnership should not stipulate that there should be no restriction on the assignment of their shares.

The next objection is the want of parties. All the existing shareholders are before the Court: but it is said that Muskett and the other shareholders who have [610] retired from the company ought to have been made parties. It is true that, in some cases, a partner may be liable to his co-partners although he has quitted the firm: but the question here is whether, assuming all the allegations in this bill to be true, Muskett and the other shareholders who have gone out ought to have been made parties. In *Glassington v. Thwaites* the bill stated a case of liability against Phillips, and treated him as a necessary party to the account. In that case, therefore, assuming the statements in the bill to be true, he was a necessary party. But that is

not the case here with respect to Muskett and the other retired shareholders ; for the bill states that Muskett resigned his office of trustee and treasurer in 1834, and that all his accounts have been finally settled and closed, and that he has been duly and absolutely discharged from all liability in respect of his office : and the bill further states that there was not any person, except the Plaintiff and the Defendants, who, at the time of filing the bill, was in any manner interested in or liable in respect of the affairs of the company as a shareholder thereof, or otherwise as a partner therein. If, therefore, Muskett and the other retired shareholders had been made parties, they might have demurred on the ground that the bill alleged that there was no liability on their parts. Besides, there is no allegation in this bill as to the time when the losses were sustained or the debts incurred, and, therefore, they might have been sustained and accrued after Muskett and the other partners quitted the firm. Partners may contract, if they please, that a retiring partner shall be no longer subject to liability. In the first clause in the deed it is declared that the continuing to be a partner shall be co-extensive with the holding of a share ; and all the other provisions of the deed tally with the notion that a partner [611] who has assigned his share is to be divested of all liability. On a dissolution taking place, all the debts and liabilities of the partnership are to be satisfied by the persons who are shareholders at the time ; and the surplus property of the partnership is to be divided amongst the same persons. What makes this still more clear is the final covenant in the deed, by which each party covenants that he will, so long as he shall hold or claim any sum or interest in the company or the capital thereof, pay the instalments or sums of money which shall become due in respect of the shares held by him, at the time and in the manner thereinbefore directed and appointed, and also will, in all things, observe, perform, confirm and abide by all the rules, regulations and provisions of the deed, so far as the same shall relate to any share held or claimed by him, or to his rights, duties, privileges or liabilities as a shareholder. So that there is an express covenant that the partners are to contribute so long as they hold shares ; but they are not to be liable to contribute after they have assigned their shares. If there were any doubt upon the point it is removed by the allegation in the bill that there is no person, except the Plaintiff and the Defendants, who is in any manner interested in or liable in respect of the affairs of the company. If Muskett or any of the other shareholders who have assigned their shares, were to be sued by any of the creditors of the company, and were compelled to satisfy their demands, they would only become creditors of the whole company : they would not be necessary parties to this suit, as it seeks only for contribution : but they would then be in the situation of a surety who has paid the debt of his principal.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot but think that the deed of November 1833, [612] by which the company was established, is, on the face of it, illegal. It proposes that certain persons should become partners, for the fanciful purpose of working gold mines in North America ; and it provides that the parties to the deed of the first, second and third parts, and all persons who should become subscribers to or interested in the capital of the company, should so long as they possessed any share of the capital, be and continue a company or partnership under the name of The Anglo-American Gold Mining Association. It then provides that, in the first instance, the shares should not exceed 60 ; but, in the subsequent part of the instrument, the shareholders are empowered to increase the number of shares to an unlimited extent, and a great number of additional shares have been, in fact, created. The deed also provides that the shares, as well original as additional, may be assigned or disposed of by deed or will, to any person or persons, at the discretion of the holders.

The fair inference to be drawn from the provisions of this deed is that certain persons were to form a company, which might be increased to an unlimited extent, and that the shareholders were to have the power of transferring their shares, to whomsoever they pleased, without any sort of control : the deed, therefore, necessarily represents that the persons who should assign their shares would get rid of all the liabilities attached to them, and that the persons who should take their shares would take them just as the assignors held them. It is clear, however, that this could not be done. In my opinion, therefore, the deed held out to the public, as an induce-

ment to them to become partners in the working of these imaginary gold mines, a false and fraudulent representation that they might continue partners in the under-[613]-taking just as long as they pleased, and then get rid of all the liability that they had incurred by transferring their shares to some other person.

In the case of *Duvergier v. Fellows*, which, it must be observed, was decided after the Bubble Act had been repealed, Lord Chief Justice Best says: "There can be no transferable shares of any stock, except the stock of corporations or of joint stock companies created by Acts of Parliament. When it is said the shares were to be transferable, that must mean that the assignee was to be placed in the precise situation that the assignor stood in before the assignment: that the assignee was to have all the rights of the assignor, and to take upon him all his liability. Now the assignee can join in no action for a cause of action that accrued before the assignment. Such rights of action must still remain in the assignor, who, notwithstanding he has retired from the company, will still remain liable for every debt contracted by the company before he ceased to be a member." (See 5 Bing. 267.)

All these reasons are applicable to the present case: and my notion is that this deed is not only illegal because it trenches on the prerogative of the King, by attempting to create a body not having the protection of the King's charter, the shares of which might be assigned without any control or restriction whatsoever; but also because it holds out to the public a false and fraudulent representation that the shares could be so assigned.

The undertaking in question appears to have been a wild project, entered into by speculating persons for the [614] purpose of deluding the weak portion of the public of this country, who too often allow themselves to be gulled by any specious scheme that holds out a prospect of gain: and what is stated to have taken place with regard to it might have been reasonably expected, namely, that all the capital has been expended, and no profits realized, but debts and liabilities incurred to a large amount.

The more such schemes are discouraged by Courts of Justice, the better it will be for Her Majesty's subjects; and, therefore, I shall allow the demurrer with costs.

[614] STRAUS v. GOLDSMID.(1) August 11, 1837.

Charity. Jews.

A bequest to enable persons professing the Jewish religion to observe its rites, is good.

A testator bequeathed one-third of his residuary personal estate in the following words:—

"The remaining third of the above residue to be given to the rulers and wardens of the Great Synagogue in this City of London in the manner hereinafter mentioned: that is to say, the interest or dividends arising from this third to be, every year on the eve of the Passover, distributed at least among 10 worthy men who have wives and children, among whom there ought to be some learned men, to purchase meat and wine fit for the service of the two nights of Passover."

Mr. Russell and Mr. Steer, for the Plaintiff.

Mr. Goldsmid, for the Defendant Goldsmid.

[615] Mr. Wray, for the Attorney-General, submitted whether this bequest was not illegal, according to the doctrine in *De Costa v. De Paz* (2 Swans. 487, note). But

THE VICE-CHANCELLOR held that the bequest, being intended to enable persons professing the Jewish religion to observe its rites, was good.

(1) *Ex relatione.*

[615] DODD v. WAKE. August 11, 1837.

Will. Construction. Remoteness.

Testator gave £30,000 unto and amongst the children of his daughter who should be living at the time the eldest should live to attain the age of 24 years, and the issue of such of them as might be then dead, to be equally divided among them, *per stirpes* and not *per capita*, and to be paid to them respectively when and as they should attain 24, but without interest in the meantime. At the testator's death his daughter had three children, who were of the ages of 13, 12 and 9. Held, that the testator intended that such only of his daughter's children should take, as should be living when the eldest for the time being should attain 24, and, consequently, that the bequest was too remote.

John Dodd, by his will, dated the 25th of August 1834, bequeathed as follows:—

"I give and bequeath the legacy or sum of £30,000 of lawful English money, unto and amongst the children of my daughter Mary Maria, the wife of George Anthony Wake, who shall be living at the time the eldest shall live to attain the age of 24 years, and the issue of such of the children of my said daughter as may then happen to be dead leaving issue, to be equally divided between or among them, share and share alike, *per stirpes* and not *per capita*, as tenants in common, and to be paid and payable unto them respectively when and as they shall respectively attain the age of 24 years, but without any interest in the meantime."

[616] The testator died on the 2d of September 1834. Mrs. Wake had issue three children, who, at the testator's death, were of the several ages of 13, 12 and 9 years.

The bill was filed by the trustees and executors of the will against Mr. and Mrs. Wake (who were interested in the testator's residuary personal estate) and their children, to have the rights of the Defendants ascertained and declared, and to have the trusts of the will carried into execution under the decree of the Court.

On the cause coming on for further directions, the question was whether the bequest in favour of the children was not void for remoteness; inasmuch as the three children who were living at the testator's death might all die under the age of 24 years, and then the legacy could not vest in any child of Mrs. Wake until the expiration of 24 years and upwards after the testator's death.

Mr. Knight and Mr. Koe, for the Plaintiffs.

THE SOLICITOR-GENERAL and Mr. James Russell, for Mr. and Mrs. Wake, referred to *Leake v. Robinson* (3 Mer. 363).

Mr. Jacob and Mr. Bailey, for the children.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator appears clearly to have intended that only those children of his daughter should take who should be alive when the eldest child for the time being should attain the age of 24; and, therefore, the bequest is void for remoteness.

[617] PRICE v. DEWHURST.(1) April 24, 1839.

Stat. 11 Geo. 4 and 1 W. 4, c. 60. Construction. Trustees and Mortgagees.

The object of the 11 Geo. 4, and 1 W. 4, c. 60, was to provide means for conveying the *legal* interest only in property; therefore, an assignment of a mortgage debt by the creditor is not within the Act, nor does the Act apply to conveyances of land out of the Queen's dominions.

By the decree in this cause it was, amongst other things, declared that the Defendants were trustees for the Plaintiffs of any estate, right and interest in the

(1) See a report of the hearing of his cause, *ante*, 279.

mortgage (1) they had acquired by virtue of the joint will of Henry Seaton and Catherine, his wife, or the confirmation thereof or the proceedings in the Executors' Court of Dealing; and that the mortgage debt due from Peter Markoe, and all the securities for the same, passed under the will of Henry Seaton, bearing date the 5th of April 1814, and also the will of Catherine Seaton, bearing date the 2d of July 1822, and the codicil thereto, dated the 1st of November 1822, and belonged to the Plaintiff, Ann Akers Price, as the personal representative of Henry and Catherine Seaton; and it was referred to the Master to take an account of all sums of money received by the Defendants Edward Dewhurst the elder, Edward Dewhurst the younger, and Benjamin William Pullan and Catherine, his wife, late Catherine Akers, widow, in respect of the mortgage or the interest thereof, or the proceeds of any estates charged with the mortgage; and it was ordered that the balance which should be found due on the taking of such account should be paid, by the last-named Defendants, to the Plaintiffs, Price and wife, as such personal representatives as aforesaid; and it was declared that the same Defendants ought to make and execute, to the Plaintiffs, in right of the [618] Plaintiff, Ann Akers Price, as such personal representative as aforesaid, all such powers of attorney, deeds of assignment or assurance as should be necessary for enabling the Plaintiffs to recover, receive and obtain the full benefit of the mortgage debt and interest and the securities for the same; and it was referred to the Master to settle and approve of such powers of attorney, deeds of assignment or other assurance, if the parties differed about the same; and it was ordered that the same, when settled and approved of, should be executed by the last-named Defendants, or such of them as the Master should direct.

The Master having reported that he had settled a deed of assignment and a power of attorney to be executed by the last-named Defendants, the Plaintiffs presented a petition stating that Edward Dewhurst the elder was residing in the island of St. Croix, and that Edward Dewhurst the younger had been resident at Southampton, but had recently gone to reside at Avranche in France in order to avoid executing the assignment and power of attorney; that Benjamin William Pullan was confined in a lunatic asylum, and that his wife refused to state where he was; that she was residing at York, and the assignment and power of attorney had been tendered to her, but she refused to execute them. The petition prayed that Master Brougham, or such other person as the Court might think proper, might be appointed to execute the assignment and power of attorney in the names of the Defendants.

Mr. Knight Bruce, for the Petitioners, relied upon 11 Geo. 4 and 1 W. 4, c. 60, ss. 2, 5 and 8.

Mr. Jacob and Mr. Sharpe, for the Defendants, said that the Act authorized the execution of conveyances [619] and assurances only; that the assignment, which had been settled by the Master, contained covenants and a power of attorney, which the Act did not authorize, and one of the deeds was a power of attorney enabling the attorney to sue in St. Croix; but the main objection was that the Act did not apply to property out of the Queen's dominions; that Acts of Parliament did not apply even to the colonies, unless they were specially named; that section 29 extended the Act to the colonies, but excluded Scotland; that the Act was passed merely to remedy a technical difficulty arising out of the practice of the English Courts; that the decree of a Court of Equity vested the right, but, without a conveyance of the legal estate, the party could not sue in another Court, and the Act was passed to remedy that technical difficulty; that the decree, in this cause, gave the Plaintiffs as much right (if any) to the property in St. Croix as the deeds would.

Mr. K. Bruce, in reply. The Act extends to property in every part of the world. The 29th section was introduced as a matter of precaution only. At all events the debt has no locality. It is personal property, and is within the provisions of the Act, even if the conveyance of the land in St. Croix is not.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The debt is a debt due to the Defendants from a person abroad, and it has its locality where the debtor is.

The object of the Act is to provide means by which the legal interest in the

(1) The mortgaged estate was in the Danish island of St. Croix.

subject of the trust or mortgage may be conveyed. The legal interest in this debt cannot be conveyed by the creditor.—So far as to the debt.

[620] With respect to the mortgage, the Act was never meant to apply to land out of the Queen's dominions. The words of the 29th section shew that it was not meant to apply to land situate in any place abroad, except the places mentioned in that section; and, consequently, I am of opinion that this Court has no jurisdiction under the Act to order the execution of the conveyance in question.

Dismiss the petition with costs as to all the parties except the Defendant Pullan, the lunatic, and, as to him, the petition must go back to the Lord Chancellor's paper.

[620] HOLLINGWORTH v. SIDEBOTTOM. Nov. 8, 1837.

Partition.

One of three tenants in common of an estate was a person of weak intellect; but no commission was in force against her. On a bill for a partition being filed against her, by the other two, the Court directed a commission of partition to issue, and that the lands should be held in severalty.

A testator had devised his real estates to his three daughters as tenants in common, and the bill was filed, by two of them against the third, for a partition. The Defendant, who had attained her majority, was a person of weak intellect, but had not been found so by inquisition, and had put in an answer by a guardian. The question was whether the Court would make a decree for a partition as against her.

Mr. Mylne, for the Plaintiffs, submitted that although no order could be made for a conveyance from the Defendant, yet the Court could make the usual order for a commission, and that the lands should be held in severalty.

Mr. Duckworth appeared for the Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell] said there was no objection to make such a decree as was proposed, reserving further directions.

[621] HORLOCK v. PRIESTLEY. Nov. 10, 1837.

[See *Cook v. Hathway*, 1869, L. R. 8 Eq. 616; *Boynnton v. Boynnton*, 1878-79, 9 Ch. D. 251; 4 App. Cas. 733.]

Costs. Executor.

An executor, after a bill filed by his testator had been dismissed with costs, revived the suit, alleging that he intended to appeal. The executor was ordered to pay the costs of the suit.

The bill in this cause had been dismissed with costs, to be paid by the Plaintiff. Shortly afterwards the Plaintiff died, having appointed one Yarde his executor. After the Plaintiff's death the costs were taxed under an order of the 8th of August 1836. Yarde revived the suit, intending, as he alleged, to appeal from the decree; he did not, however, present a petition of appeal.

Mr. Wigram and Mr. Turner, for the Defendant Mrs. Priestley, now moved that Yarde, as the Plaintiff's executor, might be ordered to pay to Mrs. Priestley, within a fortnight, the sum at which her costs had been taxed. They said that as Yarde had revived the suit, he had placed himself in Horlock's situation, and, therefore, was liable to pay the costs whether he had assets of Horlock or not; that, where a bill filed by an executor or by the assignees of a bankrupt was dismissed with costs, the Court never referred it to the Master to inquire whether there were assets of the testator, or estate of the bankrupt, sufficient to pay the costs.

Mr. Piggott, for Yarde, said that the costs were a debt due from Horlock's estate, and, therefore, Yarde ought not to be ordered to pay them personally.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As the executor of Horlock has thought proper to revive the suit, he has placed himself in the same situation with regard to it as Horlock stood in, and therefore he must pay the costs.

[622] HESLOP v. METCALFE. Nov. 13, 1837.

[S. C. affirmed, 3 My. & Cr. 183; 40 E. R. 894 (with note). See also *In re Hawkes* [1898], 2 Ch. 18.]

Solicitor and Client. Lien.

The solicitor for the Plaintiff refused to proceed with the suit unless his client would pay him the costs then incurred in the suit, and also the costs of an action at law in which he had acted as attorney for the client. Held, that the solicitor was not justified in demanding the costs of the action as well as the costs of the suit, and, consequently, that he had discharged himself; and he was ordered to deliver up the papers in the cause to the client's new solicitor, who was to hold them subject to the lien of the former solicitor, and to return them after the hearing of the cause.

In June 1834 the Plaintiff employed Mr. Blunt to commence and prosecute this suit as his solicitor, and it was agreed between them that the Plaintiff should pay to Blunt £30, on the bill being filed, and should afterwards advance money for the prosecution of the suit, in the best way he could.

The bill was filed in September 1834, and the Plaintiff paid Blunt the £30, and afterwards continued to make him further advances, to the utmost of his ability, amounting, with the £30, to £80. In November 1835 Blunt declined to proceed with the suit, unless the Plaintiff would advance him the further sum of £10 to pay the expenses of certain motions to be made in the cause. The Plaintiff accordingly paid the £10, which, as he informed Blunt, he had been compelled to borrow. In January 1836 Blunt delivered to the Plaintiff his bill of costs in this suit and also in an action brought by the Plaintiff against one Blake, up to Michaelmas term 1835. The amount of the bill was £215. The charges in it for this suit amounted to £177, and, if the £80 had been deducted from that sum, there would have been a balance of £97 only due from the Plaintiff to Blunt in respect of the suit. Blunt did not make any further demand, or again refuse to carry on the suit, until the 12th of February 1836, when he wrote to the Plaintiff as follows:—"I beg to say I have no funds whatever in my hands available to the progress of this suit; I request therefore payment of the balance due on my bill of costs delivered of £215 [623] and the subsequent costs, otherwise you must abide the consequences." On the 15th of February the Plaintiff was arrested for the £215, on a writ issued by Blunt three days before the date of the letter. On the 18th of March Blunt delivered to the Plaintiff another bill of costs in this cause, from the 12th of November 1835 to the 15th of February 1836, amounting to £36, 9s. On the 26th of May Blunt wrote to the Plaintiff stating that he had received from his Clerk in Court a note inquiring whether the rules in this cause were to be entered in that term; and adding that he should proceed no further in the cause unless the request in his letter of the 12th of February was complied with before one o'clock on the day following. On the receipt of this communication, the Plaintiff instructed Mr. Green, a solicitor, to enter the necessary rules, which he accordingly did; and in the following Trinity Vacation the cause was set down for hearing. On the 18th of October 1836 Blunt, without any intimation of his intention, commenced an action against the Plaintiff for his second bill of costs.

On the 24th of June 1837, at which time it was expected that the suit would be soon heard, and it being necessary, for protecting and enforcing the Plaintiff's rights, that Green should have possession of the pleadings and other documents connected with the suit, Green applied to Blunt to deliver them to him, upon his undertaking to hold them subject to any lien that Blunt might have thereon, and to return them

within 10 days after the hearing of the suit. Blunt refused to part with the papers until his costs both at law and in equity were paid; but said he would allow the Plaintiff and Green to peruse and take copies of them at his office, and would undertake to produce them at the [624] hearing: he added that he was willing to proceed with the suit if the Plaintiff would undertake to pay the costs that would become due to him by reason of his so proceeding. Green wrote, in reply, that, after the correspondence that had taken place and the actions that had been brought, it was futile to suppose that the proposal to proceed with the suit could be listened to. Neither Green nor the Plaintiff having received any further communication from Blunt, the Plaintiff, in November 1837, at which time the actions brought by Blunt were still pending, presented a petition in the cause, praying that Blunt might be ordered to deliver to Green the pleadings and office copies of the answers in this cause, and all such other deeds, papers, documents and proceedings in or connected with it, as, upon inspection, should be deemed by Green to be necessary, on behalf of the Plaintiff, on the hearing of the cause, on Green giving Blunt his written undertaking to receive the documents subject to Blunt's alleged lien thereon, and to return the same whole and undefaced within 10 days after the hearing of the cause, and that Blunt might be ordered to pay the costs of the petition and consequent thereon.

Mr. Knight Bruce, for the Petitioner, said that Blunt's conduct to the Plaintiff had been most unjustifiable; that Green could not conduct the suit effectually, without having the papers referred to in the petition; that *Colegrave v. Manley* (Turn. & Russ. 400) shewed that the solicitor's lien ought not to prevent the client from having the use of his papers; that, in that case as in this, the solicitor had offered to proceed with the suit, and yet the Court directed him to deliver up the papers upon the terms [625] mentioned in the order; and that a similar order ought to be made in this case, except as to the taxation of the bills, which ought not to be directed, as it would interfere with the proceedings in the pending actions.

Mr. Jacob and Mr. Addis, for Blunt. The practice in cases like the present has undergone some fluctuation. In *Ross v. Loughton* (1 V. & B. 349) and *Commerell v. Poynton* (1 Swans. 1) the solicitor had voluntarily retired, and yet Lord Eldon would not order him to part with the papers, but directed only that he should allow them to be inspected and produce them at the hearing of the cause and in the Master's office. In *Colegrave v. Manley* there was no doubt about the client's ability to pay the costs, indeed, he offered to pay them when taxed: but here the Plaintiff has made no such offer; but, on the contrary, he is contesting his liability to pay a farthing of the costs. In that case, too, the withdrawal of the solicitor in no way arose from the act of the client, but that is not so here. How can it be said that, in this case, Blunt has voluntarily and arbitrarily discharged himself? The fact is that it is Heslop who has discharged Blunt by employing another solicitor and by his conduct throughout the proceedings in the suit. [THE VICE-CHANCELLOR. It does not appear that any demand of money was made by Blunt, specifically, to enable him to carry on the suit. Payment for what had passed is a distinct thing.] A solicitor is entitled to demand payment of his bill for the past, and also to demand money to enable him to proceed with the suit. Before anything took place in the nature of a discontinuance, the Plaintiff and Blunt were in a state of litigation together respecting the amount of Blunt's bill; [626] and, therefore, it followed, as a necessary consequence, that the relation of solicitor and client between them must be dissolved. Blunt has not voluntarily and arbitrarily discharged himself, but has had good reason to retire; and, even if he had capriciously discharged himself, he could not be compellable to do more than he has offered to do: if he says that he does not choose to accept Mr. Green's undertaking, the Court cannot compel him to accept it.

In *Lord v. Wormleighton* (Jacob's Rep. 580) the client died, and his executors employed another solicitor, and then moved that the former solicitor might be ordered to permit inspection of the papers and documents in his hands, and to produce them when necessary for the purposes of the cause: but Lord Eldon said his impression was that the solicitor ought to be able to make use of the non-production of the papers in order to get at what was due to him, and declined to make any order. In *Moir v. Mudie* (1 Sim. & Stu. 282) the precise question now in discussion was raised. There the solicitor had refused to act any longer for one of the Defendants, and, consequently,

had discharged himself; and, as in the present case, the application was that the solicitor might be ordered to deliver up the papers to his client: but Sir John Leach, V.-C., merely ordered him to permit the Defendant to inspect them at all reasonable times. In *Clutton v. Pardon* (1) Lord Eldon says: "Every attorney has a right to hold papers till his bill is paid: the language of every order which is made upon the subject is that, upon payment of [627] what is due, the papers shall be delivered over: but, where a party has a pressing necessity for papers, the Court will order them to be delivered over upon a deposit being made, which will cover not only what is due upon the bill, but what may be due for the costs of the taxation." In this petition no offer is made either of payment, or even of deposit.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question is whether, in this case, I am to make an order in the terms of the order in *Colegrave v. Manley*. Lord Eldon, as I understand, made the order in that case, on the ground that the solicitor had discharged himself: and, in this case, no circumstances have been made out on the part of Mr. Blunt, which allow me to say that he has not discharged himself. In my opinion, when Mr. Blunt demanded payment not only of what was due to him in the suit, but also of what was due to him in the action, he demanded too much;² for those two matters ought to have been kept separate from each other. Then, in February 1836, Mr. Blunt demanded payment of the balance due on his bill which had been delivered, and also payment of the subsequent costs of the suit; but it was not until five weeks afterwards that he delivered his bill of those costs. Then he does not do anything further until May 1836, when, in consequence of his having been asked by the Clerk in Court, whether the rules in the cause were to be entered in that term, he says that he will proceed no further in the cause unless the request contained in his letter of the 12th of February were complied with. Mr. Blunt, therefore, did virtually discharge himself: he did not direct the rules to be entered.

[628] This case, therefore, is brought within the principle upon which Lord Eldon acted in *Colegrave v. Manley*. It is sworn and not contradicted that it is necessary, in order to enable the Plaintiff's new solicitor to proceed with the cause, that there should be not only inspection, but actual delivery of the documents to which the petition relates; and, therefore, I am bound to make an order similar to that made by Lord Eldon in *Colegrave v. Manley*, except that I ought not to make an order for the taxation of the bills of costs, because the parties are now litigating at law as to whether those bills ought to be paid or not.

The next question is whether I ought to order Mr. Blunt to pay the costs of this petition. He has, as it seems to me, discharged himself by insisting on what he was not entitled to, namely, the payment of the costs incurred in the action, and also of the costs incurred in the suit up to February 1836, the bill of which was not delivered until March: and, as there has been no conduct on the part of Heslop which made it right that Blunt should discharge himself, I shall make an order similar, in every respect, to that in *Colegrave v. Manley*, except as to the taxation of the costs; and Mr. Green must give an undertaking corresponding with the undertaking in that case.(2)

[629] *In re PADDINGTON CHARITIES.* Nov. 14, Dec. 12, 1837.

[S. C. 7 L. J. Ch. (N. S.) 44; 2 Jur. 344.]

Charity. Stat. 59, Geo. 3, c. 12. Construction.

The 59th Geo. 3, c. 12, s. 17, does not apply to copyholds, nor to freeholds held upon any special trust for a parish.

This was a petition to confirm the Master's report, approving of certain persons as trustees of charity estates, consisting of freehold and copyhold lands. The rents of

(1) Turn. & Russ. 301; see 304. 1 Archbold's Prac. 40; *Steele v. Scott*, 2 Hogan's Rep. 141; and *Lambert v. Buckmaster*, 2 Barn. & Cress. 616, were also referred to in the course of the argument.

(2) Affirmed by the Lord Chancellor. See 3 Myl. & Craig, 183.

the freeholds were to be applied in purchasing bread for the poor of the parish, and the rents of the copyholds for the benefit of the poor of the parish generally.

Mr. Rudall, who appeared in support of the petition, said that it was doubtful whether the estates were not vested in the churchwardens and overseers of the parish, by virtue of 59 Geo. 3, c. 12, s. 17. (See *Attorney-General v. Lewin*, ante, 366. The 17th section of the Act will be found in p. 368.) He referred to *Doe v. Hiley* (10 Barn. & Cress. 885) and *Ex parte Annesley* (2 You. & Coll. 350).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 17th section of the 59th Geo. 3, c. 12, appears to me to apply to freehold lands held generally in trust for the parish, and the cases referred to prove it: but those cases do not affect copyholds; and I still think that the statute does not apply to them. Nor, in my opinion, does the statute apply to freeholds held upon any special trust. The report must, therefore, be confirmed.

[630] METFORD v. PETERS. Dec. 13, 1837.

Practice. Witness.

A witness who has been examined before the hearing, may be examined before the Master, *for the other side*, without the leave of the Court.

Motion to suppress the depositions of a witness who had been examined, for the Defendant, before the hearing, and for the Plaintiffs, in the course of the proceedings before the Master under the decree, without any order having been obtained for that purpose. The witness had been examined before the hearing, to prove exhibits merely; but, after the hearing, he was examined to prove, not only exhibits, but also the important point in the cause.

Mr. Wigram and Mr. Bethell, for the Defendant, in support of the motion, cited *Faughan v. Lloyd* (1 Cox, 312), *Smith v. Graham* (2 Swans. 264), *Rowley v. Adams* (1 Myl. & Keen, 543), and *Wormold v. Mackintosh* (*Ibid.* 545, cited).

Mr. Knight Bruce and Mr. Hayter, for the Plaintiff, said that the witness was merely an exhibit witness, and, therefore, no order was necessary. *Courtenay v. Hoskins* (2 Russ. 253). [THE VICE-CHANCELLOR. You have not examined him in the Master's office as a mere exhibit witness.] The witness was examined for the Defendant before the hearing, and for the Plaintiff after the hearing. A party may examine his adversary's witness without the leave of the Court. *Birch v. Walker* (2 Scho. & Lef. 518).

[631] Besides, the Defendant has by his conduct waived the objection. On the 15th of last July publication passed; on the 22d the Defendant took copies of the depositions, and on the 26th a warrant was taken out to proceed on the state of facts; but the notice of the present motion was not served until the 4th of November.

Mr. Wigram, in reply, said that his client did not attend the warrant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. My impression is that the rule only is that a witness who has been examined on one side before the hearing cannot be examined on the *same* side after the hearing, without a special order for that purpose. The reasoning of Sir John Leach, M.R., in *Rowley v. Adams*, clearly shews this. His Honor says: "The rule is well settled that a witness who has been examined in the cause cannot be examined again before the Master without an order; and such order is in general accompanied with a direction that he shall not be examined upon any points, with respect to which he has been previously examined in the cause: for it would be too dangerous to truth and justice to afford such a witness an opportunity of mending his testimony, when he had found, by the evidence on the other side, where the weakness of the case lay." That shews that Sir John Leach understood the rule as I do, and that it does not affect this case where the witness has been examined by one side before the hearing, and by the other side after the hearing. He is not called for the purpose of mending his evidence given before the hearing; and if he does mend it, he is adverse to the party who calls him.

[632] Besides, I think that the application comes too late; for after the depositions

had been published a warrant was taken out, to proceed on the state of facts, on the 26th of July. The Defendant might have attended the Master on that day and then made the objection; instead of which he suffers the matter to proceed until the 4th of November, and thus induces the Plaintiff to suppose that what the Master had done was to stand.

Motion refused with costs.

[632] HILL v. RIMELL. Nov. 16, 1837.

Motion. Practice.

Where a motion is to be made by leave of the Court, the notice ought to mention that it is to be so made, otherwise the Defendant may disregard it.

In this case the Plaintiff had, by leave of the Court, served the Defendant with notice of a motion for an injunction to be made before the Defendant had appeared, and on a day not appointed for the hearing of motions; but the notice did not mention that the motion was to be made by special leave of the Court; and

THE VICE-CHANCELLOR ruled that, on account of that omission, the Defendant was at liberty to disregard the notice.

Mr. Knight Bruce, Mr. Stinton and Mr. Wright were counsel in the cause.

[633] JONES v. JONES. Dec. 18, 1837; Jan. 12, 1838.

[S. C. 7 L. J. Ch. (N. S.) 164; 2 Jur. 589. See *Ward v. Duncombe* [1893], A. C. 390.]

Mortgage. Priority.

A. mortgaged an estate first to B., secondly to C., and thirdly to D., by virtue of a power reserved to him by his marriage settlement. C. had no notice of the first mortgage. D. had notice of the first, but not of the second; and he caused a notice of his mortgage to be indorsed on the settlement, which, together with the title-deeds, was in the possession of B. Held, that D. did not thereby gain priority over C.

By the decree in this cause, it was referred to the Master "to inquire and state what mortgages or other incumbrances there were affecting the estates of the Defendant Frederick Lewis Brown and Eliza his wife, devised to or in trust for Eliza Brown by the will of Thomas Jones, and also the estates of the same Defendants, given and devised to or in trust for Eliza Brown for her life, by the will of James Whitworth, and to state their priorities and what was due for principal and interest thereon respectively."

The Master reported in substance, as follows:—

Thomas Jones, by his will, dated the 25th May 1815, devised his freehold messuages, tenements and hereditaments situate in the town and county of Carmarthen or elsewhere, unto Robert Waters and William Jones and their heirs, upon trust to pay the rents thereof to Sarah Harvey for her life, and after her decease, upon trust, and the testator devised the same hereditaments unto, between and among Mary Whitworth and Eliza Whitworth, to hold unto and to the use of them, their heirs and assigns, as tenants in common with benefit of survivorship, in case of the decease of either unmarried and without issue, and without having disposed of her share unto the survivor of them, her heirs and assigns for ever.

James Whitworth being seised of a freehold messuage in the town of Carmarthen, called Gell Street House, by [634] his will, bearing date the 7th December 1821, devised it to the said Robert Waters and John Hughes and the survivor of them, and the heirs of such survivor, upon trust for, and the testator devised the same to Eliza Whitworth for her life, with remainders over.

In the latter part of the year 1822, Frederick Lewis Brown married Eliza Whitworth, and, in contemplation of the marriage, indentures of lease and release, bearing date the 20th and 21st December 1822, were executed, the release being made between Eliza Whitworth of the first part, Frederick Lewis Brown of the second part, John Lewis and William Skyrne of the third part, and Robert Waters and John Hughes of the fourth part, and thereby Eliza Whitworth conveyed the remainder in fee expectant upon the decease of Sarah Harvey, in one undivided moiety of the premises devised by Thomas Jones, unto John Lewis and William Skyrne and their heirs, to such uses after the marriage, as Frederick Lewis Brown and Eliza, his then intended wife, by any deed or deeds, instrument or instruments in writing, to be by them signed, sealed and delivered in the presence of, and attested by two or more credible witnesses, should, from time to time jointly appoint, with divers limitations over.

By an indenture, bearing date the 24th of December 1824, and made between Frederick Lewis Brown and Eliza his wife of the one part, and William Jones of the other part, Brown and wife, in consideration of £436, 11s. 6d. paid to them by William Jones, demised the Gell Street house to William Jones for 99 years, if Eliza Brown should so long live, subject to the proviso for redemption after mentioned; and for better securing the repayment of the £436, 11s. 6d. with interest, Brown [635] and wife jointly appointed one undivided half part of the premises devised by Thomas Jones, after the decease of Sarah Harvey, to the use of William Jones in fee, subject to redemption on payment by Brown and wife, or either of them, their heirs, executors, &c., to William Jones, his executors, &c., of the £436, 11s. 6d., with interest at £5 per cent.

By indentures of lease and release, dated the 14th and 15th of November 1825, the release being made between William Jones of the first part, Brown and wife of the second part, and Jane James, widow, of the third part, in consideration of £436, 11s. 6d. paid to William Jones by Jane James, and of the further sum of £223, 8s. 6d., paid by her to Brown and wife, William Jones assigned and Brown and wife confirmed the Gell Street house to Jane James, her executors, &c., for the remainder of the term of 99 years, subject to the proviso for redemption after mentioned; and William Jones released and Brown and wife jointly appointed, released and confirmed to Jane James and her heirs the remainder in fee expectant on the decease of Sarah Harvey, in one undivided moiety of the premises devised by Thomas Jones, subject to redemption on payment by Brown and wife, or either of them, their or either of their heirs, executors, &c., to Jane James, her executors, &c., of £660, with interest at £5 per cent.

By an indenture, dated the 14th of January 1826, and made between Brown and wife of the one part, and John Jones of the other part, after reciting the will of Thomas Jones, and that Sarah Harvey was then in possession of the premises devised thereby, and that Eliza Brown had not disposed of her reversion in the moiety of those premises expectant on the decease of Sarah [636] Harvey, and after also reciting the will of James Whitworth and the settlement of 1822, Brown and wife, in consideration of £400 paid to them by John Jones, appointed and demised the remainder in fee in the moiety of the premises devised by Thomas Jones, and also the Gell Street house, unto and to the use of John Jones for 500 years, subject to redemption on payment by Brown and wife or one of them, their or one of their heirs, executors, &c., to John Jones, his executors, &c., of £400, with interest at £5 per cent.

By an indenture, dated the 18th January 1826, and made between Brown and wife of the one part and John Jones of the other part, Brown and wife, in consideration of £100 paid to them by John Jones, demised and appointed all the premises comprised in the indenture of the 14th of January 1826 to John Jones, for 500 years, subject to redemption on payment by Brown and wife, or one of them, their or one of their heirs, executors, &c., to John Jones, his executors, &c., of £100 with lawful interest.

The report then proceeded as follows :—

“And I find that the said two sums of £400 and £100 were paid by the said John Jones to the said Frederick Lewis Brown and Eliza his wife, on or before the respective days on which the said last-mentioned indentures respectively bear date,

and that receipts for the same respectively, signed by the said Frederick Lewis Brown and Eliza, his wife, were endorsed thereon; and that the said indentures of the 14th and 18th of January 1826 were respectively signed, sealed and delivered by the said Frederick Lewis Brown and Eliza, his wife, in the presence of two or more credible witnesses, who duly [637] attested the execution thereof respectively by the same Frederick Lewis Brown and Eliza, his wife, and that the said two last-mentioned indentures were respectively made and executed to the said John Jones, and the said John Jones advanced and paid the said sums of £400 and £100, without any notice, either to the said John Jones or to the solicitor, attorney or agent of the said John Jones, of any charge or incumbrance on the said premises.

"And I find, from the deposition of John Williams, that, previous to the execution of the said indenture of mortgage, the said John Jones inquired of the said Frederick Lewis Brown if there existed any incumbrances on the said mortgaged premises at the time the said John Jones obtained such two last-mentioned securities from the said Frederick Lewis Brown, and the said John Jones also, previous to the execution of the said indentures of mortgage, caused inquiries to be made of the said John Hughes and Robert Waters,⁽¹⁾ as to whether there were any mortgages or incumbrances upon the estates mentioned in the said deeds of the 14th and 18th days of January 1826, and the said John Williams, by the direction of the said John Jones, some few days previous to the said 14th day of January 1826, went to the said John Hughes and Robert Waters and asked each of them if there was or were any mortgage, incumbrance or incumbrances upon the hereditaments and premises mentioned and described in the said deeds of the 14th and 18th days of January 1826, and that each of them declared to the said John Williams that there was no mortgage or any other incumbrance to [638] their knowledge, and each of them, at the same time, assured the said John Williams that they believed that there was no mortgage or any other debt or incumbrance upon the hereditaments and premises mentioned in the said deeds of the 14th and 18th days of January 1826.

"And I find that the Defendant John Harris, by his state of facts, stated that, in the latter end of the year 1826, the said Frederick Lewis Brown applied to the Defendant John Harris to lend him the sum of £800, and proposed to John Harris to secure such sum with interest by a mortgage of the equity of redemption of all the premises comprised in the indentures of the 24th December 1824 and 15th November 1825; that John Harris, upon such application being made to him, referred Frederick Lewis Brown to his solicitor, Mr. James Thomas, and Frederick Lewis Brown furnished Mr. Thomas with copies of the wills of the testators, Thomas Jones and James Whitworth, and of the indentures of the 21st December 1822 and 15th November 1825, and assured Mr. Thomas and also John Harris that there was no incumbrance upon the said premises or any part thereof, save only the said mortgage debt to the said Jane James, whereupon Mr. Thomas, by the direction of John Harris, obtained an inspection of the indenture of the 21st December 1822 and the title-deeds and writings belonging to the said premises, and which were in the custody of the said William Jones as the solicitor of Jane James, in order to ascertain, for the safety of John Harris, whether there was indorsed upon such indenture or any other of the title-deeds any incumbrances or incumbrance upon the premises or any part thereof, either previous or subsequent to the deed of the 21st of December 1822, when Mr. Thomas found that there was none, and asked William Jones if there [639] were or was any incumbrances or incumbrance upon or affecting the premises or any part hereof, other than the mortgage of the 15th of November 1825, and William Jones told Mr. Thomas he knew of none; that John Harris accordingly, in the month of November 1826, lent to Frederick Lewis Brown the sum of £800; that thereupon Frederick Lewis Brown and Eliza, his wife, executed indentures of lease and release, bearing date the 16th and 17th November 1826, the release being made between Frederick Lewis Brown and Eliza, his wife, of the one part, and John Harris of the other part, and thereby, after reciting the wills of Thomas Jones and James Whitworth, the indenture of the 21st of December 1822, and the indentures of the 24th of December 1824 and of the 15th of November 1825, it was witnessed that, in con-

(1) It did not appear what interest these parties had in the estates.

sideration of the £800 paid by John Harris to Frederick Lewis Brown and Eliza, his wife, Frederick Lewis Brown and Eliza, his wife, granted to John Harris, his executors, &c., their full and absolute equity of redemption in the hereditaments comprised in the mortgage of the 24th of December 1824, to hold the same, subject to the payment of the £660, and the interest for the same from the 15th of November then last, unto John Harris, his executors, &c., from thenceforth for the term of 99 years, if Frederick Lewis Brown and Eliza, his wife, or either of them should so long live, subject nevertheless to the proviso for redemption thereafter mentioned; and, for more satisfactorily securing the payment of the £800 with interest, Frederick Lewis Brown and Eliza, his wife, in pursuance of the authority to them given by the settlement of December 1822, appointed, granted and confirmed to J. Harris and his heirs their full and absolute equity of redemption in the remainder in fee, expectant upon the decease of Sarah Harvey, in one un-[640]-divided moiety of the hereditaments comprised in the settlement of December 1822, to hold the same unto and to the use of John Harris, his heirs and assigns, subject to redemption on payment of the £800 with interest: And I find that the indenture of the 17th of November 1826 was signed, sealed and delivered by Frederick Lewis Brown and Eliza, his wife, in the presence of two credible witnesses, who duly attested their execution thereof; and that Harris, on the 17th of November 1826, caused a notice of the last-mentioned mortgage to be indorsed upon the settlement of December 1822. And I find that there are the several mortgages and incumbrances hereinbefore particularly mentioned affecting the estates and premises of the Defendants Frederick Lewis Brown and Eliza, his wife, given and devised to or in trust for the said Eliza Brown, by the will of Thomas Jones, and also the estates of the same Defendants given and devised to or in trust for the said Eliza Brown for her life by the will of James Whitworth: and I find that the priorities of such mortgages are as follows: first, the mortgage to the said Defendant William Jones, and afterwards assigned to the late Defendant Jane James and now vested in the Defendants Thomas Taylor Webb and David Jones; second, the mortgage to the said Defendant John Harris; and third, the mortgage to the said Defendant John Jones, and now vested in the said Plaintiffs." The Master then found what was due, for principal and interest, on those mortgages.

To this report the Plaintiffs excepted.

Mr. Knight Bruce and Mr. G. Richards, in support of the exception, contended that the representatives of John Jones were entitled to priority over Harris, in-[641]asmuch as his mortgage was prior, in point of date, to Harris's; that the notice which Harris had caused to be indorsed on the marriage settlement did not affect Jones's priority; because the doctrine laid down, as to the effect of notice, in *Dearle v. Hall* (3 Russ. 1) and *Loveridge v. Cooper* (*Ibid.* 30), applied to assignees of choses in action and not to mortgages; and they relied on *Peacock v. Burt* (Coote on Mortgages, 693).

Mr. Jacob and Mr. Coleridge, in support of the report, contended that Harris, by causing the notice of his security to be indorsed on the marriage settlement, had gained priority over John Jones, who had not taken that precaution, and had thereby enabled Brown and wife to commit a fraud upon Harris. They relied on *Dearle v. Hall*, *Loveridge v. Cooper* and *Foster v. Blackstone* (1 Myl. & Keen, 297).

THE VICE-CHANCELLOR, after stating the substance of the report and observing that there was no covenant for title in the deed of the 14th of January 1826, and that the only covenants in it were for payment of the mortgage money and interest, for quiet enjoyment free from incumbrances and for further assurance, continued thus:—

To this report an exception is taken by the parties who claim under John Jones insisting on their priority over Harris; and the question is whether the report is right.

At law the rule clearly is that different conveyances of the same tenement take effect according to their priority in time. If a man seised in fee first grants [642] one term of years and then another term, the second termor cannot enter till the first term has ceased by effluxion of time, surrender or otherwise. So, if freehold interest are carved out of the fee by different conveyances, the estate of the second grantee cannot take effect in possession till the estate of the first has in some measure ceased. The effect of different conveyances is the same as if different successive estates were granted by the same conveyance, first in possession and then in remainder. Equity follows the law; and where the legal estate is outstanding, conveyances of the equity

able interest are construed and treated in a Court of Equity, in the same manner as conveyances of the legal estate are construed and treated at law. In *Beckett v. Cordley* (1 Bro. C. C. 353), which Lord Eldon notices in *Ex parte Cawthorne* (1 Glyn. & Jam. 240) and in *Martinez v. Cooper* (2 Russ. 214), Lord Thurlow twice decided that where the legal estate was outstanding in a first mortgagee of two subsequent equitable incumbrancers, he who is prior in time must be prior in equity. His words are: "The second equitable incumbrancer had the security he trusted to. He knew he had not the legal estate. He trusted to the honour of the borrower." In the present case no such question arises as is noticed in *Willoughby v. Willoughby* (1 T. R. 763-772), or as is noticed in *Evans v. Bicknell* (6 Ves. 174-183), where Lord Eldon alludes to what fell from Mr. J. Buller in *Goodtitle v. Morgan* (1 T. R. 762): for Harris, the third incumbrancer, has not got in the legal estate, nor has he any declaration of trust from the holder of it, nor has he possession of the mortgage deeds conveying the legal estate or of any other of the title-deeds. He gave notice of his [643] incumbrance to the first mortgagee. But, according to what the present Lord Chancellor decided in *Peacock v. Burt*, such notice is of no value. The fact is that, upon Harris's answer and before the Master as well as in the argument at the Bar, the case of *Harris* was attempted to be put upon the decisions in *Dearle v. Hall*, *Loveridge v. Cooper*, and *Foster v. Blackstone*, decided by Sir John Leach and afterwards by the House of Lords. But in each of those cases the subject of discussion was a chose in action. According to what is said by Lord Lyndhurst, in *Foster v. Cockerell* (3 Clark & Fin. 456), in moving to affirm the decree in *Foster v. Blackstone*, and according to what is said by the present Lord Chancellor in *Peacock v. Burt* (p. 607 in Mr. Coote's valuable Treatise on Mortgages), one principle established by *Dearle v. Hall* and *Loveridge v. Cooper* was that, in order to complete the transfer of a chose in action, notice to the legal holder of the fund is necessary. In the former of those cases Sir T. Plumer says: "The law of England has always been that personal property passes by delivery of possession: and it is possession which determines the apparent ownership" (3 Russ. 22), and, by way of preserving the analogy between personal chattels and possession and choses in action, he says: "Notice is necessary to perfect the title" (that is to a chose in action) "to give a complete right *in rem*, and not merely a right as against him who conveys his interest." (*Ibid.* 24.) But what is stated by the Lord Chancellor in *Hiern v. Mill* (13 Ves. 119) is unquestionably true: "There is a marked distinction between a real estate and a personal chattel. The latter is held by possession; a real estate by title." In *Loveridge v. Cooper* Sir T. Plumer says: [644] "It is of the utmost importance to the interests of mankind that plain and clear rules of property should be laid down, and, when laid down, that they should not be riddled away by nice and frivolous distinctions." (3 Russ. 35.) Broad distinctions must be preserved; and it is of the utmost importance that an equity of redemption of real estate should not be taken to be a mere equitable interest in the nature of a chose in action.

The case before me is a case of real estate, not of a chose in action. John Jones, the first incumbrancer on the equity of redemption, took his title by the conveyances of January 1826; and notice or possession was not necessary to complete his title. Harris took his title by a subsequent conveyance, and merely gave a notice which did not and could not affect Jones. No fraud whatever can be imputed to Jones. He made some inquiry and was misled. He was the innocent subject of fraud, and not the doer of it: and in my opinion the exception must be allowed.

Reports of CASES DECIDED in the HIGH COURT
OF CHANCERY by the Right Honorable Sir
LANCELOT SHADWELL, Vice-Chancellor of
England, containing cases in 1837, 1838 and 1839,
with a few in 1840. By NICHOLAS SIMONS, of
Lincoln's Inn, Esqr., Barrister-at-Law. Vol. IX.
1840.

[1] BRASIER v. HUDSON. Nov. 21, 22, 1837.

Vendor and Purchaser. Receipt Clause. Trustees. Power to appoint Trustees.

A. being entitled to £4500 secured on his father's estate, and payable after his father's death, borrowed £1500 of B. and assigned to him the £4500, with power to sell the same and to give an effectual discharge to the purchaser. A. afterwards borrowed money of other persons, and gave similar securities to them. The estate was subsequently sold under the father's will. Held, that the purchaser of the estate could not safely pay the whole £4500 to B. on his sole receipt; but that all the other persons who had charges on that sum must be made parties to the conveyance and give receipts for the portions of it to which they were respectively entitled.

A. being entitled to a sum of money, payable at a future time, assigned it to B. and C. (who were bankers and co-partners) to secure monies to be advanced by them or either of them, to A. C. survived B. Held, that as the security was made to B. and C. jointly, C. alone could give a sufficient discharge for the whole amount due on the security.

A lady being entitled to £2000 charged on her father's estates and payable after the decease of her surviving parent, it was agreed by her marriage articles that, in the settlement to be made in pursuance thereof, there should be contained a power enabling her father, in his lifetime, or his executors, within six months after the £2000 should become payable, to invest that sum in the usual securities, *in the names of trustees to be for that purpose appointed*, and for the trustees or the survivor of them, from time to time, with the consent of the husband and wife or the survivor, or of their own proper authority, as the case should happen, to change the securities, and to pay the interest to the husband for life, to the wife for life for her separate use, and to pay the principal to their children, and, in default of children, to the wife's next of kin or personal representatives. The husband died leaving his wife and four infant children surviving. No trustees of the £2000 having been appointed, the wife, after her husband's death, appointed two persons to be such trustees. Held, that the appointment ought to have been made by the husband and wife jointly, and that the appointment made by the wife was invalid.

The late H. Z. Jervis having devised his estates to the Plaintiffs in trust to sell the Plaintiffs agreed to sell part of the estates to the Defendant; and the bill wa

filed to compel a specific performance of the contract. At the hearing of the cause, a specific performance was decreed, and it was referred to the Master to settle the conveyance. The Master settled the conveyance accordingly, and made the personal representatives of certain persons named Francis Rufford, Thomas Biggs, William Walker and Henry Jervis, the son of H. Z. Jervis and Sarah, his wife, parties to it. On the hearing of exceptions taken by the Plaintiffs to the Master's report the question was whether the personal representatives of any of those persons [2] were necessary parties. That question arose under the following deeds.

By indentures of lease and release, dated the 26th and 27th of April 1803, part of the estate agreed to be sold was conveyed to trustees for a term of 1000 years, in trust, within six months after the decease of the survivor of H. Z. Jervis and Sarah, his wife, to raise, by sale or mortgage of the term, the sum of £4500, with interest from the day of the decease of the survivor of H. Z. Jervis and Sarah, his wife, and to pay the same to Henry Jervis, his executors, &c., and, subject thereto, to H. Z. Jervis in fee.

By an indenture of the 19th of April 1806, Henry Jervis assigned the £4500 and interest to Thomas Gent, by way of mortgage, for securing the repayment of £1500 with interest: and the trustees assigned the term of 1000 years to H. Pipe, in trust to raise the £4500 by sale or mortgage, and, after retaining the expenses of the trust, to pay Gent the £1500 and interest and the expenses incurred by him in the receipt and recovery thereof, and to pay the overplus to Henry Jervis: and Gent and Pipe, or either of them, their or either of their executors, administrators or assigns, were empowered, in case default should be made in payment of the £1500, *to sell the £4500, and the term*; and it was declared that the receipts of them or either of them, their or either of their executors, administrators or assigns, should be good receipts or discharges *to the purchaser*; and that in case Gent, his executors, &c., should receive the £4500 and interest, or any part thereof, by virtue of the assignment, he and they should stand possessed of the monies to arise from the *sale or sales* thereof, upon trust to retain and [3] pay to himself and Pipe the expenses of the *sale*, and, in the next place, to retain the £1500 and interest, and to pay over the residue of the trust monies (if any) to Henry Jervis, his executors, &c. The deed also contained a power of attorney from Henry Jervis to Gent, enabling Gent to sue for and receive the £4500, and to give receipts, releases, &c., for the same.

By an indenture of the 11th of June 1808, made between Henry Jervis of the one part, and Francis Rufford and Thomas Biggs, bankers and co-partners, of the other part, Henry Jervis assigned the £4500 to Rufford and Biggs, with full power to them or the survivor of them, his executors, administrators and assigns, in the name or names and as the attorney or attorneys of Henry Jervis, his executors and administrators, to receive and enforce payment of the £4500, and *to give acquittances or discharges for the same*, without any obligation on the part of the persons paying the same to see to the application or be answerable for the misapplication or non-application of the monies paid by them respectively: and it was declared that Rufford and Biggs, their executors, &c., should stand possessed of the £4500, upon trust, after reimbursing Pipe all the expenses which he should be put to by reason of the trusts of the deed of April 1806, and after paying Gent the £1500 and interest, to pay to W. Walker a bond debt of £500 due to him from H. Jervis, and then to retain their costs of executing the trust thereby reposed in them, and in the next place, to retain to themselves, *or the survivor of them*, his executors or administrators, all sums of money not exceeding £1500, which, at the time of receiving the thereby assigned monies, should be due to them *or the survivor of them*, or the executors, administrators or assigns of such survivor, by [4] reason of advances made to Henry Jervis, and upon trust to pay the overplus to Henry Jervis, his executors, &c.: and Rufford and Biggs, or the survivor of them, his executors or administrators, were empowered, without any consent or concurrence on the part of Henry Jervis, his executors, &c., to raise, by sale or mortgage of the £4500, or any part thereof, such sums of money as, from time to time, should be due to Walker, his executors, &c., and also to Rufford and Biggs, or the survivor of them, or the executors, &c., of such survivor, from Henry Jervis, his heirs, executors, &c.: and it was declared that the persons who should become the *purchasers*, or advance any sums of money upon the security of the £4500, and pay

their money to Rufford and Biggs or the survivor of them, or the executors, &c., of such survivor, should not be obliged to see to the application of such money, or be answerable or accountable for the misapplication or non-application thereof, or be required to see that any previous notice of sale or mortgage had been given to Henry Jervis, his executors, &c., or be obliged to inquire whether such sale was necessary for the purposes thereinbefore expressed; and that all receipts for the purchase or mortgage money which should be given by Rufford and Biggs, or the survivor of them, his executors, &c., should be good and effectual discharges for the sums therein acknowledged to be received, and that every sale which should be entered into, and assignment which should be executed by Rufford and Biggs, or the survivor of them, his executors, administrators or assigns, should be binding and conclusive on Henry Jervis, his executors, administrators and assigns.

The £1500 due to Gent was paid by Richard Croydon, and thereupon, by an indenture of the 27th of [5] April 1809, made between Gent of the first part, Pipe of the second part, Henry Jervis of the third part, Croydon of the fourth part, and John Hudson of the fifth part, Gent and Henry Jervis assigned the £4500 to Croydon; and Henry Jervis authorized and empowered Croydon, his executors, administrators and assigns, either in his or their own name or names, or in the name or names and as the attorney or attorneys of H. Jervis, his executors, or administrators, to recover and receive the £4500 and interest, and to give receipts, acquittances and discharges for the same to any person or persons whomsoever: and Pipe assigned the term of 1000 years to Hudson, in trust to raise the £4500 by sale or mortgage, and, after retaining the expenses of the trust, to pay the £1500 and interest to Croydon, and to pay the overplus (if any) to Henry Jervis: and Croydon and Hudson, or either of them, their or either of their executors, administrators or assigns, were empowered to sell the £4500 and the term; and it was declared that the receipts of them, or either of them, their or either of their executors, administrators or assigns, should be good discharges to the purchasers thereof; and that if Croydon, his executors, &c., should receive the £4500 under the assignment thereby made of that sum, then he and they should stand possessed of the monies to arise from the sale, upon trust to retain the expenses of the sale, and also the £1500 and interest, and to pay the overplus (if any) to Henry Jervis, his executors, &c.: and it was declared that the person or persons who should become the purchasers, or advance any money upon the security of the £4500 and premises thereby assigned, and pay their purchase-money or the money advanced by them to Croydon and Hudson or the survivor of them, or the executors, &c., of such survivor, should not be [6] obliged to see to the application of the same money, or be answerable or accountable for the misapplication or non-application thereof, or be obliged to inquire whether the sale was necessary for the purposes thereinbefore expressed, and that the receipts which should be given for such purchase or mortgage money by Croydon and Hudson, or the survivor of them, his executors, &c., should be good and sufficient discharges for the sum or sums thereby acknowledged to be received, and that every such sale or assignment which should be made by Croydon and Hudson, or the survivor of them, his executors, &c., should be binding and conclusive on Henry Jervis, his executors, &c.(1)

H. Z. Jervis survived his wife, and died in 1821.

By an indenture of the 9th of March 1824, made between the Plaintiffs and Henry Jervis and certain other persons, it was agreed, amongst other things, that a suit which had been instituted by Henry Jervis against his late father should be compromised and put an end to, that the father's estates should be sold pursuant to his will, and that Henry Jervis should, if required, concur in the sale and conveyances of the estates, but that the concurrence of him, his heirs, executors or administrators, should not be deemed necessary for perfecting the title of the purchaser, the same being intended for the further satisfaction and content only of the purchaser.

Henry Jervis afterwards died. Rufford, Biggs and Walker were dead also. Biggs survived Rufford.

[7] The £4500 not having been raised, and the sums secured by the indentures of June 1808 and April 1809 being still unpaid, the Master made not only Croydon and

(1) All the above deeds were correctly copied from the papers in the cause.

Hudson, but also, as has been before mentioned, the personal representatives of Rufford, Biggs, Walker and Henry Jervis, parties to the draft of the release and assignment of the estate agreed to be sold to the Defendant. The Plaintiffs excepted to the report for the following reasons:—

First. Because the representatives of Rufford and Biggs were made parties to the draft for the purpose of discharging part of the hereditaments comprised therein, from the £4500, or from such part of that sum as they were interested in under the indenture of the 11th of June 1808; whereas the representatives of Rufford and Biggs, or of either of them, were not necessary parties to the draft, because, under the indenture of the 27th of April 1809, Croydon, who was made a party to the draft, was entitled to receive the whole of the £4500, and was empowered to give a good and sufficient receipt and discharge for the same, and to release and discharge therefrom the hereditaments charged therewith; and, moreover, he was the only necessary directing party, to the person in whom the term of 1000 years was vested, to assign the same to the Defendant, or as he should direct.

Second. Because the representatives of Walker were made parties to the draft, for the purpose of discharging part of the hereditaments from the bond debt of £500, further secured on the £4500 by the indenture of the 11th of June 1808; whereas they were not necessary parties, as well on the grounds stated in the first reason, as because Walker was no party to the indenture of the [8] 11th of June 1808, nor was any estate or interest in the hereditaments vested in him, nor was any part of the £4500 made payable to him, his executors, administrators or assigns thereby.

Third. Because the administrator of Henry Jervis was made a party to the draft for the purpose of discharging part of the hereditaments from the residue of the £4500 after payment of the charges to which the same had been subjected by Henry Jervis; whereas he was not a necessary party, as well on the grounds stated in the first reason as because, by the indenture of the 9th of March 1824, it was provided that the concurrence of Henry Jervis, his heirs, executors or administrators, in any sale, conveyance or assignment to be made as in the same indenture mentioned, should not, in any wise, be deemed necessary for the perfecting the title of the purchaser of the premises therein comprised.

Mr. Knight Bruce and Mr. Coote, for the Plaintiffs, in support of the exceptions. By the draft of the conveyance as now settled by the Master, the £4500 is not made payable to Croydon alone, but is parcelled out amongst the representatives of the several *puisne* incumbrancers. Croydon is the first incumbrancer on the sum in question: and we contend that a complete conveyance can be made to the purchaser, if the whole sum is paid to Croydon and he gives a receipt for it. The language of the power of attorney in Croydon's deed is much more extensive than that which is usually found in deeds of the like nature. Croydon is appointed the attorney not only of H. Jervis, but also of his executors and administrators, and is authorized, either in his own name or in the name or names of H. Jervis, his executors or [9] administrators, to recover and receive the £4500, and to give receipts, acquittances and discharges for the same to all or any persons or person whomsoever: and in a subsequent part of the same deed, the receipt or receipts of Croydon and Hudson or either of them are declared to be good discharges to the purchaser. The word "purchaser" means any person who should pay the money. Croydon claims under Gent, who had the same powers as Croydon has. The Court has no jurisdiction in this suit to compel the representatives of the subsequent incumbrancers to join in the conveyance; and if they are necessary parties, a new bill must be filed against them.

Biggs survived Rufford, and, at all events, the representatives of the latter are not necessary parties to the conveyance. Their security was made to them as joint-tenants, not as tenants in common, and the power of giving receipts was given to them or the survivor of them.

Then with respect to Walker's representatives: there can be no ground whatever for requiring their concurrence. No estate or interest, either in the £4500 or in the term of 1000 years, was limited to Walker; the payment of his debt was provided for by a deed to which he was not a party; he, therefore, cannot claim the benefit of that deed.

At all events the representatives of Henry Jervis are not necessary parties, as he has declared that the receipts of Croydon and of Rufford and Biggs, or the survivor of them, should be sufficient discharges for himself, his executors and administrators.

[10] Mr. Jacob and Mr. T. H. Hall appeared for the Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Supposing that the power of attorney is to be considered in a Court of Equity as remaining in force, notwithstanding the death of Henry Jervis, the party who gave that power, the question is whether, on account of the difference in the language used in the two parts of the deed, the party must not be taken to have intended that there should be an inherent difference between receipts given under the power of attorney, and those given under what is usually called the receipt clause. I do not think that the Court has ever decided that a receipt given under the former is to be taken as equivalent to a receipt given under the latter.

By the deeds in this case, the receipts of Croydon and the other incumbrancers on the £4500 are made sufficient discharges in the event only of the principal and interest due to them respectively, being raised by sale or mortgage either of the £4500 or of the term of 1000 years. Consequently the receipt clauses in those deeds are not applicable to the present case, where the money for which receipts are to be given has been raised, not by sale or mortgage of either the £4500 or the term, but by a sale of the inheritance of the estate. I think, therefore, that Croydon cannot give a discharge for the whole £4500; and that all the other persons whom the Master has made parties, except Rufford's representatives, ought to remain so.

Although the deed executed to Rufford and Biggs was to secure sums advanced by them *or either of them*, yet, as the security was made to them jointly, the representative of the survivor is capable of giving a discharge [11] for the whole, as he is a trustee for the one who died first; and, consequently, Rufford's representatives are not necessary parties to the conveyance.

Ann Emma Jervis, the only younger child of H. Z. Jervis and Sarah, his wife, being entitled to £2000, charged upon the estate agreed to be sold and payable after the decease of her surviving parent, by marriage articles, dated the 24th of July 1809, and made between Henry Jones Williames of the first part, H. Z. Jervis of the second part, and Ann Emma Jervis of the third part, after reciting that a marriage was intended to be solemnized between H. J. Williames and Ann Emma Jervis, H. J. Williames covenanted with H. Z. Jervis to settle certain estates in Montgomeryshire to the uses therein expressed; and it was agreed that, in the settlement to be made in pursuance of the articles, there should be contained a power enabling H. Z. Jervis, in his lifetime, or his executors and administrators, within six months after the £2000 should become due and payable, to invest that sum in the usual securities, in the names of *trustees to be for that purpose appointed*, and for the trustees or the survivor of them from time to time, with the consent of H. J. Williames and Ann [12] Emma, his intended wife, or the survivor of them, or of their own proper authority, as the case should happen, to call in the principal, and place the same out again on such new or other securities as they or he should think proper, and pay the income thereof to H. J. Williames during his life, and, after his decease, to permit Ann Emma Jervis to receive the income during her life, and her receipt alone, notwithstanding her future coverture and whether covert or sole, to be, from time to time, a sufficient discharge to the trustees, and the same not to be liable to the debts, control or engagements of any future husband; and, after the decease of the survivor of H. J. Williames and Ann Emma Jervis, to pay the principal to such one or more of the children of the intended marriage in such shares, manner and form, or to such other uses and purposes as Ann Emma Jervis, notwithstanding her coverture, should by deed or will appoint, and, in default of such appointment, upon trust to pay the £2000, in equal proportions, to all the children of the marriage at their respective ages of 21 years or days of marriage, which should first happen; and, in case there should be no such children, or, being such, all of them should die before their portions became payable and no appointment should be made under the power given to Ann Emma Jervis, then upon trust to pay the £2000 and the interest, dividends and produce thereof, to her next of kin or personal representatives.

The marriage took effect, but no settlement was executed in pursuance of the articles.

Mr. Williams died in 1819, leaving his wife and four children by her him surviving. In 1823 Mrs. Williams married William Butler; and, no trustees of the £2000 having been appointed, an indenture, dated the 31st of [13] July 1835 (at which time two of Mrs. Butler's children by her former husband were infants), was made between the Plaintiffs, who were the executors and trustees of the will of H. Z. Jervis, of the first part, Mrs. Butler of the second part, and J. Miller and T. Beeston of the third part; and, thereby, the Plaintiffs (as the executors of H. Z. Jervis) and Mrs. Butler, in exercise of the power or powers to them, or any or either of them for that purpose given by the articles, (1) and of all and every or any other powers or power, &c., appointed Miller and Beeston to be the trustees in whose names the £2000 should be invested upon the trusts thereof declared by the articles. By a deed-poll, dated the 18th of December 1836, and under the hands and seals of the Plaintiffs and Mr. and Mrs. Butler, after reciting that it had been objected that the indenture of July 1835 was not an effectual appointment of Miller and Beeston to be trustees of the £2000, and that Mr. Butler ought to have been a party thereto, and that he was desirous of removing such objection: the Plaintiffs and Mr. and Mrs. Butler, in exercise of all powers enabling them in that behalf, appointed Miller and Beeston, their executors, administrators and assigns, to be the trustees in whose names the £2000 should be invested, and directed that that sum should be paid to them, their executors, administrators and assigns, and be invested by them in their names, in manner and upon the trusts declared by the articles thereof.

The Defendant objected to the draft of the conveyance as settled by the Master, because the £2000 was charged upon the estate therein comprised, and that sum was by the articles made subject to [14] certain trusts, and some person or persons competent to receive the same and to discharge the premises therefrom ought to have been made a party or parties to the conveyance: whereas no such person or persons was or were a party or parties thereto.

Mr. Jacob and Mr. T. H. Hall, for the Defendant, in support of the exception. The question is, who had the right to nominate the trustees of the £2000? The marriage articles were a contract between the father and daughter and the intended husband. They would be the persons to nominate the trustees, if they were all living; but the father and Williams are dead. If trustees are to be appointed and all the parties interested in the fund are *sui juris*, they are the persons to appoint the trustees: but here the parties interested in the fund are Mrs. Butler and her children by her first husband, some of whom are infants. Mr. Butler joined in the appointment; but he had no interest in the fund. The consequence is that the appointment that has been made is invalid.

Mr. Knight Bruce and Mr. Coote, for the Plaintiffs. The power to appoint new trustees is usually reserved to the tenant for life of the property. Mrs. Butler is the surviving tenant for life of the fund in question; and, as it is settled to her separate use, she is a *feme sole* with respect to it. Therefore the appointment of the trustees has been made by the proper person.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question before me is a mere question of conveyance. Of course, a title cannot be made unless the £2000 is paid off; but the only question is, what hand shall appear, on the conveyance, as the hand to receive [15] the money; and, therefore, the question is a mere question of conveyance, as I understand it.

Then the next question is whether it is competent to the party who alone is now alive to nominate trustees under the articles? Now I am not called upon to decide the question whether (if it is said, upon articles, that trustees are to be appointed, and that is all) who are the persons to appoint those trustees; because it rather appears to me that these articles themselves do furnish an answer to the question, and for this reason, namely, because they provide that in the settlement there shall be contained a power enabling the father or his executors, within a certain time, to invest the sum of £2000 at interest in Government or real securities, in the names of trustees to be

(1) No such power was given, in express terms, by the articles.

for that purpose appointed; and then the articles proceed thus: "And for the trustees or the survivor of them, from time to time, with the consent and approbation of the said H. J. Williames and Ann Emma, his intended wife, or the survivor of them, or of his or their own proper authority, as the case shall happen, to place the same out again on such new or other stocks or funds, or on Government or real securities, as they or he shall think proper." Here then the articles point to this, namely, that there is to be an operation upon the trust money, after the payment, with the consent of the husband and wife or the survivor, or by the trustees or the survivor; and there is no allusion to anything to be done by the husband and wife or the survivor till after the time at which the money has been invested.

I am not bound to give any opinion as to whether the concurrence of the father was necessary. I do not think it was; but I am not bound to give my opinion on that [16] question. I cannot, however, but think that, according to the true construction of these articles, the trustees, in the first instance, ought to have been appointed by the husband and wife jointly: and I am not at liberty to say that it was the intention of the parties that, if the trustees were not nominated by the husband and wife jointly, the nomination by either of them should be good: and, therefore, my opinion is that what has taken place has not cured the difficulty; but it may be remedied by an order in a short cause.

Allow the exception; and refer it back to the Master to review his report.

[16] BAINBRIDGE v. BAINBRIDGE. Nov. 24, 1837.

[S. C. 7 L. J. Ch. 4; 2 Jur. 63. Distinguished, *Martin v. Hobson*, 1873, L. R. 8 Ch. 401.]

Will. Construction.

A testatrix being entitled to her son's residuary estate (the amount of which was unascertained at her death) bequeathed as follows:—"If any debts due me at my decease, I request my executors will collect and pay into the hands of my children." Held, that the son's residue passed by the bequest.

Mrs. Bolt, being the residuary legatee of her deceased son, made her will containing the following bequest:—

"If any debts due me at my decease, I request my executors will collect and pay into the hands of my children." At Mrs. Bolt's death the amount of her late son's residuary estate was unascertained, and no part of it had been paid over to her. The question at the hearing of the cause was whether the son's residuary estate passed by the above-mentioned bequest.

Mr. Knight Bruce and Mr. L. Wigram, for the Plaintiffs.

Mr. Wray and Mr. Turner, for the Defendants.

[17] THE VICE-CHANCELLOR [Sir L. Shadwell]. If the son's executor had become bankrupt whilst the residue remained in his hands, it would have been a debt in equity, and would have been provable by the mother as a debt due to her from his estate. I am of opinion, therefore, that the son's residue did pass, by the mother's will, as a debt due to her.

[17] IRVING v. THOMPSON. July 25, 31, 1839.

Discovery. Pleading. Parties.

If a person who is not a party to an action is made a party to a bill of discovery in aid of the defence to the action, he may demur, notwithstanding the bill charges that he is interested in the subject of the action.

The cases of *The Bishop of London v. Fytche*, 1 Bro. C. C. 96, and *Fenton v. Hughes*, 7 Ves. 287, observed upon, and the reports of those cases corrected.

The Plaintiff was the chairman of the Alliance Marine Insurance Company; and, as such, was empowered to sue on behalf of the company. The Defendants were H. Thompson and C. Kruger. The bill alleged that in August 1837 Thompson effected a policy of insurance with the company, on a foreign ship called the "Gustav," and her cargo from Dantzic to Hull; that the ship was lost on her voyage, by the perils of the sea; that the Defendants *claimed to be solely and exclusively interested* in all the benefit to be derived from the policy, *and had produced certain papers to the company* in support of a claim made by the said Defendant,⁽¹⁾ as after mentioned, for the full amount insured by the policy, and by one of such papers it was alleged that the goods mentioned in the policy and to the amount therein mentioned, were on board the ship previously to and at the time when she was lost; that the company had, recently and long since the policy was effected, discovered, and the fact was that the ship was unseaworthy when she left Dantzic, and that the goods mentioned in the policy were never on board her; or, if they had been put on board, that they were unshipped, [18] and were not on board when she was lost; that the shipment of goods mentioned in the policy was a fraudulent shipment; that, in Trinity term then last, Thompson commenced an action in the Court of Exchequer against the Plaintiff, for the purpose of recovering the sum insured from the company, and had averred in his declaration the interest in the ship and cargo to be in himself and Kruger *or one of them*. The bill then contained various charges which, if admitted, would have shewn that the vessel was unseaworthy, and that the goods were not on board when she was lost; and it prayed for a discovery of the matters alleged, and a commission to examine witnesses abroad in aid of the defence to the action, and for an injunction to restrain the action. Kruger put in a general demurrer to the bill.

Mr. Knight Bruce and Mr. Willcock, in support of the demurrer, said that the bill was filed, not to have the policy delivered up, which was relief, but merely for discovery in aid of the defence to the action; that no person who was not a party to the record at law ought to be made a party to such a bill, and, therefore, Kruger had been improperly made a party to the bill in this case; that, consistently with the allegations in the bill, Kruger might have no interest in either the ship or cargo, but might be a mere witness. *Fenton v. Hughes* (7 Ves. 287), *Glyn v. Soares* (3 Myl. & Keen, 450; see 467, 469, 471), *Tooth v. The Dean and Chapter of Canterbury* (ante, vol. 3, p. 49).

Mr. G. Richards and Mr. Stinton, in support of the bill, said that it was sufficiently averred in the bill that Kruger was interested in the subject-matter of the [19] action: that though, in general cases, where discovery was sought in aid of a defence at law, it was not allowable to make any person who was not a party to the record at law a party to the record in equity, yet bills for discovery in aid of the defence to actions on policies of insurance were excepted from the general rule, and for the last 15 years it had been the practice in the Court of Exchequer to make all the persons who were interested under the policy on which an action was brought parties to the bill of discovery, whether they were parties to the record at law or not; that, formerly, declarations in actions on policies of insurance contained several counts, one averring the interest to be in A., another averring it to be in B., and so on, but since the new rules for regulating pleadings at law had been made, declarations in actions on policies of insurance were not allowed to contain more than one count on the same policy, and ever since the practice had been to aver that A., B. and C., some or one of them were or was interested in the vessel insured; that when the bill in this case averred that Thompson and Kruger, or one of them, claimed to be interested in the ship and cargo, it adopted the language of the declaration, and could not, consistently with truth, have averred otherwise. *Bell v. Ansley* (16 East, 141), *Glyn v. Soares* (1 Youn. & Coll. 644), *Janson v. Solarte* (2 Youn. & Coll. 127), *Kensington v. White* (3 Price, 164).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I should like to take a little time before I decide this case; for I wish to consult the registrar's book as to a case that I have in my mind: and I should feel a delicacy in deciding anything that might militate against the [20] decision of the Lord Chief Baron in *Glyn v. Soares*, more

(1) So in brief.

especially as I understand that an appeal from his decision in that case is now pending in the House of Lords.

July 31. THE VICE-CHANCELLOR. The bill is filed by the chairman of the Alliance Marine Insurance Company, who, by the Act of Parliament by which the company was established, is authorized to sue on behalf of the company; and it represents that the Defendant Thompson, on the 26th of August 1837, caused a policy to be effected with the Alliance Company on the ship "Gustav" (which appears to be a foreign vessel), and on certain goods on board it. The bill then states that Thompson and a person of the name of Kruger claimed to be solely and exclusively interested in all the benefit to be derived from the policy of insurance, and that Thompson and Kruger had produced certain papers to the Alliance Company in support of the claim "made by the said Defendant as hereinafter mentioned:" that, I suppose, means Thompson. And then it states that the company have, recently and long since the policy was effected, discovered, as the fact is, that the goods in question were either never shipped, or, if they were shipped, they were unshipped before the vessel sailed: and then it states that Thompson, in Trinity term last, commenced an action on the plea side of the Court of Exchequer against the Plaintiff, for the purpose of recovering from the Alliance Company a sum of £680 upon the policy, "and has delivered a declaration in such action, and in such declaration has averred the interest in the ship and in the goods comprised in the policy to be in himself, the said Defendant, W. Thompson, and Kruger, or one of them:" and then the bill avers that the ship was lost by the perils and dangers of the sea; and then it states that the [21] Plaintiff, on behalf of the company, had requested Thompson to discontinue the action: and then a variety of circumstances are charged to shew that there has been a fraud committed upon the Alliance Company. Nothing particular turns upon that. Then it charges possession of books and papers, and prays a discovery and injunction: and to this bill a general demurrer has been put in on the part of Kruger.

It was argued before me that this demurrer ought to be overruled, and mainly upon the authority of a case that recently came before the Lord Chief Baron of the Court of Exchequer, the case of *Glyn v. Soares*. The circumstances of that case are extremely long and extremely complicated, and I should be very unwilling to be thought, for the purpose of deciding the case now before me, to give any opinion upon the judgment which was pronounced in that case, especially as his Lordship's decision is, as I understand, now depending before the House of Lords upon appeal. The facts of the case of *Glyn v. Soares* are stated both in Mylne & Keen, and also in the Reports of Younge & Collyer in the Court of Exchequer; and I should mention that it occurred to me, in reading the case as it is reported in Mylne & Keen, that in page 453 there is a passage so printed as certainly to create a difficulty to anyone who reads it for the first time. It is this: In page 453 it is stated, "that in filing this bill of discovery the Plaintiffs, the bankers (that is Glyn & Co.), acted merely as they were advised that as the agents of the Plaintiff, Edward Richardson, they were bound to do, and by the directions of Edward Richardson, who, as the party beneficially interested, had the sole management of the action in aid of the defence to which the discovery was sought:" whereas what is meant to be expressed, is that he had [22] the sole management of the defence to the action; because he was the party who was sued at law. I only mention it because it created a very great difficulty to me when I was reading it over, and it is evidently a mistake arising from the omission of some words. However, the case of *Glyn v. Soares* depended on a great variety of complicated circumstances, and it is not my intention to give any opinion upon the judgment. But I cannot help observing upon some parts of it, which appear to me to have proceeded on a mere misapprehension of the circumstances of the cases to which the learned Lord Chief Baron alludes.

His Lordship, in pages 683 and 684, speaks very largely about the case of *Fenton v. Hughes*; and, after stating the case, says: "Lord Eldon took time to consider of it. What is his judgment? He says that he has looked with great anxiety into the bill to see if he could discover any sort of interest that Bate had to make him anything but a witness; and he goes through the topics to shew that Bate was clearly a witness at law for the party who filed the bill; that if he could not be a witness on the other side, by reason of any interest yet undiscovered, that was for the advantage of the

Plaintiff in equity ; and he comes to the conclusion that there is not such a charge of interest in Bate as justified him in retaining the bill against him." Then Lord Abinger goes on to say this : " Now if the bill had stated that the Plaintiff in the action and Bate had agreed to divide the profits, or if it had stated that Bate had some such interest in the suit as identified him in interest with the Plaintiff in the action, though not himself a Plaintiff on the record, I should have thought it probable from Lord Eldon's judgment that he would not have allowed the demurrer." What then [23] were the facts of the case in *Fenton v. Hughes*? I myself had occasion at a certain time to send for the original brief in that cause. Mr. Bate was the person who demurred ; and in this bill of *Fenton v. Hughes*, which Lord Eldon read over and yet was unable to discover anything that shewed that Bate had any interest other than that as a witness, it was charged that Bate was interested in the success of the action and was to be entitled to all or some part of the money to be recovered thereby, and that he was or would be liable to pay all or some part of the costs in case Hughes should not recover, or that there had been some agreement, bargain or understanding between Bate and Hughes and the attorney who carried on the action respecting the costs of such action which was carried on at the risk and expense of Bate. So then there were actually those very allegations in the bill which Lord Abinger supposes that, if they had been in it, Lord Eldon would have come to a different conclusion from that which he adopted. Whereas Lord Eldon, seeing all those very allegations in the bill, did deliberately come to the conclusion which he did adopt.

Then Lord Abinger, in another part of his judgment, relies upon the case of *The Bishop of London v. Fytche*, and he says, in p. 685 : " There is a case, however, which appears to me to decide the very question, that is, the case of *The Bishop of London v. Fytche and Eyre*" (1 Bro. C. C. 96). Now that was nothing more than this, that Mr. Fytche, being the patron of a living, presented a clerk, and the Bishop of London refused to institute him, on the ground of a simoniacal transaction, upon which Mr. Fytche brought a *quare impedit* against the bishop, and then the bishop filed a bill of discovery. [24] Now Lord Abinger assumes that the bill of discovery was filed both against Fytche, the patron, and Eyre, the clerk ; and he says : " The bishop filed a bill of discovery both against Fytche and Eyre, that is to say, against both the owner of the advowson and the clerk, suggesting that a bond had been given to place Eyre under an obligation of resigning at the request of the patron ; and he required a discovery of that fact." Then his Lordship speaks about the importance of the case and the way it was argued, and so on ; and he says, in p. 687 : " From this it seems clear that the clerk was no more a party to the record from his name being inserted in the declaration, than any individual is a party whose name is found in an allegation of special damages by reason of the loss of his custom and trade. Therefore the case of *The Bishop of London v. Fytche* is a direct decision that, where a party is interested in the subject-matter of the suit, a bill of discovery may be sustained against him, though not a party to the record at law, as well as against an individual who is a party on that record." But what was the fact? Why the fact was that the bill was filed against Mr. Fytche alone ; and, on the 13th of June 1781, Lord Thurlow overruled the demurrer of Fytche, the sole Defendant, who was the patron ; and, consequently, all the force and authority which seems to be derived from that case is derived from what is evidently a mistake in the printed case in Brown ; and which is a mistake of a very extraordinary kind ; because, in the title of the case, it would seem as if Fytche were the only Defendant ; but then the reporter happens, in a subsequent paragraph, to say *the Defendants*, (1) and from thence it [25] was assumed that the clerk was the party who had demurred, and that Lord Thurlow overruled the demurrer of the clerk ; and upon that which is a mere vain hypothesis, depending upon an assumption of that which turns out not to be a fact, Lord Abinger has mainly rested his decision in *Glyn v. Soares*.

The way in which, as I best recollect, I happened to become acquainted with the real facts of the case of *Fenton v. Hughes* was this : In the year 1813 a bill of discovery was filed by Powell against Yeatts and another person named Wellington,

(1) At the commencement of the report it is stated that the bill was filed by the bishop against the Defendant, the patron, *and the clerk presented by him*.

who was not a party to the action that had been brought; but there were certain charges in the bill, tending to shew that Wellington had an interest in the subject of the action; and he demurred. The demurrer came on for argument, on the 2d of August 1813, before Sir Thomas Plumer, V.-C. (who at that time may be supposed to have been deeply imbued with the practice of the Court of Exchequer), and, according to my note of what he said, he was very much affected by the charges that were contained in the bill in *Powell v. Yeatts*; and he said (I have my own note before me): "I feel myself tied down by admissions in the demurrer; it is not a case of a naked witness;" and the demurrer was overruled. But, in the meantime, the parties who were in support of the demurrer procured the original brief in *Fenton v. Hughes*, and, according to my note, upon producing the brief in that cause, on the 14th of the same month of August, the demurrer was allowed. I have had the registrar's notebook before the Vice-Chancellor searched, and I find that it exactly tallies with my own note, namely, that on the 2d of August the demurrer was overruled, and on the 14th of August the demurrer was allowed, and allowed notwithstanding the feel-[26]-ing which Sir T. Plumer had with respect to the charges in *Powell v. Yeatts*; because when the original brief in *Fenton v. Hughes* was produced, Sir Thomas Plumer was convinced that charges as strong as those which were contained in the bill in *Fenton v. Hughes* could not have the effect of making a party who was not a party to the record at law (whatever might be the charges as to his interest in the result of the action), to be considered, in this Court, as anything more than a mere witness.

Now I have read over again, for the second time since the year 1813, a copy of the original bill in *Powell v. Yeatts*; and there is a long transaction stated, with respect to a dealing in wool, between Messrs. Powell, in Bristol, and two gentlemen who were partners, Osborn Yeatts and Samuel Yeatts. Then there was a sale; and then, to a certain extent, the sale was rescinded, and money was paid for what they call a rue (1) bargain, and, ultimately, upon different dealings which were had with the wool, an action was brought, by Osborn Yeatts, for several sums of money to recover (I think it was stated) what he had paid to Messrs. Powell; and then the bill stated this: "That it has been agreed, between Osborn Yeatts and James Wellington, that James Wellington shall have some share of or benefit from the damages to be recovered in such action." Then it charged that there then or lately were, in the possession or power of Osborn Yeatts, William Ebsworth and James Wellington, divers documents, &c., the production of which would verify the truth of what the Plaintiff stated. Now it was upon [27] the hearing of what was so stated in this bill, as to Wellington, that Sir T. Plumer said he felt himself tied down by the admissions in the demurrer, and that it was not a case of a naked witness; but, nevertheless, when the still stronger allegations were produced which were found in the case of *Fenton v. Hughes*, Sir T. Plumer thought that if one of the Defendants on the record in equity was not a party to the action, all the allegations about his interest in the action were perfectly immaterial; and so it was that he ultimately did allow the demurrer.

I see nothing in this case which tends to shew that Kruger is anything else than a party who may have a benefit from the action, but he is not a party to the record at law: and I cannot but think, notwithstanding the doubts and difficulties which seem to have weighed in the mind of the Lord Chief Baron in *Glyn v. Soares*, that this is a perfectly plain case; that this is a case which is bound by the decision in *Fenton v. Hughes*, followed up as it has been by the decision in *Powell v. Yeatts*, and that, therefore, this demurrer must be allowed.

I should mention, with respect to the case of *Few v. Guppy* (which is referred to by the Lord Chief Baron, and is to be found in Mr. Hare's excellent work on Discovery (p. 124), that, in the first instance, the motion was made (as I understand the report) in that cause only in which a bill of discovery had been filed, and the motion was made for the production of documents referred to in the schedule. I was of opinion that, as the motion was in reality against the *cestui que trusts*, the production

(1) A rue bargain is one which one of the parties is at liberty to rescind, on paying a certain sum to the other.

could not be directed unless they were parties. [28] There was, to a certain extent, an appeal from that decision to Lord Lyndhurst, C.; but not strictly an appeal, because the motion before me had been made in the suit for discovery only; but the parties made their motion before the Lord Chancellor, both in the original cause out of which the bill of discovery grew, and also in the suit which was merely for discovery; and upon that motion the documents were ordered to be produced; because the motion being made in that manner, it then did appear that those persons who were the *cestui que trusts*, and who were the Plaintiffs in the original cause, were in effect and virtually the Plaintiffs in the action; for the action, as I understand the report, had been brought by a person who was the trustee, at the suggestion of the *cestui que trusts*, and by virtue of an order made in the original cause; and so the documents were ordered to be produced. It appears to me, therefore, that what is attributed by Mr. Hare to Lord Lyndhurst in his judgment on the case was really extra-judicial; because, if the matter was so circumstanced before him that, at all events, the papers must be produced, it was not necessary to go into a statement of what his Lordship's opinion was or might have been if the motion had been made before him only in the cause in which there was a bill of discovery.

However, it does appear to me that, notwithstanding what has been stated so confidently with respect to the practice of the Court of Exchequer, the decisions to which I have referred actually bind this case.

I should notice also that, although it has been stated that it has been constantly the practice for the last 15 years in the Court of the Exchequer, to file bills for discovery merely against parties who are not the parties to [29] the record at law, but who are averred to have an interest in the subject of the action, it certainly did not appear to Lord Eldon that such was the practice of the Court of Exchequer; because, in the case of *Bromley v. Holland* (7 Ves. 3; see 20) his Lordship says: "So upon bills to have promissory notes delivered up in complicated cases, and as the evidence may be lost; and so upon bills to have void policies of insurance delivered up, which in the cases in the Court of Exchequer is always prayed, and which may be, though they are not usually followed up to a decree upon this principle." Then he states the principle. He, therefore, evidently takes it for granted that the practice is in the Court of Exchequer to file a bill not merely to have a discovery, in which case the bill would only be against the person who is party to the record at law, but for the purpose of having the policy delivered up: and it is quite plain that, when the bill is so framed, all persons ought to be made parties who are charged on the face of the bill, or who appear on the face of the bill to have an interest in the policy, although they may not be parties to the record at law. And as none of the numerous bills that have been filed during the last 15 years in the Court of Exchequer have been produced, I cannot but think that there has been a mistake in the statement that has been made respecting the practice of that Court; but if there has not, my opinion is the mere practice of the Court of Exchequer, which, perhaps, has never been made the subject of discussion, cannot have the effect of altering that which I take to be the clear law of this Court.

Therefore, upon the authorities which I have mentioned, I think I am bound to allow the demurrer.

[30] Between THE ATTORNEY-GENERAL, at the Relation of the Mayor, Aldermen and Burgesses of the Borough of Leeds, *Informant*; and the said MAYOR, ALDERMEN AND BURGESSES, *Plaintiffs*; and JOHN WILSON AND OTHERS, *Defendants*.
Nov. 22, 23, 24, 28, 29, 1837.

[S. C. 7 L. J. Ch. 76; 1 Jur. 890. See also 9 Sim. 526;
1 Cr. & Ph. 1; 41 E. R. 389.]

Municipal Corporation Act. Jurisdiction. Pleading. Liability of Corporators Individually.

This Court still has jurisdiction to relieve against collusive alienations of corporate property, notwithstanding the remedy provided by the 97th section of the

Municipal Corporation Act: but as by that Act corporate property is applicable to public purposes, the Attorney-General must sue in such cases in conjunction with the corporation.

The Municipal Corporation Act has not destroyed the individuality of the old corporations, but has merely varied the mode in which the officers are to be chosen.

If some of the members of a corporation are instrumental in unlawfully dispossessing the corporation of its property, they are personally liable.

The information and bill stated letters patent of King Charles the Second, by which the town of Leeds was incorporated, and the mayor, 12 aldermen and 24 assistants were directed to be chosen out of the inhabitants, and the aldermen and assistants were to be called the Common Council of the borough, and were to aid, counsel and assist the mayor in the well ruling and governing of the borough, and in all disposals of lands, tenements and profits to the same belonging, and in all matters and things appertaining or belonging thereto, for the better advantage, promotion, maintenance and benefit of the borough; and the mayor, aldermen and assistants were to have the government of all the real and personal property of the corporation, and power to dispose thereof as they should deem most beneficial for the good rule and government of the borough.

The information and bill further stated that, on the 30th of May 1835 (previous to which day notice had [31] been given in the House of Commons of the intention of the Government to bring forward a bill for the reform of municipal corporations), the corporation was possessed of £6500 three per cents., then standing in the names of Edward Markland, deceased, and of the Defendants, Christopher Beckett and John Wilson, as trustees for the corporation, and of certain other property of small amount: that on the 30th of May 1835 a meeting of some of the members of the corporation was held, at which a resolution, purporting to be a resolution of the mayor, aldermen and assistants, was passed to the following effect: "Resolved unanimously that the sum of £6500 three per cent. consols, being the property of this corporation, be absolutely transferred and alienated to John Wilson, Esq., William Beckett, Esq., and John Blayds, Esq. (three of the Defendants), so as thereby to vest the same in those gentlemen, and divest this corporation of all power and control over the same," but no actual transfer or assignment was then made in pursuance of the resolution: that Wilson, Beckett and Blayds were informed of the resolution shortly after it was passed, and there was some understanding between them and some of the members of the corporation that they were not to be entitled to the stock for their own benefit, but were to hold and dispose of it for such purposes as the corporation or the court of the mayor, aldermen and assistants should thereafter direct: that several meetings purporting to be courts of the mayor, aldermen and assistants were held after the 30th of May, and before the 9th of September 1835 (being the day on which the Royal assent was given to the Act of Parliament after mentioned), but no resolution was passed respecting the stock.

The information and bill then stated that, by the Municipal Corporation Act (5 & 6 Will. 4, c. 76), it was [32] enacted that so much of all laws, statutes and usages, and so much of all Royal and other charters, grants and letters patent then in force relating to the several boroughs named in the schedules to the Act, as were inconsistent with the provisions of the Act, should be repealed: Sect. 1.—That, after the first election of councillors under that Act in any borough, the body corporate named in the schedules in connection with such borough should take and bear the name of the mayor, aldermen and burgesses of such borough: Sect. 6.—That a mayor, aldermen and councillors should be elected in manner therein mentioned, and called the council of such borough: Sect. 25.—And that they should appoint a town clerk and treasurer of the borough: Sect. 58.—That after the election of the treasurer, the rents and profits of all hereditaments, and the interest, dividends and annual proceeds of all monies, goods, chattels and valuable securities belonging or payable to the body corporate, or to any member or officer thereof in his corporate capacity, should be paid to the treasurer of the borough, and all the monies which he should so receive should be carried by him to the account of a fund to be called

"The Borough Fund," and such fund, subject as therein mentioned, should be applied towards the payment of the salaries of the mayor and other officers of the borough and for certain other public purposes, and that the surplus of the fund, if any, should be applied under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough: Sect. 92.—That it should be lawful for the council first to be elected under the provisions of the Act, to call in question all purchases, sales, leases and demises not made in pursuance of some such *bonâ fide* agreement or resolution made or entered into, in such manner as was [33] authorized by the Act, before the 5th of June 1835, and all contracts for purchase, sale, lease or demise of any lands, tenements and hereditaments, and all divisions and appropriations of the movables, goods and valuable securities, or any part of the real or personal estate, of which, on or before the said 5th of June the body corporate of which they were the council, whether in their own right or as trustees for charitable or other purposes, were seised or possessed, which should have been made or contracted between the said 5th of June and the day of the declaration of their election. Sect. 97.(1)

(1) The 94th section of the Act, to which the 97th section refers, but which was not set forth in the information and bill, was as follows:—"And be it enacted that it shall not be lawful for the council of any body corporate to be elected under this Act, to sell, mortgage or alienate the lands, tenements or hereditaments of the said body corporate, or any part thereof, except in pursuance of some covenant, contract or agreement *bonâ fide* made or entered into on or before the 5th day of June in this present year, by or on behalf of the body corporate of any borough, or of some resolution duly entered in the corporation books of such body corporate on or before the said 5th day of June, or to demise or lease, except in pursuance of some covenant, contract or agreement *bonâ fide* made or entered into on or before the said 5th day of June by or on the behalf of such body corporate, or in pursuance of some resolutions duly entered in the corporation books of such body corporate on or before the said 5th day of June, or except in the cases hereinafter mentioned, any lands, tenements or hereditaments of such body corporate, or any part thereof, or to enter into any new covenant, contract or agreement (except in the cases hereinafter mentioned) for demising or leasing any such lands, tenements or hereditaments, or any part thereof, for any term exceeding 31 years from the time when such lease shall be made, or, if made in pursuance of a previous agreement, then from the time when such agreement shall have been entered into; and in every lease which the said council is not hereby restrained from making, there shall (except in the cases hereinafter mentioned) be reserved and made payable during the whole of the term thereby granted, such clear yearly rent as to the council shall appear reasonable, without taking any fine for the same; provided, nevertheless, that in every case in which such council shall deem it expedient to sell and alienate or to demise and lease for a longer term than 31 years, or upon different terms and conditions than those hereinbefore mentioned, any of the said lands, tenements or hereditaments, it shall be lawful for such council to represent the circumstances of the case to the Lords Commissioners of His Majesty's Treasury, and it shall be lawful for such council, with the approbation of the said Lords Commissioners, or any three of them, to sell, alienate and demise any of the lands, tenements and hereditaments of the said body corporate, in such manner and on such terms and conditions as shall have been approved by the said Lords Commissioners: provided always, that notice of the intention of the council to make such application as aforesaid shall be fixed on the outer door of the town hall, or in some public and conspicuous place within the borough, one calendar month at least before such application; and a copy of the memorial intended to be sent to the said Lords Commissioners shall be kept in the town clerk's office during such calendar month, and shall be freely open to the inspection of every burgess at all reasonable hours during the same."

The 97th section, which was much relied on and observed upon, both in the argument and in the judgment, requires to be set forth more fully than the information and bill stated it. It is as follows:—"And be it enacted that it shall be lawful for the council first to be elected in any borough under the provisions of this Act, to call in

[34] The information and bill next stated that Leeds was one of the boroughs mentioned in the schedules to the [35] Act: that the council of the borough, as constituted by the Act, had discovered that the £6500 stock was [36] assigned or transferred to Wilson, Beckett and Blayds some time after the 30th of May 1835, but without any [37] consideration, and as trustees for the mayor, aldermen and assistants, or of the corporation of which they were the officers, and that the same stock was directed to be transferred or assigned as aforesaid, by the meeting held on the 30th of May 1835, to the Defendants Wilson, Beckett and Blayds collusively and without consideration, and in order to disappoint, as far as possible, the objects and intention of Parliament in passing the Act, and that the only division or appropriation which was made of the stock was made between the 5th of June [38] 1835 and the day of the declaration of the election of the council of the borough within the meaning of the Act of Parliament, and, in fact, no transfer or assignment was made, or at least completed, and no trust was declared of the stock until after the 5th of June 1835, nor was any such trust declared until after the Act of Parliament had passed, and although it was alleged that the stock, or certain parts thereof, had been since sold and disposed of, they had been sold and disposed of contrary to the express provisions of the Act, and had been applied in a manner which, even if the Act had not been passed, would have been improper and unjustifiable; that, shortly before the 30th of May 1835, a scheme or plan was formed, by or with the

question all purchases, sales leases and demises not made in pursuance of some such *bonâ fide* covenant, contract, agreement or resolution made or entered into as aforesaid before the 5th day of June, and all contracts for the purchase, sale, lease or demise of any lands, tenements and hereditaments, and all divisions and appropriations of the monies, goods and valuable securities, or any part of the real or personal estate of which, on or before the 5th day of June in this present year, the body corporate of which they are the council, whether in their own right or as trustees for charitable or other purposes, was seised or possessed, which shall have been made or contracted between the said 5th day of June and the day of the declaration of their election; and, for that purpose, if it shall appear to the said council that there is ground for believing that any such purchase, sale, lease or demise, or such contract, or such division or appropriation of the premises was collusively made for no consideration, or for an inadequate consideration, it shall be lawful for the council of such borough, at any time within six calendar months next after the first election of councillors under this Act shall have been declared in such borough, upon notice of their intention being first given in the *London Gazette*, and also affixed on the outer door of the town hall or in some public place within the borough, to cause the value of the lands, tenements, hereditaments and premises in question to be required of and found by a jury of 12 indifferent men of the county in which, or adjoining to which in the case of Berwick-upon-Tweed, and of all counties of cities and towns corporate, such lands, tenements, hereditaments or premises do lie; and in order thereto, the said council is empowered to summon and call before such jury all persons having the custody and possession of any deed or agreement concerning the said lands, tenements, hereditaments and premises made or entered into since the said 5th day of June, and to cause all such deeds and agreements to be produced before the said jury and examined by them, and to examine upon oath every person who shall be thought necessary to be examined (which oath the mayor is hereby empowered to administer), and the council shall, by ordering a view or otherwise, use all lawful means for the information, as well of themselves as of the said jury, in the premises, and the jury shall find the value of the said lands, tenements, hereditaments and premises, and the consideration which shall have been given, and also that which ought of right to have been given for the purchase, sale, lease, demise or appropriation thereof according to the terms of such purchase, sale, lease, demise, contract or appropriation, and taking into account all the circumstances under which the same shall have taken place; and if the jury by their oaths shall find that no consideration, or a consideration less than that which they shall have so found to be the value which ought therefore to have been given, shall have been collusively given, or contracted to be given by the terms of any such purchase, sale, lease, demise, contract or appropriation, the party to such

privity of some of the members of the old corporation, for preventing the £6500 stock from passing into the hands or coming under the control of the members of the new corporation which might be established under the Act of Parliament then expected to be passed in the course of a short time for the reform of municipal corporations, and it was then, or shortly afterwards, suggested or arranged, by or between such members of the old corporation, that the matter should be contrived so as to enable the mayor, aldermen and assistants to repossess themselves of the stock in case the Act should not pass, or they or their political friends should become the governing body of the new corporation, and in fact the transfer and assignment directed to be made and afterwards made of the stock, and many of the trusts subsequently declared thereof were made in pursuance of the aforesaid scheme or plan, and in carrying or attempting to carry the same into effect several meetings of the said members were held, and the name and seal of the old corporation and the names of the mayor, aldermen and assistants, were improperly and irregularly used by the members [39] engaged therein; that, during the year 1835, the Defendant Wright was the Mayor of Leeds and the Defendants, Hall, Christopher Beckett and Bramley were three of the aldermen of the corporation, and the Defendant Charlesworth was one of the assistants, and those five Defendants were the members of the corporation who were engaged in transacting and carrying into effect the aforesaid scheme or plan, and they were the only members of the corporation who attended all the meetings held

purchase, sale, lease, demise, contract or appropriation, shall have his option either to reconvey and restore the lands, tenements, hereditaments and premises in question, and to abandon the contract to which he shall have been party, upon receipt in each case of the consideration, if any, which he shall have given for the same, or to give, therefore, in each case such additional consideration, so that the whole consideration given shall be that which ought of right to have been given, so found by the jury as aforesaid; and in every such case as last aforesaid the additional consideration given, or to be given, shall be endorsed on the original deed or conveyance, and unless he shall so do within one calendar month next after the finding of the jury, every such purchase, sale, lease, demise, contract and conveyance shall be absolutely void and of none effect as against the said body corporate and their successors; and in every case in which any such contract shall have been abandoned as aforesaid, or in which any such purchase, sale, lease, demise, contract or conveyance shall become void and of none effect under the provisions of this Act, the party who would otherwise have had the benefit of the same shall be remitted to his former estate, title and interest (if any) in the premises, as if no such contract, purchase, sale, lease or demise had been made or entered into: and for summoning and returning such juries, and for imposing fines on the sheriff, his deputy, bailiff or agent, and on the persons summoned and returned on the said jury, and on any person required to give evidence, who shall in this behalf contravene the provisions of this Act, the council of every such borough shall have all the powers given in that behalf to the trustees or commissioners of any turnpike road, by an Act made in the third year of His late Majesty George the Third, intituled 'An Act to Amend the General Laws now in being for Regulating Turnpike Roads in that Part of Great Britain called England,' and all the costs of the said jury, and of all witnesses tendered by the said council to be examined before the said jury shall in every case be borne by the council and paid out of the Borough Fund: provided, nevertheless, that it shall be lawful for His Majesty, if he shall think fit, by the advice of his Privy Council, upon petition to him setting forth the special circumstances under which any purchase, sale, lease, demise, contract or appropriation of any of the said lands, tenements, hereditaments and premises shall have been made since the said 5th day of June, to order that the same shall not be called in question, under the provisions of this Act, and in such case as last aforesaid the same shall not be called in question or set aside, or affected under the provisions of this Act: provided always, that in every case in which such petition shall have been presented, it shall be lawful for His Majesty, if he shall think fit, to enlarge the time within which (in case His Majesty shall not think fit to make such order as aforesaid) the council may have power as aforesaid to call in question any purchase, sale, lease, demise, contract or appropriation referred to in such petition."

for that purpose, and if any other members were present at some of such meetings, they were not present at all of them; that no trust was ever declared of the stock by the mayor, aldermen and assistants, but it was alleged that on the 30th of May 1835 an indenture was made between the old corporation of the one part, and Wilson, William Beckett and Blayds of the other part, whereby the corporation assigned the stock to Wilson, William Beckett and Blayds, but they were not to be entitled to it for their own benefit, and they became and were trustees thereof for the old corporation: and it was also alleged that, on the 24th of November 1835, Wilson, William Beckett and Blayds executed a deed of that date, and which was expressed to be made between them of the one part, and the mayor, aldermen and burgesses of the other part, and thereby, after reciting the deed of the 30th of May 1835, and that the stock had been assigned to Wilson, William Beckett and Blayds, to the end that the same might be applied by them to certain public and corporate purposes as thereafter mentioned, the parties of the one part covenanted with the parties of the other part, to stand possessed of the stock as follows, that is to say, upon trust to pay certain sums to the recorder and deputy-recorder of the borough, and certain other sums to the treasurers for the time being of the Leeds [40] Infirmary, the Leeds Fever Hospital and Public Dispensary, and to the incumbents, for the time being, of certain churches in Leeds, and as to the residue of the stock, in trust to pay and discharge all such debts, sums of money, engagements, expenses, claims, dues and demands whatsoever which then were, or should be thereafter due, owing, contracted, made or entered into, by, from or with the mayor, aldermen and burgesses, and also all other sums of money which might be ordered to be paid or applied by the mayor, aldermen and burgesses, or by certain persons therein named (forming the committee appointed by the mayor, aldermen and burgesses for the purpose of settling the amount of the sums so to be paid as aforesaid, and of ordering the payment thereof), and subject thereto upon trust for the mayor, aldermen and burgesses, their successors and assigns.

The information and bill further stated that none of the before-mentioned deeds were executed by the corporation: and it charged that the name of the mayor and the seal of the corporation were not set or affixed to the deed of the 30th of May 1835, at the meeting held on that day or at any court of the mayor, aldermen and assistants duly convened for the purpose, and at all events, they were not properly and regularly set and affixed thereto, and that the deed was not delivered to Wilson, W. Beckett and Blayds until April 1836; that Wilson, W. Beckett and Blayds never gave any directions respecting the deed of November 1835 or the trusts thereof, and if they executed it they never obtained any previous authority for that purpose, either from the corporation or the mayor, aldermen and assistants, and that the trusts therein declared were only inserted therein in pursuance of some direction to that [41] effect from some of the members of the corporation: that the trusts of the £6500 stock were never duly declared by the mayor, aldermen and assistants, nor were any trusts declared thereof until November 1835; that the recorder and deputy-recorder declined to receive the sums given or voted to them; that Wright, Hall, Christopher Beckett, Bramley and Charlesworth were the chief contrivers and promoters of and were the only members of the corporation who assisted in all the before-mentioned proceedings with respect to the £6500 stock, and they were personally responsible for that sum or so much thereof as had not been applied in payment of debts properly incurred by the corporation, and that Wilson and C. Beckett were also personally liable for having transferred the stock in manner aforesaid.

The information and bill prayed that it might be declared that the transfer and alienation of the stock to Wilson, William Beckett and Blayds was fraudulent and void, and that the same might be set aside, and that it might be declared that the last-named Defendants, and also Wright, Hall, Christopher Beckett, Bramley and Charlesworth were respectively liable to make good the same sum, or so much thereof as should not have been applied in payment of debts properly incurred by the corporation, and that they might be decreed to make good and pay the same to the Plaintiffs or their treasurer; and that Wilson, William Beckett and Blayds and certain of the other Defendants in whose names some parts of the stock were still

standing might be declared trustees thereof for the Plaintiffs, and might be decreed to transfer the same to them, and that, in the meantime, they might be restrained from disposing thereof.

[42] The information and bill was filed not only against the persons before mentioned as Defendants, but also against the incumbents of the livings, and the treasurers of the hospitals and dispensary mentioned in the declaration of trust. Three demurrers to it were filed for want of equity: one by the incumbents and treasurers; another by Wright, Bramley and Charlesworth, and another by Christopher Beckett.

Sir Charles Wetherell, Mr. K. Bruce and Mr. Bethell, in support of the demurrers. The corporation, which is the Plaintiff on this record, is, in law, the same identical body as that which existed prior to the Municipal Corporation Act: it is, therefore, the same body as that which did the acts complained of in the information and bill; and, consequently, the corporation is now seeking to annul its own acts. In other words, the perpetrator of a fraud is asking to be relieved from the fraud he has committed.

The information and bill is founded on the Municipal Corporation Act, and, no doubt, it will be contended that the disposition that was made of the £6500 consols was a fraud upon that Act. But, before that Act was passed, a civil corporation had an unrestricted right to alienate its property. The resolution by which the stock was disposed of was passed in May 1835, which was before the Municipal Corporation Bill was even introduced into Parliament: and, therefore, as the Act contains no retrospective enactments depriving corporations of their *jus disponendi*, the disposition which was made of the stock was legal. *The Mayor and Commonalty of Colchester v. Lowten* (1 V. & B. 226), *Sutton's Hospital case* (10 Co. 1). The purposes to which the stock was [43] dedicated were proper and landable purposes, and were, in fact, for the benefit of the inhabitants of the borough: and, as the new corporation is to have the power of disposing of its property for the benefit of the inhabitants, why is not the old corporation to have the same power?

Next, admitting for the present that the disposition of the stock was a wrongful act, and that this Court still has jurisdiction to redress it, we contend that the record is improperly constructed. It ought to have been either an information or a bill, but not both. If the alienation of the stock was a fraud upon the public, an information ought to have been filed; if it was a fraud upon the corporation, then redress ought to have been sought by bill. In *The Attorney-General v. Aspinall* (1 Keen, 513; see 544, and 2 Myl. & Craig, 613) an information only was filed; and it was upheld by the Lord Chancellor on that ground mainly, and also because the town council had declined to interfere. The case was originally brought before Lord Langdale, M.R., and that learned Judge was of opinion that the old governing body of a corporation was not forbidden or precluded by the Act, from a fair application of the corporate property for the benefit of the inhabitants of the borough: and his Lordship was of opinion that the purposes for which the property had been applied in that case, and which are very similar to the purposes to which the stock has been dedicated in the present case, ought to be considered as beneficial to the inhabitants; and he overruled the demurrer. It is true that Lord Langdale's decision was reversed by the Lord Chancellor; but his Lordship did not differ substantially from Lord Langdale, but merely took a different view of some of the allegations in the information. Besides, in *The Attorney-General v. Aspinall*, [44] the acts complained of were not only completed but originated after the Municipal Corporation Act was passed.

Supposing that the disposition of the stock was a fraud upon the Act of Parliament, relief ought not to have been sought in this Court; for, by the 97th section of the Act, a new judicature is created, and the jurisdiction of this Court, in cases like the present, is entirely superseded and excluded.

Lastly, at all events, the demurrers that have been filed by Wright, Bramley, C. Beckett and Charlesworth must be allowed. Those gentlemen were individual corporators when the acts complained of were done. Those acts were the acts of the whole corporate body; and individual members of a corporation cannot be made answerable for every act done by the corporation during the time that they were members of the body.

THE SOLICITOR-GENERAL, Mr. Jacob and Mr. Walker, in support of the information and bill, contended that the alienation of the stock was an act done by some of the members of the corporation and not by the corporation itself, as no instrument had been executed under the common seal; that, supposing the alienation to have been made by the corporate body, the resolution in pursuance of which it was made was not passed until after the corporation had notice that it was the intention of Government to bring in a bill for the reform of municipal corporations, nor was the alienation completed until after the Act had received the Royal assent; that the record was properly constructed, for, by the Act of Parliament, the fund was made applicable to public purposes, and, consequently, the Attorney-General became the trustee, and the town council the *cestuis que trust* of [45] it, and a trustee and *cestui que trust* might join in a suit to recover the trust property from the holders of it; that the remedy given by the 97th section of the Act was cumulative, and did not deprive the parties of their ordinary remedy in a Court of Equity; and lastly, that Wright, Bramley, Christopher Beckett and Charlesworth were personally liable, inasmuch as the alienation of the stock was not an act of the body corporate, but of those individuals who had availed themselves of their connection with the corporation to do the acts complained of.

They relied principally upon the Lord Chancellor's judgment in *The Attorney-General v. Aspinall*, and also referred to 8 Anne, c. 19. *Beckford v. Hood* (7 T. R. 620), *Chapman v. Pickersgill* (2 Wilson, 145), *Dummer v. The Corporation of Chippenham* (14 Ves. 245), and *Carter v. The Dean of Ely* (*ante*, vol. 7, p. 211).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have had an opportunity of considering this case during the argument, which has occupied several days: and, according to the view which I take of the case, it is not necessary for me to notice some of the arguments that have been used in support of these demurrers; for, upon looking through this very voluminous information and bill, I am bound to take it that there has been no final and effectual alienation of the stock in question by the Corporation of Leeds.

The information and bill represents that, on the 30th of May 1835, the corporation was possessed of the sum of £6500 3 per cent. consols, which was then stand-[46]-ing in the names of Edward Markland, and the Defendants Christopher Beckett and John Wilson, as trustees for the corporation, and that on the 30th of May 1835 a meeting of some of the members of the corporation was held, at which a resolution, purporting to be a resolution of the mayor, aldermen and assistants, was passed to the following effect, namely, that the £6500 stock should be absolutely transferred and alienated to the Defendants John Wilson, William Beckett and John Blayds, so as to vest the same in those gentlemen. But the information and bill alleges that no actual transfer or assignment of the stock was made in pursuance of that resolution, and that no communication respecting the subject and object of the resolution was made to Messrs. Wilson, Beckett and Blayds until after it was passed, but those gentlemen were informed of it shortly afterwards, and there was some understanding between them and some of the members of the corporation that they were not to be entitled to the stock for their own benefit, but were to hold and dispose of it for such purposes as the corporation or the court of the mayor, aldermen and assistants, should thereafter direct; and no resolution was passed at the meeting held on the 30th of May declaratory of such purposes. The information and bill then states that the council of the borough, as constituted by the Municipal Corporation Reform Act, have discovered, and the fact is, that the stock was assigned or transferred to Wilson, Beckett and Blayds some time after the 30th of May 1835, but without consideration and as trustees for the mayor, aldermen and assistants, or of the corporation of which they were the officers, and that the stock was directed to be transferred to Wilson, Beckett and Blayds collusively and without consideration, and in order to defeat the objects of the Act, and that no trust was declared of the stock [47] until after the 5th of June 1835, nor indeed until after the Act had passed, and that such parts of the stock as had been since disposed of had been applied in a manner which was contrary to the express provisions of the Act, and which, even if the Act had not passed, would have been improper and unjustifiable. The information and bill then states that the informant and Plaintiffs had discovered, and the fact

is that, shortly before the 30th of May 1835, a scheme or plan was formed by some of the members of the corporation for preventing the £6500 stock from passing into the hands or coming under the control of the new or reformed corporation, and that it was arranged that the matter should be contrived so as to enable the mayor, aldermen and assistants to repossess themselves of the stock in case the Act should not pass, or they or their political friends should become the governing body of the corporation to be established under the Act; and that the transfer of the stock and the declaration of trust subsequently made were made in pursuance of the before-mentioned scheme, and that the name and seal of the corporation and the names of the mayor, aldermen and assistants were improperly and irregularly used by the members engaged therein. Then it states that a deed of assignment (but which was no assignment at all) of the stock is alleged to have been executed on the 30th of May 1835, and a deed purporting to be a declaration of trust of the stock, on the 24th of November 1835, but that neither of those deeds was executed by the mayor, aldermen or burgesses of the borough. It then charges that no trusts of the stock were declared by the corporation or the mayor, aldermen or assistants, nor were any declared by Wilson, Beckett and Blayds till after the Act had passed. The information and bill then repeats that no assignment or declaration of trust of the stock was ever [48] duly executed by the corporation or the mayor, aldermen and assistants, nor were any trusts declared thereof until November 1835.

Now I am of opinion upon these allegations that, if the transfer of the stock took place as stated, the beneficial property in it was not altered, but it still remained in the corporation: for it was necessary for the corporation to do some corporate Act, in order to divest themselves of the property in the £6500 consols (that is to say), it was necessary for them to execute some instrument under their common seal for that purpose; and, as they did not do so, the stock remained vested in Messrs. Wilson, Beckett and Blayds, as trustees for the corporation. And, in my opinion, the resolution that was passed in May 1835, taking it (as I am bound to do on the present occasion) to have been made in the way in which the information and bill represents, did not divest the corporation of their beneficial interest in the stock in question. The consequence is that the corporation may call on those who are the mere legal depositaries of the fund for a transfer of it to new trustees or for any other purpose that they may think proper to direct.

It does not appear to me that the Municipal Corporation Act has destroyed the identity of the old corporations; but it has continued the existence of the old corporations, varying, however, the mode in which certain corporate officers are to be chosen. This, however, is to be observed, that although the mode of choosing the officers is altered, the corporation, in law, remaining the same, yet the application of the funds belonging to corporations is varied. For the 92d section of the Act, after directing the property of corpo-[49]-rations to be applied to certain specified purposes, directs that the surplus (if any) shall be applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough: so that there is a sort of public trust affixed upon that which, before the Act was passed, was mere corporate property, capable of alienation according to the uncontrolled will and pleasure of the body corporate. The novelty which has been introduced by the Act is twofold: first, the funds of corporations are to be applied to public purposes; and, secondly, they are to be applied under the direction of the council.

It seems to me, having regard to the allegations in this information and bill, that the Corporation of Leeds are now merely calling for a restoration of their own property, with the beneficial interest in which they have never parted.

But it was said that they are not at liberty so to do, as the 97th section of the Act has provided a new course of proceeding to be taken in cases where corporate property has been collusively alienated. But, after having frequently read over that section, the conclusion that I have come to is that that section cannot be considered to have ousted this Court of its general jurisdiction to enforce a mere trust: and I should have come to that conclusion even if the matter had not been so decided, as I think it has been. It is true that the Act has, to a certain extent, changed the form of the remedy; for, as corporate property is now applicable to public purposes, it may be right that, in all future instances, the Attorney-General should sue in conjunction

with the corporation. But for that circumstance, the corporation might have filed a bill against those individuals who [50] have placed themselves in the situation of trustees, and thereby have compelled them to give an account of their trust, and to make restitution to the corporation of its own property. In my opinion it never could have been the intention of the Legislature, by this 97th section, to oust this Court of its general jurisdiction: for it is to be observed that the remedy is of an extremely minute and special nature; and, moreover, it is to be exercised only within a limited time: because it is enacted that it shall be lawful for the council, at any time within six calendar months next after the first election of councillors under the Act shall have been declared, to summon a jury, in order that the matter complained of may be inquired into and rectified. Now it obviously might happen that the town council might not know the fact within the six months after the first election of councillors under the Act: and it would be singular if an alienation of corporate property, however improper, should go unredressed, merely because the town council had not that information which would enable them to take proceedings for defeating it within the very limited time prescribed by the Act. I cannot think that such was the intention of the Legislature. And the latter part of the section throws light upon the question; for the power that is given to His Majesty in Council to order that, in certain cases, improper alienations of corporate property shall not be called in question is not a general power to His Majesty in Council to order that those alienations shall not be called in question at all, but only to order that they shall not be called in question under the provisions of that Act. The meaning of the Legislature was that the power of the King in Council should be limited to that which is mentioned in the antecedent part of the section, namely, to the proceedings which should be taken under the pro-[51]-visions of the Act; and the restrictive words which are there found were meant to be confined to that new mode of proceeding provided by the section itself, and which was to take place in a given form. If, before the passing of the Act now under consideration, this Court had a right to interfere at the instance of corporations suing as *cestuis que trust* to protect their property in the hands of their trustees, there are, in my opinion, no restrictive words in the Act to destroy that antecedent right; but there is only a cumulative right given, in a particular form, to set aside certain alienations of corporate property that might be discovered by the town council within a very limited time.

If, however, there were any doubt upon the point, it seems to me that what took place in the case of *The Attorney-General v. Aspinall* would be conclusive. For though the demurrer to the information was allowed by the Master of the Rolls, yet, when it was brought before the Lord Chancellor on appeal, his Lordship overruled the demurrer. Now, how could he have done so, unless the general jurisdiction of this Court to relieve against transactions of the nature there complained of remained unaffected by the Municipal Corporation Act. And I observe, from the language used by his Lordship when, as Master of the Rolls, he dissolved the injunction which had been granted on the original information, he did dissolve it for the express purpose of reserving to himself the determination of the question when those Acts should have been completed, which were necessary to be done before the question could be brought on for solemn argument and decision. (See *The Attorney-General v. The Mayor of Liverpool*, 1 Myl. & Craig, 171.) It [52] is clear therefore that the Lord Chancellor considered that this Court would have had jurisdiction to interfere in such a case as was stated on the original information: and, when his Lordship overruled the demurrer that was filed to the supplemental information, he asserted and maintained that jurisdiction. Consequently, if I had any doubts upon the question now before me, they would be overruled by what was done by the Lord Chancellor in the case of *The Attorney-General v. Aspinall*; and I take the liberty of saying that I entirely concur with his Lordship in the opinion which he expressed in deciding that case. Therefore, generally speaking, the demurrers must be overruled.

With respect to those Defendants who are supposed to have acquired a right to certain portions of the £6500 consols under the deed of November 1835, I am quite clear that the information and bill can be maintained as against them. But it was said that there was something peculiar in the cases of Messrs. Wright, Bramley, Charlesworth and Christopher Beckett. Now, with respect to those gentlemen, it is

to be observed that they were all members of the old corporation: Mr. Wright was the mayor, Mr. Beckett and Mr. Bramley were aldermen, and Mr. Charlesworth was an assistant: and the information and bill alleges that, shortly before the 30th of May 1835, a scheme was formed by some of the then members of the corporation for preventing the £6500 consols from passing into the hands or coming under the control of the members of the corporation to be formed under the Act of Parliament which was then in contemplation, and that the acts complained of were done in pursuance of that scheme, and that the four last-named gentlemen, together with Mr. Hall, were the members of the corporation [53] who were engaged in contriving the scheme and carrying it into effect; and it charges that they are personally liable for those portions of the stock that were attempted to be alienated. Now that charge would be of no value, unless, as is the case, there were facts stated in the information in support of it. And I am of opinion that, if members of a corporation do contrive a scheme unlawfully to dispossess the corporation of its funds, they, *prima facie*, are personally answerable: and this Court has, in former cases, made persons standing in the situation of these four Defendants, personally liable for their wrongful acts, although they have derived no benefit from them. Consequently the demurrers put in by those Defendants, as well as the demurrer filed by those individuals who were intended to be benefited by means of the scheme, must be overruled.

[54] WILSON v. BATES. Nov. 16, 19, 1837; Jan. 31, 1838.

[Affirmed, 3 My. & Cr. 197; 40 E. R. 900 (with note).]

Practice. Contempt. Lord Bacon's 78th Order.

A Plaintiff may issue an attachment against a Defendant for want of answer, although he is himself in contempt for non-payment of costs, which he has been ordered to pay to the Defendant.

The Plaintiff, whilst he was in custody of the sheriff under an attachment, obtained against him by the Defendant, for non-payment of the costs of a motion, issued an attachment against the Defendant for want of answer. The Defendant now moved that the attachment against him might be discharged for irregularity, and that the bond which he had given to the sheriff, who had taken him on the attachment, might be cancelled.

Mr. Wakefield and Mr. G. L. Russell, in support of the motion, said that the attachment against the Defendant was irregular, because the Plaintiff, when he obtained the order for it, was in contempt, and a party, whilst in that situation, could not make any application to the Court. Lord Bacon's Orders (Beam. Ord. 35),¹ Gibb. For. Rom. 102. "It is to be observed, as a general rule, that the contemner who is in contempt is never to be heard, by motion or otherwise, till he hath cleared his contempt and paid the costs."

Mr. Knight Bruce and Mr. Bethell appeared for the Plaintiff.

THE VICE-CHANCELLOR thought that the motion ought not to be granted; but allowed it to stand over in order that the opinion of the officers of the Court might be taken upon it.

Jan. 31, 1838. The motion was mentioned again on this day, and a certificate in favour of it, signed by 13 of the Clerks in [55] Court, was produced. All the registrars also, except Mr. Colville, concurred with the Clerks in Court.

THE VICE-CHANCELLOR [Sir L. Shadwell], however, was of opinion that he was not bound to decide according to the certificate, as no decided case was referred to in support of it, but the opinion of the Clerks in Court was founded on a theory of their own. His Honor added that if the meaning of Lord Bacon's Order was that a party, when in contempt, could not apply to the Court for any purpose whatever, the order, to that extent at least, could not be considered as remaining in force, as the practice of the Court had been long at variance with it; and he did not think

that he should be justified in granting the motion; but, as the Clerks in Court had certified in favour of it, he should not refuse it with costs, but would make no order.(1)

[56] MOCATTA v. LINDO. Dec. 1, 1837.

[Cf. *Whiting v. Force*, 1840, 2 Beav. 571; 48 E. R. 1303. Observed upon, *In re Wilmott's Trusts*, 1869, L. R. 7 Eq. 532.]

Construction. Settlement. Portions.

By a marriage settlement, stock was settled, subject to life interests in the husband and wife, in trust for their children, share and share alike, the shares to be paid to them at 21 or marriage, and the shares of children dying leaving issue before their shares had become payable, were to be in trust for their issue, but in case any of the children should die before their shares should become payable, without leaving any issue, then their shares were to be in trust for the surviving children. There were six children of the marriage, who all attained 21: two of them died in the lifetime of their surviving parent. Held, that the word "payable" must be held to mean "vested," and, consequently, that the representatives of the deceased children were entitled to shares of the stock.

By the settlement on the marriage of Moses and Esther Lindo, Moses Lindo covenanted to lay out £1000 in the purchase of stock in the names of the trustees, in trust for himself and his intended wife for their lives successively, and, after their several deceases, then upon trust for the benefit of all and every the child and children of the marriage, equally to be divided between and amongst them, if more than one, share and share alike, but if there should be but one such child, then in trust for the benefit of such only child, and to be paid and payable to him, her or them respectively, on their respectively attaining the age of 21 years or day or days of marriage, which should first happen, and to the children or issue of such child or children of the marriage as should happen to die leaving a child or children before their respective shares thereof should become payable as before mentioned: and, in case any such child or children should happen to die before their shares should become payable, without leaving any issue, then all and every such share or shares of him, her or them so dying, should go and accrue to the survivors or survivor of all and every of such child and children, and be paid and payable at the same time, and subject to the same chance of accruer or survivorship as their original shares thereof: and it was declared that the dividends and interest of the share of each and every such child of and in the capital stock, should be ap-[57]-licable to the maintenance and education of such child and children respectively, and the overplus, if any, should be laid out and added to the capital to accumulate for such child or children's benefit respectively, and should be subject in all respects to the same contingencies as the capital of such child and children's share and shares was and were thereinbefore made subject and liable.

In the subsequent part of the settlement the same words were twice repeated; once in declaring the trusts of certain reversionary property to which Mr. Lindo was entitled, and again in declaring the trusts of the property to which Mrs. Lindo was entitled.

(1) See *Ricketts v. Morington*, ante, vol. 7, p. 200.

The decision reported above was affirmed by the Lord Chancellor (see 3 Myl. & Craig, 197), on the authority of two cases, *Wild v. Hobson* and *Eddowes v. Neville*, with which Mr. Colville furnished his Lordship.

Mr. Colville kindly informed the reporter that the bill in *Wild v. Hobson* was dismissed at the hearing with costs; but the order, on that occasion, commenced with a direction that the Plaintiff should pay to the Defendant the costs of his motions which had been refused in November 1818, "as directed by the orders then made:" but for which direction the order dismissing the bill would have put an end to the process for compelling payment of the costs of the motions.

Mrs. Lindo survived her husband and died in 1837, leaving four children of the marriage, all of whom had attained 21. There had been two other children, both of whom attained 21 but died without issue, one in the lifetime of Mr. Lindo, and the other after his death, but in the lifetime of Mrs. Lindo.

The bill was filed by the trustees of the settlement against the surviving children and the representatives of the deceased children, praying that the rights and interests of the Defendants in the trust funds might be ascertained and declared by the Court, and that the Plaintiffs might be indemnified and protected in the disposing thereof accordingly.

The question was whether the representatives of the deceased children were entitled to share in the trust funds, or whether those funds were wholly divisible amongst the surviving children, that is, whether the word "payable," in the limitation over to the surviving [58] children, was to be taken in its proper sense, or was to be held to mean "vested."

Mr. Knight Bruce and Mr. Lowndes appeared for the Plaintiffs.

Mr. Wigram, Mr. Anderdon and Mr. Bacon, for the surviving children, said that to construe the word "payable" as "vested" was doing a violence to the words used in the instrument; and that the circumstance which Lord Eldon, in his judgment in *Hope v. Lord Clifden* (6 Ves. 499, 507), stated to be the inducement for the Court's adopting that forced construction, namely, that otherwise the descendants of a child who had attained 21, but happened to die in the lifetime of its parents, would be left without any provision, did not exist in the present case, as provision was made by the settlement for the issue of children dying in their parents' lifetime and leaving issue.

Mr. Richards, Mr. Heathfield and Mr. Goldsmid, for the representatives of the deceased children, contended that the word "payable" must be taken to mean "vested." They cited *Walker v. Main* (1 Jac. & Walk. 1) and *Fry v. Lord Sherborne* (*ante*, vol. 3, p. 243).

THE VICE-CHANCELLOR [Sir L. Shadwell]. It plainly appears to me that each child who attained 21, though it died in the lifetime of either parent, is entitled to one-sixth of the trust funds. (See *Whatford v. Moore*, *ante*, vol. 7, p. 574, and 3 Myl. & Craig, 274.)

[59] KING v. HEMING. Dec. 4, 1837.

Plea and Pleading.

If a plea purports to be a plea to the relief only, the Defendant ought to give the discovery, otherwise the plea is bad.

In this case the Defendant put in a plea to the bill, which commenced and concluded as follows:—"This Defendant, by protestation, &c., to *all the relief* sought by the said bill, doth plead in bar, and, for plea, saith, &c. All which matters and things this Defendant doth aver to be true and is ready to prove as this honourable Court shall direct: and he doth plead the same in bar to all the relief sought by the said bill, and doth humbly demand the judgment of this honourable Court whether he ought to be compelled to make any other answer thereto."

It was objected, for the Plaintiff, that as the plea was confined to the relief sought by the bill, the Defendant ought to have given the discovery, and, as he had not done so, the plea must be overruled.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In point of form the plea is wrong. I do not see why the Defendant has pleaded to the relief only. I admit that, if a plea is put in which shews that the Plaintiff is not entitled to the relief, it protects the Defendant from giving the discovery; but if the Defendant, on the face of his plea, pleads to the relief only, he professes that he will give the discovery.

Sir W. Horne and Mr. Lovat, in support of the plea.

Mr. Knight Bruce, Mr. Wakefield and Mr. James Russell, in support of the bill.

[60] NEATE v. THE DUKE OF MARLBOROUGH. Dec. 5, 1837.

[Affirmed, 3 My. & Cr. 407; 2 Jur. 76. See cases in note, 40 E. R. 983, and also *Flegg v. Prentis* [1892], 2 Ch. 430; *Marshall v. South Staffordshire Tramways Company* [1895], 2 Ch. 50.]

Judgment Creditor. Demurrer.

A Court of Equity will not assist a judgment creditor to obtain payment of his debt, unless he has sued out execution; and, if he does not state that he has done so, in his bill, the Defendant may demur.

The Plaintiff was a judgment creditor of the Duke of Marlborough; and the object of the bill was to obtain payment of the judgment debt out of an annuity of £3000 a year, which the bill represented to be payable to the duke out of certain freehold as well as copyhold and leasehold estates and canal shares, under the trusts of certain deeds executed in August 1818. The judgment was signed in November 1818, and had been ever since regularly kept on foot. The bill alleged that the Plaintiff would be wholly unable to recover his debt unless the Court would assist him in obtaining payment of it out of the duke's equitable interest under the deeds of August 1818.

The duke and General St. John, who was the trustee of the estates, put in demurrers to the bill.

Mr. Knight Bruce, Mr. Jacob, Mr. Wray and Mr. G. Richards supported the demurrers on three grounds: first, because part of the property out of which the annuity was payable, namely, the copyhold estates and canal shares were not liable to be taken in execution; (1) secondly, because the duke's right to the annuity was of a fluctuating and contingent nature, as it depended upon the duchess's consenting to receive £13,000 instead of £16,000 a year to which she was entitled under the deeds; and, thirdly (which was the only ground that it was thought necessary to notice at any [61] length), because the Plaintiff had not sued out an *elegit* on his judgment. They said that a Court of Equity would not assist a judgment creditor to obtain payment of his debt out of the freehold estates of his debtor, unless he had sued out an *elegit* and placed the writ in the hands of the sheriff; for a Court of Equity did not give a judgment creditor more extensive rights than he had at law, and would not interfere on his behalf, unless the writ had been issued and the sheriff was prevented, by some legal impediment, from putting it in force. "Courts of Equity will also lend their aid to enforce the judgments of Courts of ordinary jurisdiction; and, therefore a bill may be brought to obtain the execution or the benefit of an *elegit* or a *fieri facias*, when defeated by a prior title either fraudulent or not extending to the whole interest of the debtor in the property upon which the judgment is proposed to be executed. In any case, to procure relief in equity, the creditor must shew, by his bill, that he has proceeded at law to the extent necessary to give him a complete title. Thus, in the cases alluded to of an *elegit* and *fieri facias*, he must shew that he has sued out the writs the execution of which is avoided, or the Defendant may demur; but it is not necessary for the Plaintiff to procure returns to those writs." (Mitf. Treat. 3d edit. 101, 102.) *Shirley v. Watts* (3 Atk. 200), *Davidson v. Foley* (2 Bro. C. C. 203), *Williams v. Craddock* (ante, vol. 4, p. 313), *Cuddon v. Hubert* (ante, vol. 7, p. 485).

Mr. Temple, Mr. Ellison and Mr. Jervis, in support of the bill, said that, as the property which the Plaintiff sought to make available to the satisfaction of his debt could not be reached at law, the suing out of an *elegit* would have been a mere useless formality: and they cited [62] *Forth v. The Duke of Norfolk* (4 Madd. 503), *Lord Dillon v. Plaskett* (2 Bligh, N. S. 239), and *Lewis v. Lord Zouche* (ante, vol. 2, p. 388).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill does not state that the deeds of August 1818 contain any direct trust for the duke, but merely that his receipt of the £3000 a year is to depend upon the voluntary act of the duchess in relinquish-

(1) The law is altered in these and other respects by the recent Act for Abolishing Imprisonment for Debt, 1 & 2 Vict. c. 110.

ing £3000, part of her annuity of £16,000, to the duke; and therefore the bill has not so stated the existence of the fund which is sought to be made available to the payment of the Plaintiff's debt, as that I can give relief. If, however, the case had been stated otherwise, and, as it has been said it was meant to be stated, I should still have been of opinion that no case had been brought forward on which this Court could give relief. Lord Lyndhurst, in delivering his opinion in the case of *Lord Dillon v. Plaskett*, did not mean to interfere with what is stated by Lord Redesdale to be the rule in cases like the present, namely, that in any case to procure relief in equity the creditor must shew, by his bill, that he has proceeded at law to the extent necessary to give him a complete title, that is, he must have sued out a proper writ having regard to the nature of the property out of which he seeks satisfaction of his debt. Lord Redesdale cites cases in *Vernon* and *Atkins* in support of the rule so laid down by him, and I am of opinion that it still continues to be the law of this Court.

It is plain that what the Court looks at, when it interferes to assist a judgment creditor, is the right which the creditor would have at law, but for certain impediments which this Court can remove, to enforce his judgment against that property as to which those impediments exist; and, as the bill does not state that any writ has been taken out with respect to the freehold estates comprised in the deeds of August 1818, I am of opinion that the demurrers must be allowed; but, as the Plaintiff does state a case of a judgment debt and that he does not accurately know the nature of the trusts of those deeds, I think that he ought to be allowed to amend his bill.(1)

[63] JOSSELYN v. JOSSELYN. Dec. 18, 1837.

Will. Construction. Infant. Maintenance.

Testator gave his residuary personal estate to J. J., an infant, and directed his executors to place it out at interest to accumulate, and to pay the principal to the infant on his attaining 24, and in the meantime to allow £60 a year for his maintenance; and the testator gave the residue over, on the infant's dying under 21. The Court held that the residue was actually given to the infant, and that what followed the gift was merely directory as to the management of it; and, on the infant's attaining *twenty-one*, allowed the residue and accumulations to be transferred to him.

Testator gave his residuary estate to an infant, and directed £60 a year to be allowed for his maintenance. The residue was of large amount; and the Court, from time to time, considerably increased the maintenance.

James Josselyn, the testator in the cause, disposed of his residuary personal estate in the following words: "All the rest, residue and remainder of my goods, chattels, ready money, securities for monies in the public stocks or funds, debts and all other personal estate whatsoever, I give unto John Josselyn, the son of my late cousin John Josselyn, deceased; and I order and [64] direct my executors, or the survivor of them, &c., to place the same out on Government or good real security, and the interest arising therefrom, as the same shall become due, to place out on the like securities, so as to accumulate, and the principal to be paid to the said John Josselyn at his attainment of the age of 24 years, and to pay and allow thereof the sum of £60 per annum for the board and education of the said J. Josselyn, until his attainment of the age of 24 years: and I further empower, order and direct my said executors or the survivor of them, &c., to lay out any part of the monies, as they in their discretion may think proper, in the purchase of lands and real estate in the counties of Essex or Suffolk, for the benefit of the said John Josselyn, and to be conveyed to them accordingly; but in case the said John Josselyn shall happen to die under the

(1). Affirmed by the Lord Chancellor except as to the leave to amend. See 3 Myl. & Craig, 407.

age of 21 years and without leaving issue of his body lawfully begotten then living, and which shall be living until his, her or their age or ages of 21 years, then I give all the residue of my goods, chattels, monies and personal estate, and all real estate (if any) of every kind and description, unto my said brother Mark Josselyn, if he shall be then living, during his life, and, after his death, to all his children lawfully to be begotten, equally to be divided between them: but in case my said brother shall happen to die without leaving issue of his body lawfully begotten then living, and which shall be living until his, her or their age or ages of 21 years, then I give all the residue of my goods, chattels, monies and personal estate, and also real estate, if any, of every kind and description, unto my cousin, Charles Josselyn, his executors and administrators."

The testator died on the 1st of June 1824, and his will was proved by his executors Mark Josselyn and [65] Charles Josselyn. Mark Josselyn died on the 13th of July 1825 without having had any issue.

John Josselyn (who was the Plaintiff in the cause) was eight years old at the testator's death. The property to which he became entitled under the will was of large amount; and, although the testator had directed that only £60 a year should be allowed for his board and education during his minority, yet, by an order in the cause made in November 1826, £182 was allowed for his maintenance and education from the testator's death down to June 1826, and 150 guineas per annum were allowed for his future maintenance and education; and, by two subsequent orders, one made in February 1830 and the other in July 1832, £300 per annum and £400 per annum were allowed for the like purposes.

The Plaintiff attained 21 in August 1837, and, thereupon, presented a petition stating that he was advised that, *on attaining that age he became entitled, under the will, to a vested interest in the testator's residuary estate* and the accumulations thereof, and praying that the funds of which the residue and accumulations consisted might be transferred to him.

Mr. Spence and Mr. Wood appeared in support of the motion.

Mr. Knight Bruce and Mr. Jacob, for the Defendant Charles Josselyn, and

Sir W. Horne, for the Defendant Royce, the executor of Mark Josselyn, and the only other party to the suit.

[66] THE VICE-CHANCELLOR [Sir L. Shadwell]. The residue is actually given to the Plaintiff; and the words which follow the gift are merely directory as to the future management of what is before given. I shall, therefore, make an order according to the prayer of the petition.

[66] FREWIN v. LEWIS. Dec. 21, 23, 1837.

[Reversed, 4 My. & Cr. 249; 41 E. R. 98 (with note); 6 Ad. & E. 73 (n.).]

Poor Law Amendment Act. Jurisdiction. Injunction.

Although the Poor Law Amendment Act enacts that no order of the Poor Law Commissioners shall be removed by *certiorari* into any Court of Record except the King's Bench, and that every order which shall be removed into that Court shall, nevertheless, until declared illegal, continue in force and be obeyed in the same manner as if it had not been so removed; yet the Court of Chancery has jurisdiction to restrain the Commissioners and the guardians of a union from acting upon an order pending proceedings under a *certiorari* obtained by the Plaintiff to try the validity of it.

The Plaintiffs were the Governors and Directors of the United Parishes of St. Andrew, Holborn, above the Bars, and St. George the Martyr, elected under a local Act of the 6th Geo. 4, c. 175. The Defendants were the Poor Law Commissioners and the Guardians of the Holborn Union under the Poor Law Amendment Act (4 & 5 Will. 4, c. 76).

The bill alleged that, ever since the passing of the local Act, the affairs of the two

united parishes, so far as related to the poor, had been under the management of the Board of Governors and Directors elected under that Act; that, in March 1836, the Poor Law Commissioners issued an order directing that those parishes and certain other places should be formed into a union, to be called "The Holborn Union," and that a Board of Guardians for the Union should be chosen according to the provisions of the Poor Law Amendment Act; and, by a subsequent order, they directed the poor rates [67] of the Union to be placed under the control of the guardians; and, under that order, the Plaintiffs had paid over considerable sums to the guardians, and had put them in possession of the workhouse of the two parishes, which was vested in the Plaintiffs by the local Act. The bill further alleged that the Plaintiffs had lately discovered that, by reason of the provisions of the local Act, the Poor Law Commissioners had no jurisdiction over the two parishes, and that the Plaintiffs were entitled to continue in the possession of the funds and property of those parishes, and in the collection and disposition thereof; and that they had obtained a *certiorari* for removing the first order of the Commissioners into the Court of Queen's Bench, in order that the same might be quashed, and that the proceedings under the *certiorari* were still pending; that, whatever might be the decision of the Court of Queen's Bench as to the legality of the order of the Commissioners, the intended enlargement of the workhouse was wholly unnecessary, and would be very burthensome to the parishioners. The bill prayed that it might be declared that the workhouse and the funds raised for the relief of the poor in the two united parishes were still vested in the Plaintiffs under the local Act, and that neither the Poor Law Commissioners nor the Guardians of the Holborn Union had any power to alter the workhouse, or to dispose of the funds of the two parishes, and that they might be restrained from so doing.

The Defendants demurred generally to the bill.

THE SOLICITOR-GENERAL [Sir R. M. Rolfe], Mr. Wigram, Mr. W. T. S. Daniel, Mr. Tomlinson and Mr. Collins appeared in support of the demurrer, and contended that, although the two parishes were united for certain purposes by the [68] local Act, yet they did not constitute such a union as was contemplated and intended by the new Poor Law Act: and also that, under the 105th section(1) of that Act, the legality of orders made by the Commissioners could not be called in question in any Court except the Court of Queen's Bench, and, consequently, that the Court of Chancery had no jurisdiction in the present case.

Mr. Knight Bruce, Mr. Jacob and Mr. Stuart, in support of the bill, said that the new Poor Law Act did not apply to parishes which were united by local Acts of Parliament, and, consequently, that the powers vested in the Plaintiffs by their local Act were not abridged or in any manner affected by the new Act. *The King v. The Poor Law Commissioners in the matter of the Parish of St. Pancras* (6 Adol. & Ell. 1). They contended also that, although the Poor Law Commissioners were public functionaries, the Court of Chancery had jurisdiction to call in question and control their acts. *Rankin v. Huskisson* (ante, vol. 4, p. 13), *Ellis v. Earl Grey* (ante, vol. 6, p. 214), *Attorney-General v. Forbes* (2 Myl. & Craig, 123).

[69] THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill in the present case clearly shews that the legality of the orders of the Poor Law Commissioners is, in fact, disputed, and the arguments used at the Bar in support of the demurrers shew that it is at least disputable; and I think that I should be departing from that safe mode of proceeding uniformly adopted by Judges sitting in Courts of Equity if I were to take upon myself, in a case like the present, to decide what the law is, particularly as the question as to the legality of the orders is now in a train for

(1) That section enacts, "that no rule, order or regulation of the Commissioners or Assistant Commissioners, or any of them, shall be removed or removable, by writ of *certiorari*, into any Court of Record, except His Majesty's Court of King's Bench at Westminster, and that every rule, order or regulation which shall be removed by writ of *certiorari* into the said Court of King's Bench shall, nevertheless, unless and until the same shall be declared illegal by that Court, continue in full force and virtue, and be obeyed, performed and enforced, in such and the same manner, and by such and the same ways and means as if the same had not been so removed."

decision according to the method pointed out by the Act of Parliament, namely, the writ of *certiorari*. There being then, in fact, a dispute pending as to the legality of the orders of the Commissioners, it is alleged by the Plaintiffs that certain things are proposed to be done by the Board of Guardians appointed under the new Act which tend to put in jeopardy, not only the funds belonging to the two united parishes of St. Andrew and St. George, but also the building which now exists in the shape of a workhouse, the property in which, the Plaintiffs contend, is still vested in them under the provisions of the local Act. There can be no doubt that this Court has a plain right to exercise a jurisdiction for the preservation of property whilst a *bonâ fide* dispute is going on between two parties as to the right to that property, whether between individuals or bodies corporate and individuals, or in any other form. Now, supposing it should turn out, by the decision of the Court of Queen's Bench upon the writ of *certiorari*, that all the orders of the Poor Law Commissioners are wrong, and that the guardians are not justified in making the proposed alteration and enlargement of the workhouse, what reparation can the Plaintiffs obtain? The Act complained of will have [70] been done: the enlargement will have taken place. The alteration may be perfectly judicious if the union directed by the Commissioners is to stand; but it will be most injudicious and detrimental to the interest of the parishioners if the two parishes are to continue as they existed under the Act of the 6th Geo. 4. If the orders of the Commissioners are held to be right by the Court of Queen's Bench, then, I apprehend, the only consequence will be that the measures which are complained of will be carried into effect.

With reference to the observations made on the 105th section of the Poor Law Amendment Act, it appears to me that there is nothing to be found in that section which prevents any other Court than the Court of Queen's Bench from incidentally judging of the legality of the orders of the Poor Law Commissioners; because a case may arise in which the Commissioners may direct some act to be done which will have the effect of trenching on the rights of some single individual. Can it be said that, in such a case, the individual would be deprived of his action of trespass, or of any other remedy which the law in general affords? The words of the section are, "that no rule, order or regulation of the said Commissioners, or Assistant Commissioners, or any of them, shall be removed or removable, by writ of *certiorari*, into any Court of Record, except His Majesty's Court of King's Bench at Westminster; and that every rule, order or regulation which shall be removed by writ of *certiorari* into the said Court of King's Bench shall, nevertheless, unless and until the same shall be declared illegal by that Court, continue in full force and virtue, and be obeyed, performed and enforced in such and the same manner, and by such and the same ways and means as if the same had not been so removed," or, in other words, [71] that the removal of the order shall not of itself be taken to be conclusive of its illegality during the time that the question of its legality is pending. So that that section only leaves the matter in the same state as if there had been no *certiorari* at all; and I apprehend that, notwithstanding that clause, the rights of individuals are, by the frame of the statute, left untouched.

Inasmuch as the acts sought to be restrained by the injunction are acts which can only be done by the Board of Guardians in consequence of an order of the Poor Law Commissioners, I cannot see how the Court can sever the one body from the other: and I apprehend that, in a case like the present, where there is a grave question depending as to the right to do the act complained of, this Court will not, in the meantime, suffer one of the litigating parties to assume that the law is on his side, and to proceed to complete that act, the legality of which is to be tried in the pending litigation. The demurrers must, therefore, be overruled.(1)

Upon the demurrers being overruled, Mr. Knight Bruce moved for and obtained an injunction according to the prayer of the bill.

(1) The rule *nisi*, which had been granted for the *certiorari*, was discharged by the Court of Queen's Bench. See *The Queen v. The Poor Law Commissioners in the matter of the Holborn Union*, 6 Adol. & Ell. 56.

[72] VIGERS v. LORD AUDLEY. Dec. 5, 6, 1837.

Pleading. Supplemental Bill.

Two members of a company filed a bill against the directors, and afterwards obtained an injunction against them. A new director was afterwards elected; and on his doing an act in conjunction with one of the original directors, which was prohibited by the injunction, the Plaintiffs filed a supplemental bill against him, stating that fact, but omitting the allegations in the original bill. Held, that the Plaintiffs had stated sufficient to maintain their supplemental bill.

The question in this case arose upon the argument of a demurrer to a supplemental bill. That bill was filed on the 22d of July 1837 by W. Vigers and John Timins, on behalf of themselves and all other the shareholders in the West Cork Mining Company, except the Defendants thereto. It stated that in October 1836 the Plaintiffs filed their original bill against Lord Audley, Pike, Prickett, Ellis, Warneford, Davis and Solari, as directors of the company; that the original bill stated, amongst other things, the formation of the company, an Act of Parliament enabling any director to sue and be sued on behalf of the company, and a contract alleged to have been entered into by Pike with Lord Audley for a lease of certain mines; and that the shareholders of the company were very numerous, and, therefore, they could not be made parties to the suit so as to enable the Plaintiffs to prosecute it with effect. The supplemental bill then set out the prayer of the original bill, the object of which was to compel the directors to refund certain sums of money which they were alleged to have fraudulently paid to Lord Audley out of the funds of the company, and to restrain them from further disposing of or intermeddling with those funds. It next stated that, on the 2d of November 1839, the Lord Chancellor granted an injunction restraining the directors from signing or issuing any bills of exchange, promissory notes or other securities, binding or pledging the company to the payment of any sums of money to Lord Audley; that, on the 23d of December 1836, the Plaintiffs filed a supplemental bill against the Defendants to the original bill, "which, [73] after stating to the purport and effect therein stated, prayed that all the therein-mentioned discoveries, statements, facts and circumstances might be taken, treated and considered as supplemental to and in aid of the said original bill and of the relief sought thereby, and that the Defendants might be restrained as therein mentioned and as prayed by the original bill, and otherwise as therein mentioned."

The first-mentioned supplemental bill then stated that, on the 27th of December 1836, an order was made by the Vice-Chancellor restraining Pike, Prickett and Warneford from interfering with, possessing, receiving or disposing of the funds of the company, and that that order was afterwards affirmed by the Lord Chancellor; that Pike, with the aid and concurrence of Solari, or Pike and Solari conjointly, determined to nominate or obtain the nomination of a temporary director of the company; and, accordingly, Knapp was appointed or nominated by Pike, Solari and other directors acting with them: that, in April 1837, Knapp and Solari fraudulently concurred with Pike in appointing Elkington (who was in insolvent circumstances) a temporary director; that the company being pressed to make some payments, Solari, Knapp and Elkington, acting in collusion together and with Pike, determined on borrowing money on behalf of the company from Solari; and, under the pretence of some resolutions of Solari, and of Knapp and Elkington as such temporary directors, Solari made some advances of money for the company, amounting, as he alleged, to £1139; that, in order to ruin the company or otherwise effect some sinister object of the said parties, a writ was, on the 14th of June 1837, sued out in the name of Solari against Prickett, as a director of the company, as the nominal Defendant in an action of debt at the [74] suit of Solari, for his alleged advances; and, on the 18th of the same month, an appearance to the writ was entered for Prickett by Solari's attorney, and, on the 21st, a judgment by default was signed for Solari, and, in July following, execution was issued thereon, and the goods and chattels of the company were seized

and were advertised for sale on the 25th of that month; that an action had been commenced by Elkington against Prickett for a debt alleged to be due to him from the company, in which similar proceedings had taken place; that both those actions were fraudulent as against the shareholders; that Solari and Knapp, being themselves merely temporary directors, had no right or power to nominate Elkington as a director, and such appointment was altogether void.

The first-mentioned supplemental bill prayed that all the aforesaid several matters might be taken as supplemental to the former suits, and that the Plaintiffs might have all the same benefit thereof against the Defendants, as they were entitled to in respect of the several matters in their former bills alleged, and might have such and the like relief against the Defendants, Knapp and Elkington, as was prayed by their former bills and as they were entitled to against the several other Defendants therein named, and that Solari and Knapp might be restrained from proceeding with their actions.

Knapp put in a general demurrer.

Mr. Wigram and Mr. Toller, in support of the demurrer, said that Knapp was not required to answer the bills in the former suits, nor was it shewn that he was in any manner bound by the orders made therein; that, as the same relief was prayed against him as was [75] prayed by the former bills, and as the Plaintiffs were entitled to against the other Defendants therein named, it was not sufficient to refer to those bills in the usual form as being on the files of the Court; but the case made by those bills ought to have been stated over again; for, as the record now stood, it did not appear that the Plaintiffs had any equity to the relief prayed. *Phelps v. Sproule* (ante, vol. 4, p. 318).

Mr. Knight Bruce, Mr. Wakefield and Mr. Rogers, for the Plaintiffs, said that the former bills were referred to as remaining filed as of record in the Court, and, therefore, all their contents were embodied by reference in the bill demurred to; that, as equitable relief was sought against the directors, all of them must be parties to the discussion of the question; and, if a new director chose to intervene in matters which were in litigation, he must be made a party even if he were an innocent director, as the equity could not be administered without him: that, moreover, Knapp was charged with having, in collusion with Pike, borrowed money on behalf of the company, in disregard of the injunction that had issued against the other directors; and that that and the other charges against him shewed that he was properly made a party to the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell]. All that I intended to do in *Phelps v. Sproule* was to act upon the proposition laid down by Lord Redesdale, namely, that a person who files a bill of revivor must shew a title to revive, that is, he must state so much of the original bill as is necessary to shew that he has a right to revive. (See Treat. on Plead. 3d edit. p. 59, and 4th edit. p. 76).

[76] In this case the supplemental bill which has been demurred to states that the original bill was filed against Lord Audley and certain other persons who were directors of the West Cork Mining Company, and that an injunction was asked for and granted to restrain the directors from issuing bills of exchange or other securities binding the company to the payment of any sums of money to Lord Audley. Then a supplemental bill was filed against the same defendants, and an injunction was granted which restrained Pike and two of the other directors from interfering with the funds of the company; and that injunction was upheld by the Lord Chancellor. Then it appears that Knapp was subsequently appointed a temporary director under circumstances that were collusive and fraudulent; and then it is stated that Solari, Knapp and Elkington, acting in collusion together and with Pike, determined on borrowing money from Solari on behalf of the company, and that Solari, under the pretence of some resolutions made by him in conjunction with Knapp and Elkington as temporary directors, made some advances of money for the company. Now, is not that, in substance, a violation of the injunction which was upheld by the Lord Chancellor? For the moment the money was borrowed for the company it became the funds of the company, and, consequently, the act so stated to have been done by Knapp in collusion with Pike, after he had been elected a temporary director of the company, was, in effect, an interference with the funds of the company; and it would

be strange to say that, if it was thought right to restrain Pike from interfering with the funds, a temporary director subsequently elected is at liberty to concur with him in doing an act which the Lord Chancellor had prohibited. As it then appears that the Judges of the Court have granted injunctions, no further statement [77] was necessary for the purpose of shewing that the Plaintiffs had an equity.

It is not necessary for a Plaintiff when he files a supplemental bill to state in it all the circumstances of the case at length. All that is requisite is that he should state so much of the case as shews that there was an equity: and, as the Plaintiffs in this case have stated that the Judges of the Court have granted injunctions in the prior stages of the cause, they have stated sufficient to shew that there was an equity; and the consequence is that the demurrer must be overruled.

[77] GIBBINS v. MAINWARING. Dec. 13, 1837.

Receiver. Practice.

Receiver granted against a Defendant who was out of the jurisdiction.

In this case Mr. Knight Bruce, for the Plaintiff, moved for a receiver against the Defendant who was out of the jurisdiction.

THE VICE-CHANCELLOR [Sir L. Shadwell] made the order. (See *Tanfield v. Irvine*, 2 Russ. 149.)

[78] THE ATTORNEY-GENERAL v. THE LONDON AND SOUTHAMPTON RAILWAY COMPANY. Dec. 14, 1837.

[S. C. 1 Railw. Cas. 302; 7 L. J. Ch. 15.]

Construction of Railway Act, as to Crossing Roads.

By the Southampton Railway Act, it was enacted that it should be lawful for the company, according to the provisions and subject to the restrictions of the Act, to construct in, upon, across, under, or over, any lands, streets, roads, rivers, &c., such bridges, arches, piers, &c., as they should think proper; that where any bridge should be erected for carrying the railway over or across any road, the span of the arch should be formed so as to leave a clear and open space under every arch of not less than 15 feet: that in all cases in which any road should be found necessary to be cut through, diverted, taken or so much injured as to be impassable for passengers or carriages, the company should, before any road should be so cut through, &c., cause a sufficient carriage or horse road as the case might require, to be made instead thereof, as convenient for passengers and carriages as the road to be cut through, &c., or as near thereto as might be, and should cause the same to be put into good order where the former road could not be more easily restored; and, when the road cut through, &c., should be a turnpike road, the substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six months; and the railway where it should cross such turnpike road should be constructed and kept in repair so as to prevent, as far as practicable, any obstruction to the passage along the road. Held, that the company in carrying a bridge over a turnpike road might erect the piers upon the road, and were not bound to leave more than a clear open space of 15 feet under each arch, notwithstanding the original width of the road would be considerably lessened thereby.

By the London and Southampton Railway Act (4 & 5 Will. 4, c. 88), it was enacted that, for the purposes and subject to the restrictions of the Act, it should be lawful for the company, and they were thereby empowered for the purposes and according to the provisions and subject to the restrictions of the Act, to make or construct in, upon, across, under or over any lands, streets, rivers, roads, &c., such

inclined planes, tunnels, embankments, bridges, arches, piers, roads, &c., as they should think proper: sect. 9. That where any bridge should be erected by the company, for the purpose of carrying the railway over or across any turnpike road [79] or other public highway, the span of the arch of such bridge should be formed and continued of such width as to leave a clear and open space under every such arch of not less than 15 feet: sect. 74. That in all cases in which, in the exercise of any of the powers granted by the Act, any part of any carriage or horse road, either public or private, should be found necessary to be cut through, diverted, raised, sunk, taken or so much injured as to be impassable for passengers or carriages or the persons entitled to the use thereof, the company should, at their own expense and before any road should be so cut through, diverted, raised, sunk, taken or injured as aforesaid, cause a sufficient carriage or horse road (as the case might require) to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, &c., or as near thereto as might be, and should cause the same to be put into good and substantial order and condition, where the former road could not more easily be restored; and, where the road cut through, diverted, &c., should be a turnpike road, the substituted road, if temporary, should be set out and made as aforesaid, and the principal road should be restored within six calendar months next after the commencement of the operation; and that the railway, where it should cross such turnpike road, should be constructed and kept in repair in such manner as to prevent, as far as might be practicable, any obstruction to the passing along such turnpike road: sect. 77.

The railway company having made preparations for erecting an arch across the turnpike road from London to Portsmouth, at Ditton Marsh, where the road was 38 feet wide, the information was filed, alleging that the clear space under the arch would be of the width [80] of 24 feet only, which was much less than the average width of the road, and wholly inadequate to the great traffic on it; and consequently the projected lessening of its width would be attended with danger and inconvenience to the public, and would be, in fact, a public nuisance. The information prayed that the company might be restrained from proceeding to erect the arch, and from erecting any other arch or building upon or across the road which would so obstruct or narrow it as to be a nuisance or injury to the public.

A motion was now made for the injunction, supported by affidavits verifying the statements in the information. Affidavits also were made on behalf of the company, shewing that the road, in certain parts of it where the traffic was greater than at Ditton Marsh, was not 24 feet wide.

Mr. Knight Bruce, Mr. Foster and Mr. Sugden, in support of the motion. According to the construction which the company put upon the Act, a width of 15 feet is all that they can be required to give in any case. But it is evident that a width that may be sufficient at one place may be wholly insufficient at another, and consequently the Legislature does not say that, where the company are under the necessity of carrying a bridge over a road, the span of the arch shall, in no case, be greater than 15 feet, but merely that, in no case, shall it be less. The Legislature considered that a space of 15 feet was the least width that the safety and convenience of the public could, in any case, require: but it did not mean to enact that no greater space should be allowed where the safety and convenience of the public required it. [81] *Prima facie*, the road as it now is must be taken not to be wider than is requisite: indeed some of our affidavits state that a width of 40 feet is necessary; but they all agree that a less width than 30 feet will be both dangerous and inconvenient to travellers on the road. The Defendants' affidavits do not state that the present road is unnecessarily wide; but they merely contain the speculative opinions of the deponents as to what the convenience of other persons may require. The 77th section of the Act aids the construction which we contend for; for it enacts that a new road, where it is necessary to make one, shall be set out and made as convenient for passengers and carriages as the old one. Can it then be said that a road which is only 15 feet wide is as convenient for passengers and carriages as one that is 38 feet wide? The new Highway Act (5 & 6 Will. 4, c. 50, s. 69) shews that the Legislature considers 30 feet to be the proper width of a public road: for it imposes penalties on persons making encroachments within 15 feet of the centre of the road.

In *Blakemore v. The Glamorganshire Canal Navigation* (see 1 Myl. & Keen, 162), Lord Brougham, C., speaking of Acts of Parliament of the same nature as the one now under consideration, says: "When I look upon these Acts of Parliament, I regard them all in the light of contracts made by the Legislature, on behalf of every person interested in anything to be done under them; and I have no hesitation in asserting that, unless that principle is applied in construing statutes of this description, they become instruments of greater oppression than anything in the whole system of administration under [82] our constitution. Such Acts of Parliament have now become extremely numerous; and, from their number and operation, they so much affect individuals, that I apprehend those who come for them to Parliament do, in effect, undertake that they shall do and submit to whatever the Legislature empowers and compels them to do, and that they shall do nothing else; that they shall do and shall forbear all that they are thereby required to do and to forbear, as well with reference to the interests of the public as with reference to the interests of individuals." This is the true point of view in which all Acts of Parliament like the present ought to be regarded.

Mr. Wigram and Mr. Duckworth, for the Defendants. By the 9th section of the Act, the company are empowered to construct bridges and arches *upon* as well as *across* and over turnpike roads, *as they may think proper*; and therefore, if the words, "according to the provisions and subject to the restrictions of the Act" had been omitted, the company might have made the arches of the bridge of any width that they pleased. The restriction imposed by the Act is that a clear and open space shall be left under every arch, of not less than 15 feet. Taking then both the sections together, it is clear that the company are empowered by the Act to construct bridges over turnpike roads, and to make a roadway under each arch, of the width of 15 feet. The Legislature considered that that was the width which the safety and convenience of the public required; and the Act nowhere says that the company are not to diminish the width of roads where they are unnecessarily wide. If it had been the intention of the Legislature that the existing width of the roads should be preserved, it would [83] have been easy to say so. The trustees of the road had notice that it was the intention of the company to apply for the Act, why then did they not procure a special provision to be inserted in the Act for preserving the original width of their road? Special clauses are inserted in the Act for the protection of the river Wey navigation and other public undertakings.

The Court of Chancery never interferes to restrain a general nuisance without sending the question to be tried in a Court of law. *The Attorney-General v. Cleaver* (18 Ves. 211).

Mr. Knight Bruce, in reply. The Act gives no power to the company, in crossing a road, to occupy any part of it with a pier, buttress or any other building. In the 9th section, the words "in and upon" apply to lands only; the words "across and over," are applicable to roads and rivers; and it is observable that all the prepositions used in the 9th section, except "across and over," are omitted in the 74th section. The provision that there shall be at least a certain space under each arch cannot be construed as a provision that there shall be no greater space. The *minimum* is fixed, but the *maximum* is not, unless the words "not less than" are to be taken to mean "not more than." At all events the Act gives no power to the company to touch the surface of any road.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case it is observable that, by the 9th section of the Act of Parliament, it is enacted that, for the purposes and subject to the restrictions of the Act, it shall [84] be lawful for the company, their deputies, engineers, contractors, servants, agents and workmen, and all other persons by them authorized, for the purposes and according to the provisions and subject to the restrictions of the Act, to make or construct in, upon, across, under or over the railway or other works, and in, upon, across, under or over any lands, streets, hills, vallies, roads, rivers, canals, brooks, streams or other waters, such inclined planes, tunnels, embankments, bridges, arches, piers, roads, ways, passages, conduits, drains, cuttings and fences as the company should think proper. Now, if it stood there, there would be a general power given to the company, not merely to make a bridge over or across a road, but also to erect piers and arches in and upon the road. But that general

power, given by the 9th section, is clearly intended to be restricted to a certain extent ; for the company are only enabled to do those things which the 9th section empowers them to do, according to the provisions and subject to the restrictions of the Act ; and, when you look at the 74th section, you see that it enacts that, "where any bridge shall be erected by the company for the purpose of carrying the railway over or across any turnpike road or other public highway, the span of the arch of such bridge shall be formed, and shall, at all times, be and be continued of such width as to leave a clear and open space under every such arch of not less than 15 feet, and of a height, from the surface of such turnpike road to the centre of such arch, of not less than 16 feet, and of a height, from the surface of any other public highway to the centre of such arch, of not less than 14 feet ;" *prima facie*, therefore, one would have supposed that the general power given to the company by the 9th section would have been capable of being exercised by them in any way they thought [85] proper, provided that, in crossing a turnpike road by a bridge, they did not make the open space under the arches less than 15 feet wide. It was obviously the intention of the Legislature to empower the company to erect the piers of the arches on the road, provided a clear, open space of not less than 15 feet was left for the public between the piers.

But it was said that that was not the construction which ought to be put upon the two sections before mentioned ; for, if we look at the 77th section of the Act, we shall find these words, "that in all cases in which, in the exercise of any of the powers hereby granted, any part of any carriage or horse road, either public or private, shall be found necessary to be cut through, diverted, raised, sunk or so much injured as to be impassable for passengers or carriages or the persons entitled to the use thereof, the company shall at their own expense, and before any road shall be so cut through, diverted, raised, sunk, taken or injured as aforesaid, cause a sufficient carriage or horse road, as the case may require, to be set out and made instead thereof, as convenient for passengers and carriages as the road to be cut through, diverted, raised, sunk, taken or injured as aforesaid, or as near thereto as may be, and shall cause the same to be put into good and substantial order and condition where the former road cannot more easily be restored ; and, when the road cut through, diverted, raised, sunk, taken or injured, shall be a turnpike road, the substituted road, if temporary, shall be set out and made as aforesaid, and the original road shall be restored within six calendar months next after the commencement of the operation ; and the railway, where it shall cross such turnpike road, shall be [86] constructed and kept in repair in such manner as to prevent, as far as may be practicable, any obstruction to the passage along such turnpike road." Now that section points at two things : first, where it may be necessary to divert the road temporarily, and, secondly, where it may be necessary to divert it absolutely and altogether for an indefinite period of time ; and then it provides that where the railway crosses the road it shall be constructed and kept in repair so as to prevent, as far as may be practicable, any obstruction to the passage along the road. But that provision appears to me not to be a general provision applying to all the other sections of the Act, but only to the particular case contemplated in that section, namely, to a case where there may be a diversion of a road for any particular purpose, either temporarily or absolutely ; but it has no relation to the case contemplated by the 74th section, which is only a modification of the general power given by the 9th section.

It seems to me to be useless for the Court to consider whether the enactments of the Act may or may not produce inconvenience, or, perhaps, damage to the public. The Legislature gives what power it thinks proper, either to an individual or to a body corporate, and defines that power in the manner which it considers most fit ; and it is not the province of a Judge to determine what the convenience or inconvenience of the public may require.

In my opinion it is plain beyond a doubt, upon this Act of Parliament, that, if a clear open space of not less than 15 feet is left under the arch of the bridge, the company may erect the piers of the bridge on the [87] road, and may make the bridge in any manner they may think proper ; and, therefore, I think that there is no foundation for this application.

But though this is my opinion, and, that being so, it would not be right for me

to grant the injunction; yet, if the relators think it right to take the opinion of a Court of law upon the question raised by this information, I will give them leave so to do; but at present I shall not grant the order that is asked for; and I shall reserve the consideration of the costs of the motion, if the relators think proper to take the opinion of a Court of law, until I know the result of the proceedings at law.

[87] WARD v. COOKE. Jan. 12, 1838.

Opening. Biddings.

Four lots were sold for £610, £60, £20 and £20 severally to the same person. The Court opened the biddings on an advance of £160 on £710, the whole amount of the sales, but would not order the lots to be resold in one lot.

The estate directed to be sold by the decree in this cause was put up for sale in 22 lots, but only 18 of the lots were sold. Afterwards the remaining four lots were again put up for sale, and all of them were purchased by the same individual for the several sums of £610, £60, £20 and £20, amounting together to £710.

Mr. G. Richards now moved that the biddings for the four lots might be opened upon an advance of £100 upon the £710, and that the lots might be resold in one lot. He cited *Brookfield v. Bradley* (1 Sim. & Stu. 23).

Mr. Knight Bruce and Mr. Campbell, for one of the parties in the cause, opposed the motion on the ground that Mr. Richards's client was present at the sale.

[88] THE VICE-CHANCELLOR [Sir L. Shadwell] said that he would not alter the original scheme of sale without some reason being assigned for it; but that if Mr. Richards's client would advance £160 upon the whole amount of the biddings he would order them to be opened.

[88] GREENAWAY v. ROTHERHAM. Jan. 16, 1838.

Feme Coverte. Infant. Next Friend.

A suit was instituted by husband and wife and their infant children by their father as next friend, respecting separate property of the wife in which the children also were interested. Pending the suit, the husband absconded. Held, that the Court could not appoint a next friend for the wife and a new next friend for the children, but it ordered that a person to be named by the wife should be allowed to prosecute the suit on behalf of the Plaintiffs.

This suit was instituted by a husband and wife and their infant children by their father as their next friend, in respect of separate property of the wife in which the children also were interested. In the progress of the suit the father absconded and went abroad; and, thereupon, the wife presented a petition praying that some person might be appointed her next friend, and that a new next friend might be appointed for her children.

Mr. Elderton appeared in support of the petition.

THE VICE-CHANCELLOR said he had no jurisdiction to make the order asked for, but that he would order that some person to be appointed by the wife should be allowed to prosecute the suit in the name of the Plaintiffs, without prejudice to any lien which the husband's solicitor might eventually have for his costs.

[89] GIBBS v. HOOPER. Jan. 19, 1838.

[S. C. 7 L. J. Ch. 124 ; 2 Jur. 321.]

Annuity. Memorial.

The memorial of an annuity, after setting forth the grant, from which it appeared that the consideration for the annuity was £455, averred that the true and *bonâ fide* consideration for the annuity was £450, and that the said sum of £450 was paid to the grantor by the grantee. The memorial stated also that the grantee's execution of the deed was attested by three persons whose names it mentioned, but the name of only one of them was indorsed on the deed. Held that the grant of the annuity and all the securities for it were void.

The question in this case arose on the argument of exceptions to the Master's report, finding that an annuity granted at the time when the Annuity Act of the 17th Geo. 3, c. 26, was in force was void on account of the following errors in the memorial.

First. The memorial, after setting forth the deed and the receipt indorsed on it, in which the consideration for the annuity was mentioned to be £455, averred that the true and *bonâ fide* consideration advanced and paid for the annuity was £450, and that the said sum of £450 was paid to the grantor, by the agent of the grantee, in notes of the Governor and Company of the Bank of England.

Secondly. The memorial mentioned the names of Cox and two other persons as witnesses to the execution of the deed by the grantee ; whereas Cox was the only attesting witness to the grantee's execution.

Mr. Jacob and Mr. Sharp, for the exceptants. Both the recitals and the operative part of the deed, as set forth in the memorial, mention the consideration for the annuity to be £455. In *Cousins v. Thompson* (6 T. R. 335) the memorial contained nothing about the consideration, except the recital in the deed ; and yet it was held to be sufficiently stated. *Hodges v. Money* (4 T. R. 500), *Sowerby v. Harris* (*Ibid.* 494), *Ranger v. The Earl of Chesterfield* (5 M. & S. 2), are cases to the same effect. Those cases decide also [90] that it is sufficient if the consideration is set forth once in the memorial. Here it is four times correctly set forth as being £455. [THE VICE-CHANCELLOR. The memorial sets forth the consideration as expressed in the recitals and operative part of the deed : and that, if it had stood alone, would have been a sufficient compliance with what the Act requires : but in the subsequent part of the memorial there is a different statement as to the amount of the consideration.] The Act does not say that the memorial shall contain a specific allegation as to the consideration, but merely requires it to be set forth ; and when the memorial states the recitals in the deed, that is a sufficient setting forth within the Act : therefore, the allegation that the consideration was £450 may be considered as surplusage or as a clerical mistake. *Ince v. Everard* (6 T. R. 545). [THE VICE-CHANCELLOR. In that case the memorial, after declaring that the £280 mentioned in the grant of the annuity was the whole of the purchase-money paid for it, proceeded thus : "and that the said sum of £250 was really and *bonâ fide* paid" by the grantee. It was evident, therefore, that the £250 was inserted, by mistake, for the £280.]

With respect to the objection that the names of two of the persons whom the memorial represents to have been present when the grantee executed the deed do not appear on the back of it : the case of *Ex parte Macreth* (2 East, 563) was relied on, before the Master, in support of that objection. But that case is totally different from the present : for, there, the memorial stated that all the securities were attested by four persons ; whereas it was admitted that three of the instruments were witnessed by only two of those [91] persons : the memorial, therefore, stated what was untrue. Here the memorial states what is perfectly true, namely, that the deed was executed in the presence of Cox ; and it may be taken to have been executed in the presence of the two other persons, although their names do not appear on the back of the deed. *Browne v. Rose* (6 Taunt. 124), *Orton v. Knight* (3 Bos. & Pull. 153), *Wyatt v. Barwell* (19 Ves. 435). Besides, it is perfectly immaterial whether the grantee executed the

deed or not. The errors complained of are of the most trivial nature: and the memorial gives all the information that the Legislature intended it to give.

At all events the memorial is good as to the warrant of attorney; and the case of *Browne v. Rose* is an authority for holding that some of the securities for an annuity may be bad and others good.

Mr. Knight Bruce, Mr. Russell, Mr. Pitman, Mr. Fisher and Mr. Gardner appeared for other parties in the cause; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: When the memorial of an annuity deed sets forth, by way of recital, what was the consideration for the annuity it has been decided that that is a substantial setting forth of the consideration. But, here, the memorial first sets forth the whole contents of the deed (from which it appears that the consideration for the annuity was £455) and then it contains a substantive averment that the true and *bona fide* consideration paid for the purchase of the annuity was the sum of £450. If, after that averment, it had gone on to state that the [92] said sum of £455 was paid by the grantee, then you might have said that there was evidently a clerical error in the previous averment, because the memorial went on to say that the said sum of £455 was paid by the grantee to the grantor. But, in this case, the memorial asserts, not only that the true and *bona fide* consideration paid for the purchase of the annuity was the sum of £450, but also that the said sum of £450 was paid by the grantee. Therefore there is, in one part of the memorial, a statement, by way of recital, that the consideration for the annuity was £455; and, in the subsequent part of the memorial, there is a substantive averment that the consideration was a different sum: and, consequently, the memorial does not contain a true statement of what the consideration really was. That, in my opinion, is a good objection extending to the whole of the transaction, and, therefore, it vitiates the warrant of attorney as well as the grant of the annuity.

Next, with respect to the objection as to the witnesses. That objection also appears to me to be a fatal one. The object of the Legislature in requiring the several particulars mentioned in the Act to be set forth in the memorial was to enable any person, who might be desirous of inquiring into the transaction to ascertain what the *res gestæ* of it really were: and, in my opinion, that object is not complied with when, in addition to the names of the persons who did witness the execution of the deed, the names of other persons are introduced into the memorial. Such a misstatement would lead to endless trouble and confusion, by inducing a person desirous of inquiring into the transaction to apply for information to persons who were entire strangers to it. Moreover, the memorial would contain an untrue representation of the *res gestæ* of the transaction; and the [93] public would be deceived if the parties were allowed to represent that the transaction had the sanction of two persons, both, perhaps, of the greatest respectability, but who were wholly ignorant that any such transaction had taken place.

On the first ground, however, I think that the annuity is clearly void.

[93] GRAHAM v. COAPE. Jan. 20, 22, 1838.

[Affirmed, 3 My. & Cr. 638; 40 E. R. 1073.]

Defendant. Disclaimer.

A bill was filed by a person claiming to be entitled to a trust fund against the trustees and another party, who it alleged claimed an interest in the fund; and it contained various allegations tending to shew that he had rendered the suit necessary by his personal conduct; and it prayed that that party might pay the costs of the suit. Held, that as the bill did not state simply that the Defendant claimed an interest in the fund, it was not sufficient for him to put in a mere disclaimer, but that he must answer the bill fully.

The bill in this cause was a cross-bill. It stated that, on the 27th of February 1837, the Plaintiff married Jane Edmiston, his late wife, and that, by their marriage

settlement, certain sums of stock, the wife's property, were assigned to the Defendants Graham and Forbes, in trust for the wife's separate use for life, and, after her death, for the Plaintiff, his executors, &c.; that the Plaintiff's wife died in March 1837, and thereupon the Plaintiff became entitled to have the stock transferred to him; that, if she had died unmarried, the Defendants Henry Coape and Susanna, his wife, and Henry Coe Coape and Sidney, his wife, in right of their wives respectively, as her next of kin or under some other right or title unknown to the Plaintiff and which those Defendants refused to discover, would have been entitled to the stock; that the same Defendants alleged that the Plaintiff's wife was of unsound mind at the time of her marriage, and consequently that the settlement and mar-[94]-riage were invalid, and that they, the Defendants, under such right or title as aforesaid, were entitled to the stock, and had required the trustees to transfer it to them; that the Plaintiff's wife was of perfectly sound mind at the execution of the settlement and solemnization of the marriage; but the trustees, in consequence of the before-mentioned claims, refused to transfer the stock to the Plaintiff; that he frequently requested the Defendants to relinquish their alleged claim to the stock and to permit the trustees to transfer it to him, but they had refused so to do; that in April 1837 H. Coape and Susanna, his wife, exhibited their bill in this Court against the Plaintiff and the trustees, alleging that the Plaintiff's wife was of unsound mind at and for some time before her marriage, and that the Plaintiff and his father and mother formed a plan for procuring a marriage between her and the Plaintiff in order that the Plaintiff might become possessed of her property, and that they procured the settlement to be executed by her at a time when her intellects were impaired by paralysis; and praying that the settlement might be delivered up to be cancelled, and that the trustees might be decreed to transfer the stock to the Plaintiffs in the original suit. The cross-bill then contained charges contradicting the allegations in the original bill, and tending to shew the sanity of the Plaintiff's wife, and that the marriage was her free act, and that it had been admitted to be so by the Defendants, the Coapes, and that it was known to her relations, and particularly to those Defendants for nearly a year before it took place, and that they endeavoured to dissuade her from it in hopes of succeeding to her property, and that they had tampered with her servants and medical attendants for the purpose of obtaining information as to the state of her health. The cross-bill then charged that the several acts and pro-[95]-ceedings before mentioned on the part of the Defendants were evidence that they had or claimed some interest in the stock on the supposition that the Plaintiff's wife died unmarried; that she had requested H. C. Coape to be one of the trustees of her settlement, to which he consented, but afterwards retracted his consent; that the Defendants never pretended that the Plaintiff's wife was of unsound mind until after her death, but always treated and considered her as sane; that on the 7th of February 1837 H. C. Coape had an interview with her, and had much conversation with her respecting her intended marriage, and endeavoured to dissuade her from it, and on that occasion retracted his consent to be one of the trustees of her settlement; and that he ought to set forth all that passed at that interview; that the Plaintiff's wife frequently wrote letters to the Defendants, the Coapes, which were then in their possession, and which proved that she was perfectly sane, and that those Defendants had written letters to each other which proved the same fact; that they had executed some deed by which they had assigned their shares of the stock upon certain trusts for their own benefit, but the particulars of such deed were wholly unknown to the Plaintiff, and they ought to discover the same; that Henry C. Coape and his wife claimed to be interested in the stock under such deed; that they sometimes pretended that they did not claim any interest in the stock; whereas the Plaintiff charged the contrary, and that they claimed such interest therein as before mentioned, and, as part evidence thereof, that they took an active part in endeavouring to prevent the marriage, and in preventing the trustees from transferring the stock to the Plaintiff; that the trustees were willing to transfer the stock to the Plaintiff, but they had been advised that they could not safely do so by reason of the Defendants' claims to it, and of the suit insti-[96]-tuted by them; that the Defendants, the Coapes, ought to pay to the Plaintiff the costs of this suit, and the other costs occasioned by their claims; and that they had in their possession various letters, &c., relating to the Plaintiff's wife, and

her state and condition, and their own title to the stock and the other matters in the bill.

The bill prayed that the Plaintiff might be declared to be entitled to the stock under the settlement, and that the trustees might be decreed to transfer it to him; *and that the Coapes might pay him his costs of the suit.*

H. C. Coape and his wife put in an answer and disclaimer (as they intituled it) to the bill. It was as follows: "These Defendants say that they or either of them never had, nor did they or either of them claim or pretend to have, nor do they or either of them now claim any right, title or interest of, in or to the estate, funds, stocks and premises in the said bill mentioned of Jane Edmiston, deceased, in the said bill named, or in any part of such estate, funds, stocks and premises; and these Defendants do disclaim all right, title and interest to the same estate, funds, stocks and premises and every part thereof."

To this answer and disclaimer the Plaintiff took exceptions which comprised all the interrogatories in the bill. The Master reported that the answer and disclaimer were sufficient, and that the Plaintiff ought to pay the costs of the reference. The Plaintiff excepted to the report; and those exceptions now came on to be argued.

Mr. Jacob and Mr. James Parker, in support of the exceptions. The document which the Defendants Henry Coe Coape and his wife call an answer and disclaimer is, in [97] fact, a partial answer; for they say that they never had or claimed to have nor do they now claim any interest in the property in question. If a bill seeks no relief or discovery against a Defendant, but alleges, merely, that he claims some interest in the property in dispute, the Defendant, by putting in a simple disclaimer, removes the only ground on which he was made a party to the suit. But here the Defendants have put in an answer, as well as a disclaimer; and by the general rules of this Court, independently of what appears in this bill, they cannot, if they adopt such a course, avoid answering the bill fully. The bill is a cross-bill, praying relief as well as discovery; and, with respect to the Defendants who have put in this answer and disclaimer, it prays that they may pay the Plaintiff his costs of the suit. All the allegations in the bill tend, either directly or indirectly, to fix those Defendants with the costs; and, consequently, they ought to have put in a full answer. At all events, they ought to have answered the allegations that they had required the trustees to transfer the funds to them; that they had refused to relinquish their claim to the funds, and that they took an active part in preventing the marriage, and in preventing the trustees, since the death of the Plaintiff's wife, from transferring the funds to the Plaintiff: no answer, however, is given to any of those allegations: nor is there any answer to the charge that they have executed some deed or instrument whereby they have assigned or agreed to assign their alleged shares or interests in the stocks and funds upon certain trusts for their own benefit. Where, as in this case, the bill seeks to fix a party with a liability, he cannot get rid of the liability by putting in a disclaimer. *Deacon v. Deacon* (ante, vol. 7, p. 378), *Glassington v. Thwaites* (2 Rnss. 458), *Cookson v. [98] Ellison* (2 Bro. C. C. 252), *Bulkeley v. Dunbar* (1 Anst. 37), *Orenham v. Esdaile* (Maclel. & Youn. 540). The Defendants might have put in a plea stating facts which exempted them from answering the bill; but then the Plaintiff would have been at liberty to enter into evidence to disprove those facts; and, if he succeeded, the Defendants would have been compelled to answer interrogatories embracing all the allegations in the bill.

THE VICE-CHANCELLOR. If the Defendants did claim the funds from the trustees, as they are alleged to have done, it would be a ground for making them pay the costs of the suit, provided the Plaintiff ultimately establishes his title to the funds; and, therefore, all the allegations that go to shew that the Defendants have acted as if they claimed the funds are material, as they tend to shew that they did make the claim, and, consequently, my present impression is that all those allegations, as well as the statements relative to the Plaintiff's title, ought to have been answered.

Mr. Knight Bruce and Mr. G. Richards, in support of the report. The Defendants who have put in the answer and disclaimer are not parties to the original bill. A suit is now pending in the Ecclesiastical Court as to the right of the Plaintiff to be administrator to his wife: and the validity of their marriage is the question in contest in that suit. The filing of this cross-bill is a mere device to ascertain what

the Defendants; who have disclaimed, may have to say, as witnesses, relative to the alleged marriage. It is not necessary to ask for costs except against a person who is made a party to a suit, [99] as having been guilty of a fraud. Where, as in the present case, a person is made a party because he has made a claim to the property in litigation, the Court may order him to pay costs, although they are not prayed against him. We admit that a party cannot disclaim a liability; but he may disclaim an interest. Lord Redesdale says: "It has been already observed that, if a claim of interest is alleged by a bill against a person who has no interest in the subject, he cannot, by demurrer, protect himself from a discovery, and must resort either to a plea or disclaimer: by either of which means, it should seem, he may protect himself from making, by answer, that discovery which he may properly be required to make, if called upon as a witness. In some cases, however, the Court has allowed a Defendant to protect himself, by answer denying the charge of interest, from answering to matters to which he may be afterwards called upon to answer in the character of a witness; and, perhaps, in justice to those against whom he may afterwards be called upon to give evidence as a witness, he ought not to be previously examined to the same matters upon a bill under the pretence of an interest which he has not." (Treat. Plead. 283, 284, 4 edit.; see also *Ibid.* 188, 319.) It is obvious that these Defendants are witnesses; and, if the Court compels them to put in a full answer, it will enable the Plaintiff, by means of a fictitious allegation, to ascertain all that they have to say upon the subject of the suit. Moreover, if what is now insisted on be the law of the Court, there never could be a disclaimer; for there is no case in which a claim of interest has been made, in which the Court might not have given costs at the hearing. But it was never before attempted to be said that the possibility of the Court's giving costs against a party was a reason for [100] not allowing that party to disclaim. It has been always competent to a party who has made a claim before the suit was instituted to disclaim, even where the claim may have rendered the suit necessary. [THE VICE-CHANCELLOR. If a bill alleges, simply, that a certain person who is a party to it claims to be interested in the subject-matter of the suit, then that party may disclaim. But if a person has called upon the trustees of a fund to transfer the fund to him, and another person tells the trustees that he is entitled to the fund and that an assignment of it has been made to him, in consequence of which the trustees refuse to part with the fund except under the direction of the Court; would it be enough for the party who made the adverse claim to say that he does not claim any interest in the fund? In my opinion the Plaintiff, in such a case, would have a right to know whether he had or not made the claim in such a form as to render the suit necessary.] This bill alleges, throughout, that the Defendants *now* claim an interest in the fund.

In *Deacon v. Deacon* the Defendant had originally made a claim, and he persisted in asserting the truth of the facts on which his claim was founded: so that it was impossible to know whether he disclaimed or not. The decision in *Bulkeley v. Dunbar* was founded on this, namely, that the Defendant was implicated in a fraud. Here no case of fraud is alleged against these Defendants. In *Glassington v. Thwaites* the party was accountable to the Plaintiff; and it was on that ground that the Lord Chancellor held that he could not protect himself from answering the bill by disclaiming all benefit and interest in the suit. (See 2 Russ. 462.)

[101] THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot get over the difficulty which I adverted to in the course of the argument.

The Plaintiff has filed a bill, in which he represents in effect that, in February 1837, a marriage took place between him and a lady of the name of Jane Edmiston; that she died shortly afterwards, and that, in consequence of the death of his wife, he has become entitled to certain funded property to which, if his wife had died unmarried, the Defendants would have been entitled as her next of kin or under some other right or title; and that they hold out that the marriage was not valid, in consequence of the lady being of unsound mind, and that, under such right or title as before mentioned, they are entitled to the property, and had required the trustees to transfer it to them. The bill then alleges that, in consequence of the claims of the Defendants, the trustees had refused to transfer the funds to the Plaintiff; and that the Plaintiff had requested the Defendants to relinquish their claims, but that they had refused so

to do. The bill then states the original bill, which was filed by Henry Coape and his wife against the trustees and the Plaintiff in the present suit, and which prayed that the Plaintiff's marriage settlement might be declared to be void, and that the trustees might be decreed to transfer the funds to Henry Coape and his wife. The bill then states various circumstances of conduct with regard to the Defendants; and it charges that the said several acts and proceedings are evidence that the Defendants claim some share or interest in the funds, on the supposition that the Plaintiff's wife died unmarried. The bill then charges that the Plaintiff's wife requested the Defendant Henry Coe Coape to be one of the trustees of her settlement, and that he first gave his consent, [102] but afterwards retracted it; that he endeavoured to induce the physician and apothecary, who attended the lady in an illness which she had not long before her marriage, to dissuade her from marrying the Plaintiff; and that on the 7th of February 1837 he had an interview with her, and endeavoured to dissuade her from the marriage; and the bill requires him to set forth all that passed at that interview. It then alleges that various letters had been written by the Defendants touching the lady's state of mind and bodily health and the validity of her marriage; that the Defendants had executed some deed or instrument by which they had assigned or agreed to assign their alleged shares or interests in the funds, upon certain trusts for their benefit, and that the Defendants H. C. Coape and his wife claimed to be interested in the funds under such deed or instrument. The bill then alleges that those Defendants sometimes pretend that they do not claim any interest in the funds: whereas the Plaintiff charges the contrary, and that they claim such interest therein as before mentioned; and, as part evidence thereof, that they took a very active part in the measures adopted to prevent the marriage, and in the proceedings which had been adopted since the lady's death, to prevent the trustees from transferring the funds to the Plaintiff, and that the trustees were willing to make the transfer, but that they had been advised that they could not safely do so by reason of the claims made by the other Defendants, and that those Defendants ought to pay to the Plaintiff his costs of the suit.

Now, although it may be true that the Defendants H. C. Coape and his wife do not now claim any interest in the funds; yet, if all the allegations which I have adverted to are true, and the trustees had no objection [103] to transfer the funds to the Plaintiff, except that which was created by those Defendants, the Plaintiff, on establishing his title to the funds, would have a right to say that the suit was rendered necessary by the conduct of those Defendants, and that they ought to pay him the costs of the suit.

I admit that it would be an abuse of the power of the Court, if, on a bill so framed a party who, in fact, had nothing whatever to do with the transaction, were compelled to disclose circumstances as to which he might be examined as a witness. I must, however, deal with the record as I find it.

Generally speaking, a disclaimer has been thought sufficient; because the bill has alleged, simply, that the Defendant claims an interest in the property in dispute; and, if he says that he claims no interest, *that* is an answer to the allegation. But where, as in the present case, Defendants have mixed themselves up with the whole of the transaction, and, by their personal conduct, have made it necessary that the bill should be filed, I think that it would be contrary to justice if I were to allow them to put in a mere disclaimer.

My opinion therefore is that the Master's report is wrong on both points; and that the Defendants ought to have answered all the interrogatories in the bill except that which requires them to set forth under what right or title they claim to be interested in the funds in question; and that they ought to pay to the Plaintiffs the costs of the exceptions to the answer and disclaimer, and of the reference to the Master.(1)

(1) Affirmed by the Lord Chancellor; see 3 Myl. & Craig, 638.

[104] LOWRY v. FULTON. Jan. 26, 1838; April 27, 29, 30, May 1, 29, 1839.

[S. C. 7 L. J. Ch. 158. On point as to liability of executor, see *In re Stevens* [1898], 1 Ch. 178.]

Pleading. Parties. Costs. Will. Construction. Executor. Trustee. Acceptance of Trust.

A testator in India bequeathed his residuary estate to A., B. and C., in trust for his children L., M. and N., and appointed A., B. and C. his executors. A. proved in India, and C. in England. B. died without proving; but he was alleged to have acted and committed a breach of trust in conjunction with A. L. died, and C. proved his will in Ireland. M. and N. filed a bill against B.'s executrix and A. and C. (alleging that the two last were out of the jurisdiction, and praying process against them accordingly), for a general administration of the testator's estate, and seeking to make A. and B.'s estate responsible for the breach of trust, and to have A. and C. removed from being trustees. Held, that the cause could not proceed, because no personal representative of the testator, or of L., was before the Court.

A cause was ordered to stand over for want of parties; and the Court gave the Defendants the costs of the day, although the objection was not taken by their answers.

A testator resident in India directed his trustees and executors to invest his residue in *Government or other good securities*, and then declared trusts of it for the benefit of his children and other persons, all of whom were resident either in England or Ireland, and were mentioned so as to be in the will. The residue was allowed to remain in the hands of the testator's bankers and agents in India, who ultimately failed. Held, that the acting executor and trustee was responsible for the loss thereby occasioned to the estate.

A testator resident in India appointed A., B. and C. his executors and trustees. A. and B. were resident in India, and C. in Ireland. A. proved the will in India, and C. in England; but B. did not prove at all. The assets were suffered to remain, for several years, in the hands of M. & Co. of Calcutta, the testator's bankers and agents. B. was a partner in that firm at the testator's death; but, shortly afterwards, he retired and came to England. He then entered into partnership with R. & Co. of London, the agents and correspondents of M. & Co., and paid some of the testator's legacies to persons in England; and, in order to satisfy a legacy given by the testator upon certain trusts, he invested the amount in stock, in the names of A. and himself as trustees; but the payments and the investment were made by the direction of A., and out of remittances sent by him to R. & Co. M. & Co. ultimately failed. Held, that the above-mentioned acts were done by B. as agent to A. and not as an executor or trustee of the will, and, consequently, that he was not responsible for the loss occasioned to the estate by the failure of M. & Co.

An executor who does not prove, but acts, is answerable only for what he actually receives.

Thomas Lowry, a major in the East India Company's service, by his will, dated the 2d of October 1817, gave the whole of the property of which he should die possessed or to which he should be entitled, to his brother, James Lowry, William Casement, a lieutenant-colonel in the East India Company's service, and John Williamson Fulton, upon trust, after payment of his debts and funeral expenses, to convert the residue of his property into cash, and to discharge thereout certain pecuniary legacies in his will mentioned; and upon further trust to invest the residue of the said cash in *Government or other good securities*; and he bequeathed all that remained of his property, after such annuities and legacies deducted as in his will mentioned, to his children, George Lowry, John Lowry and Jane Lowry (all of whom were infants), and also to such child as a woman named Rajbibbie was, at the date of his will, supposed to be pregnant with, share and share alike, to his said two sons, when they should have attained the age of 21 years, and to his daughter, Jane

[105] Lowry, on her marriage or her attaining the age of 20 years, as might seem

best in the judgment of his trustees, and to the child of which the said Rajbibbie was then supposed to be pregnant, in like manner according to its sex; and he directed that until his said children should have attained the ages and times before specified, the education and other necessary charges attending their maintenance should be defrayed from the interest, dividends and annual produce accruing on their respective shares; and that, in the event of the death of one or more of his children, and also of the one then supposed to be in embryo, before they should have attained the ages or times aforesaid, the share or shares given to such deceased child should devolve to the survivor or survivors, in equal shares; and, in the event of the death of all his children, he gave the residue of his property to his brother, James Lowry; and he appointed William Casement, James Lowry and John Williamson Fulton the executors and trustees of his will.

The testator afterwards made a codicil, dated the 3d of March 1819, and, after taking notice that the child alluded to in his will as being then expected to be born of the said Rajbibbie, had since been born a girl, he declared it to be still his will that such child should share the residue of his property as mentioned in his will.(1)

The testator died in India in the beginning of December 1819; and, on the 22d of that month, Colonel Case-[106]-ment, who was at that time and still continued to be resident in India, proved the will in Calcutta.

At the testator's death James Lowry was, and ever since had been, resident in Ireland; and, in July 1824, he proved the will in the Prerogative Court of the Archbishop of Canterbury.

At the testator's death J. W. Fulton was a partner in the house of Mackintosh & Co. of Calcutta, who were the testator's bankers and money agents. In May 1820 he retired from the partnership; and, in September or November following, he left India for England, and, shortly after his arrival, he entered into partnership with Richards, Mackintosh & Co. of London, who were the correspondents and agents of Mackintosh & Co. He died in January 1830, without having proved the will either in India, England or elsewhere. His widow, Anne Fulton, was his executrix.

The testator's residuary estate consisted of 113,473 sicca rupees, two shares in the Calcutta Bank, and three six per cent. notes of the Indian Government. The bank shares and Government notes were sold after J. W. Fulton had retired from the firm of Mackintosh & Company, and the proceeds, together with the 113,473 sicca rupees, or a considerable part thereof, were allowed by Colonel Casement, with the full knowledge and acquiescence, as it was alleged, of J. W. Fulton, to remain in the hands of Mackintosh & Co., and to be used by them as part of the assets of their business, until January 1833, when the house stopped payment.

John Lowry, one of the testator's sons, died an infant in 1825. George Lowry, the other son, attained 21 and [107] died in Ireland in June 1831. Letters of administration with his will annexed were granted to James Lowry by the Consistory Court of the Bishop of Down and Connor.

The bill was filed by the testator's two daughters, the younger of whom was still an infant, against Anne Fulton, Colonel Casement and James Lowry; and after stating, amongst other things, that those two gentlemen were out of the jurisdiction of the Court, and charging that J. W. Fulton, as well as Colonel Casement, had acted in the trusts of the will and had been guilty of a breach of trust in suffering the testator's property to remain in the hands of Mackintosh & Co., instead of remitting it to England and investing it in the funds, it prayed that an account might be taken of the testator's estate come to the hands of those two Defendants, or either of them, or to the hands of any other person or persons, by their order or for their use, and also of the testator's debts, funeral expenses and legacies; and that the testator's estate might be applied in payment thereof; and that the residue might be ascertained; and, if it should appear that any part of the estate remained unapplied and uninvested in the hands of Casement and Fulton, or either of them, with the knowledge or consent of the other, at the end of twelve months from the testator's death, then

(1) The above statement of the will and codicil was taken from the brief with which alone the reporter was furnished. The will is more fully set forth in the judgment on the hearing of the cause. (See *post*, p. 118.)

that those Defendants might be charged with interest on the balances from time to time in their hands; and, if it should appear that any of the securities in which the testator's estate was invested were sold and converted into cash, and that, in consequence thereof, any part of it had been lost, then that Colonel Casement and Fulton's estate, and Anne Fulton, as his personal representative, to the extent of that estate, might be declared to be jointly [108] and severally responsible to the Plaintiffs for such loss, and might be decreed to replace the amount thereof, and that Colonel Casement and James Lowry might be discharged from the trusts of the will, and that new trustees might be appointed thereof.

The bill prayed process against Colonel Casement and James Lowry when they should come within the jurisdiction.

On the cause coming on to be heard,

Mr. K. Bruce and Mr. Lloyd, for the Defendant Anne Fulton, said that the suit, being for the general administration of the testator's estate, could not proceed, first, because there was no personal representative of the testator before the Court; that, supposing J. W. Fulton to have acted in the trusts, which was a disputed fact, his executrix, who was the only Defendant that was brought before the Court, sustained no other character than that of a debtor to the testator's estate, and would be liable to account over again to his executors: that before the cause could be heard, the Plaintiffs must either procure Colonel Casement or James Lowry to come within the jurisdiction, or prevail on some one to take out administration to the testator for the purposes of the suit, if that would be sufficient, which was doubtful. *Fell v. Brown* (2 Bro. C. C. 276), *Browne v. Blount* (2 Russ. & Myl. 83), *Roveray v. Grayson* (3 Swanst. 139, n.), *Lowe v. Farlie* (2 Madd. 101), *Logan v. Fairlie* (2 Sim. & Stu. 284; see 1 Myl. & Craig, 59), *Wilson v. Moore* (1 Myl. & Keen, 126), *Tyler v. Bell* (2 Myl. & Craig, 89; see 109), *Munch v. Cockerell* (*ante*, vol. 8, p. 219).

[109] Secondly. That the personal representative of George Lowry, one of the testator's sons, was a necessary party; inasmuch as, although George Lowry was alleged to have received some part of his share of the residue in his lifetime, it did not appear that he had received the whole of it.

Mr. Jacob, Mr. Wigram and Mr. Coleridge, for the Plaintiffs. The bill states that both Colonel Casement and James Lowry (who is the representative of George Lowry, as well as one of the executors of the original testator) are out of the jurisdiction of the Court, and it prays process against them when they shall come within the jurisdiction. It is laid down by Lord Redesdale, that when a person who is a necessary party is out of the jurisdiction, that fact is, in most cases, a sufficient reason for not bringing him before the Court, and the Court will proceed against the other parties as far as circumstances will permit. (Treat. on Plead. 164, 165, 172 and 173, 4th edit.) The Court, therefore, will proceed against Mrs. Fulton. James Lowry is not alleged to have acted, and, therefore, he is not a necessary party for any other purpose than to protect the testator's estate.

The Defendants' counsel have cited several cases which they consider to be applicable to the present case. The first is *Fell v. Brown*. If that case be right, the cases subsequently decided by Lord Eldon must be wrong. It cannot be the law of this Court that in the absence of the mortgagor, the Court cannot decide the rights as between the first and second mortgagee. In *Browne v. Blount* the bill was filed by a judgment-[110]-creditor of Sir Charles Blount, for the purpose of getting equitable execution against certain freehold estates which were vested in trustees upon certain trusts under which Sir C. Blount was entitled to the rents during his life. When the cause came on to be heard, Sir Charles Blount, who was abroad, had not appeared; but the trustees and the other parties who were interested in the estates were before the Court: and Sir J. Leach, M.R., decided that the cause could not proceed in the absence of Sir C. Blount. But the Court will find that in another case, *Tanfield v. Irvine* (1 Russ. 249), in which Sir John Leach decided on a similar ground, his decision was appealed from, and Lord Eldon differed in opinion from him. In *Lowe v. Farlie*, the will had never been proved in this country; and the only Defendant to the suit was an agent, to whom one of the executors, who was resident in India, had remitted a sum of money: and it is evident, from the reasons assigned by Sir T. Plumer, V.-C., in his judgment, that the bill could not be sustained. In *Tyler v.*

Bell, no personal representative of Margaret Maria Moscrop, appointed by any Ecclesiastical Court in this country, was made a party to the suit, as being either within or out of the jurisdiction: and, moreover, the Lord Chancellor did not decide that the personal representative must be actually present. In *Wilson v. Moore* Sir John Leach seems to have departed in some measure from what he had decided in *Browne v. Blount*: for His Honor held that as Bennett, the person in whom the real estate was vested, was made a Defendant, the cause ought to proceed notwithstanding he was out of the jurisdiction. Here we have a personal representative of the testator, constituted by the Prerogative Court, a [111] party to the record. In *Logan v. Fairlie* the testator was not represented at all in this country; and it was held that administration must be taken out to him, on account of legacy duty being payable. Here the will has been proved in this country; and neither legacy nor probate duty is payable. *Arnold v. Arnold* (2 Myl. & Craig, 256).

With respect to George Lowry, it appears, from the correspondence in the cause, that he was paid the whole of his share. But supposing that not to be so, the case with respect to his personal representative is totally different. It is not the object of the present suit to administer his property. The only reason for his personal representative being a party to the suit is that his interest may be protected; and James Lowry, who is his representative according to the place of his domicile, is quite sufficient for that purpose. *Anderson v. Caunter* (2 Myl. & Keen, 763).

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is not necessary for me to give an opinion on a case which is not before me: but I can conceive that it might be possible so to frame a case with regard to transactions in which Mr. Fulton was concerned, as to have relief against his representative without making some of those persons parties whose presence is said to be necessary on the present record. That, however, is not the case which this record presents to me. I judge of what the case is, in a great degree, by what is prayed by the bill.

Now the prayer of the bill is that an account may be taken of the personal estate of the testator possessed by or come to the hands of Colonel Casement and Mr. Fulton or either of them, or by any person or persons [112] by their or either of their order, or for their or either of their use; and also that an account may be taken of the testator's debts, funeral expenses and legacies. Then it asks that the personal estate of the testator may be applied in payment of his debts, funeral expenses and legacies (so that I cannot take it for granted that all the debts are paid); and that the residue may be ascertained, and that Colonel Casement and Mr. Fulton may be charged with interest on the balances from time to time in their hands; and if it should appear that any of the securities in which the testator's personal estate was invested were sold and converted into cash, and that in consequence of such sale and conversion any part of the estate has been lost, then that Colonel Casement and the estate of Mr. Fulton and the Defendant Anne Fulton, as his personal representative, to the extent of that estate, may be declared to be jointly and severally responsible to the Plaintiffs for such loss, and that they may be decreed to replace the amount of the loss. Then it asks that (if necessary) an account may be taken of Fulton's estate, and that Colonel Casement and James Lowry may be discharged from acting any longer in the execution of the trusts of the will.

The case, as I understand it, is this: The testator made a will by which he appointed Colonel Casement, James Lowry and John W. Fulton his executors. Casement proved the will in India, and Lowry proved the will in England: and it is observable that the bill asks for a general administration of the personal estate. Fulton never proved, but it is alleged that he did, in some manner, act; and in respect of his so acting, which is alleged to have had the concurrence or connivance of Colonel Casement, the particular relief is sought by the prayer of this bill.

[113] Now, how can I administer the estate generally, without having the personal representative of the testator here? Fulton never proved; and, though he might, in some sense, be said to have been an executor; yet, he having died, the representation of the testator is not in his executrix; because Colonel Casement, who proved in India, and James Lowry, who proved in England, are both of them alive. But Colonel Casement is said to be now in India; and James Lowry is said to be in Ireland: nevertheless, it is absolutely necessary, for the general administration of the estate

which is asked by this bill, that there should be before the Court, with more or less of substance of character, a person who does represent the personal estate of the testator: and, though it may be true that the person who may be appointed for that purpose will be a mere nominee of the Plaintiffs; yet it should be observed that that person, by taking out administration, will incur all the responsibility of an administrator: and, though he may voluntarily clothe himself with that character, yet what the Court looks at is to see that the estate of which he is administrator is properly protected by his superintendence. It seems to me, therefore, that the mere fact that Colonel Casement is in India, and James Lowry in Ireland, is not an answer to the objection that there is no personal representative of the testator before the Court.

Then the next objection made by the Defendants is that the suit cannot go on unless Colonel Casement is here. Now, as I said before, I can conceive that the record might have been so framed, suggesting certain circumstances, as that relief might have been given in the absence of Colonel Casement. But observe what is asked by this bill. It asks first, specifically, that Colonel Casement may be charged with interest on the balances [114] from time to time in his hands and with the loss occasioned by the conversion of the testator's securities into cash, and, in the next place, that he may be discharged from acting any longer in the execution of the trusts of the will. How is it possible to give that relief against a person who is not present? It appears to me, therefore, that that objection must be sustained.

The last objection relates to George Lowry, the residuary legatee who is stated to be dead. It is impossible for me to assume that that letter which was written by Mackintosh & Co., and which the Plaintiffs' counsel have relied upon, is equivalent to proof that George Lowry did receive the whole of his share of the personal estate: it amounts merely to this; that he may have received something in respect of his share. Then, he is dead, and it is stated that James Lowry, who was the executor of the testator who proved in England, has proved the will of George Lowry in the Diocese of Down and Connor in Ireland. But this Court knows nothing of that: and I apprehend that it is quite a matter of course, where a bill is filed for the purpose of having the residue of a testator's estate ascertained, and for the payment of it among the parties entitled, that you must either have all the parties who are entitled to it before the Court, or give some good, substantial reason why some of them are not before the Court. The mere fact that George Lowry is dead, and that some person has proved his will in a Diocesan Court not in England, is no reason why you should not have his representative here: and my opinion, therefore, is that that objection also must be sustained.

The cause was ordered to stand over, with liberty to the Plaintiffs to amend by adding parties and otherwise, as [115] they should be advised: and His Honor gave the Defendants the costs of the day, notwithstanding the objections for want of parties were not taken by the answers.

In consequence of the above decision, William Handley obtained, from the Prerogative Court of the Archbishop of Canterbury, letters of administration to the testator and also to George Lowry; and he was made a Defendant to the bill as their sole legal, personal representative in England. The letters of administration to the testator were stated to be limited for the purpose to become and be made a party to a bill or bills to be exhibited against Handley in any of Her Majesty's [116] Courts of Equity, and to carry the decree or decrees of the said Courts into effect: and the letters of administration to George Lowry were stated to be limited to the purpose only to attend, supply, substantiate and confirm the proceedings already had or that might, thereafter, be had in this cause, or in any other suit which might hereafter be commenced, in this or any other Court, touching the premises, and until a final decree should be made therein and the said decree carried into execution and the execution thereof fully completed. No other amendment was made in the bill.

It appeared from the evidence for the Plaintiffs that Mr. Fulton, some time after his return to England, paid two legacies given by the will, one to Mrs. Stewart, the testator's aunt, and the other to Mr. Gowdey; and that, for the purpose of satisfying a legacy of £2000 given by the testator to his mother, Eleanor Lowry, for life, with remainder to his brother Casement William Lowry, for life, with remainder to the

children of the latter, Mr. Fulton invested that sum in the purchase of stock in the names of himself and Colonel Casement, as trustees thereof. It appeared also that Mr. Fulton had regulated the expenses of the testator's children, and had given, from time to time, directions as to their maintenance and education; and that, the Plaintiffs having been placed, first, under the care of Mrs. Stewart, and, upon her death, under the care of a lady named Spitter, he had paid those ladies for their maintenance and education. The Plaintiffs also gave in evidence several letters from Mr. Fulton to Mrs. Stewart and Jane Lowry, the elder Plaintiff, containing expressions which shewed, as they contended, that Mr. Fulton considered and held himself forth as the guardian of the Plaintiffs and the trustee of their property.

[117] On the part of the Defendant, Mrs. Fulton, evidence was entered into which tended to shew that all the above-mentioned acts were done by Mr. Fulton, in compliance with directions sent from time to time, either by Colonel Casement or by Mackintosh & Co. as his agents; and that remittances had been made by them to Rickards, Mackintosh & Co. for the purpose of paying the legacies and the expenses of the Plaintiffs' maintenance and education. It further appeared that Mr. Fulton, in his answer to a bill which, in the year 1824, was filed against him, in the Court of Chancery of Ireland, by James Lowry, Casement William Lowry and the testator's children denied that he had ever acted or meant to act as an executor of the testator, or that, independently of his partners, Rickards, Mackintosh & Co., he had ever received any money from or out of the testator's estate or effects.

The cause now came on to be heard. (1)

Mr. Jacob, Mr. Bethell and Mr. Coleridge, for the Plaintiffs, contended that the payments made by Mr. Fulton, and the other acts done by him as before mentioned, shewed that he had accepted the trusts and acted as a trustee and executor of the testator's will; and, consequently, that he was responsible to the Plaintiffs for the breach of trust that had been committed by suffering the testator's property to remain in the hands of Mackintosh & Co. *Urch v. Walker* (3 Myl. & Craig, 702), *Boardman v. Mosman* (1 Bro. C. C. 68), *French v. Hobson* (9 Ves. 103), *Conyngnam v. [118] Conyngnam* (1 Vez. 522), *Walker v. Symonds* (3 Swanst. 1; see *Munch v. Cockerell*, ante, vol. 8, p. 219), *Stacey v. Elph* (1 Myl. & Keen, 195).

Mr. Knight Bruce and Mr. Lloyd, for the Defendant Mrs. Fulton, said that Mr. Fulton had never accepted or acted in the trusts of the will; and that the acts relied upon by the Plaintiffs' counsel were done by him merely as the agent of Colonel Casement.

Mr. White appeared for the Defendant Handley.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the facts appear to be that the testator, Thomas Lowry, made his will on the 2d of October 1817; and, by that will, after giving certain small legacies and a sum of £2000 to his mother, for life, with remainders over, and a sum of 8000 sicca rupees for the benefit of a Hindostanee woman called Rajbibbie, for life, with remainder over, he gave, in effect, the residue of his personal estate among the three children that woman then had, and a child of whom she was at that time *enceinte*. That child was born and christened by the name of Mary Ellen; and she and her eldest sister are the Plaintiffs in the cause. The testator made a codicil on the 3d of March 1819; and he died in the month of December 1819. He appointed three executors, James Lowry, who then was and now is resident in Ireland, Colonel Casement, who then was and now is resident in India, and Mr. John Williamson Fulton, who was then in Calcutta, but who never proved the will either in England, India or elsewhere. The will was [119] proved in Bengal on the 22d of December 1819 by Colonel Casement, and it was proved in the province of Canterbury on the 20th of July 1824 by James Lowry.

Upon the construction of this will I think that the general residue ought to have been invested in Government or other securities in England. The expression is "Government or other good securities" generally. The expression as to Rajbibbie's legacy of 8000 sicca rupees is "Government or other good security in Calcutta," and she is described as of Hindostan. But the children who are named in the will, the

(1) The reporter was unavoidably absent from Court on some of the days on which the cause was argued.

residuary legatees, are all said to be now in Ireland; and James Lowry, who was the ultimate residuary legatee, is said to be now in the north of Ireland.

The testator had dealings with Mackintosh & Co. of Calcutta, who, long before and up to the time of his death, were his money agents and bankers; and he had large sums of money in their hands. The account current, dated the 1st of May 1827, which has been proved as an exhibit, shews how his assets were dealt with by them; and the account was kept as between the estate of the testator and Colonel Casement as his executor, but, in reality, it was an account between Mackintosh & Co. and Colonel Casement. The bill states the different sales of the Government notes and bank shares to have been made by the direction of Colonel Casement, but with the knowledge of Mr. Fulton. There, however, is no evidence that that sale, or that any sale was effected with Fulton's knowledge; and, if it were so, he could not be responsible as executor for the sale. There could not have been a remittance to England without a sale; the sale was right; but the keeping of the produce uninvested in the hands of Mackintosh & Co. was wrong; [120] but with that Mr. Fulton had nothing to do; for, though he was a partner in the house of Mackintosh & Co., yet the Plaintiffs have proved that he ceased to be a partner in the house on the 1st of May 1820. He left Calcutta for England, as the bill says, in September 1820, but, as the answer states, on the 19th of November 1820, and he brought with him the Plaintiff, Mary Ellen, and, on reaching England, he sent her to Mrs. Stewart, in Ireland, with whom the Plaintiff, Jane, who was then eight or nine years old, resided. In September 1819 Mr. Fulton took some steps towards disposing of his share and interest in the house of Mackintosh & Co.; and it is distinctly proved by one of the Plaintiff's witnesses, who, in August 1820, became himself a partner in that house, that Mr. Fulton ceased to be a partner in it on the 1st of May 1820, that is, several months before the sale of the Government notes in August 1820. Rickards, Mackintosh & Co., of London, were the general factors and agents of Mackintosh & Co., and Mackintosh & Co. were the general factors and agents of Rickards, Mackintosh & Co.; but Rickards, Mackintosh & Co. were not partners with Mackintosh & Co. In, or not long after, the year 1823, Mr. Fulton became a partner in the house of Rickards, Mackintosh & Co., and continued a partner in it till he died. When Mr. Fulton quitted India he had a large sum of money due to him in the hands of Mackintosh & Co. Of that sum he gradually drew out about 5-6ths; and, at the time of the failure of Mackintosh & Co., the balance due to him was 102,517 sicca rupees, according to the evidence of one of the Plaintiffs' witnesses. He dealt with his former partners just as other customers might have done. From 1821 to 1827 Rickards & Co. were indebted to Mackintosh & Co., but in 1827 they became creditors; and in 1829 they had a demand upon Mackintosh [121] & Co. to the amount of upwards of a million sicca rupees. Yet Mr. Fulton still left part of his money in the house of Mackintosh & Co. About January 1823 Colonel Casement, through Mackintosh & Co., remitted £2000 to Rickards, Mackintosh & Co., who, according to their instructions, invested it in £2511, 15s. 6d. Reduced annuities in the names of Colonel Casement and Mr. Fulton to answer the legacy of £2000 given to the testator's mother for her life, with remainder to his brother Casement William Lowry for his life, with remainder to the children of C. W. Lowry. In July 1824 James Lowry, C. W. Lowry and the four children of the testator, the three youngest being infants, by George Lowry their next friend, filed a bill in Chancery in Ireland against Mr. Fulton for an account of the assets of the testator. In November 1824 Mr. Fulton put in his answer and denied that he had ever acted as executor of the testator, or that he ever meant to act in that capacity. The schedules to that answer contained the early part of the account appearing in the account current up to the 22d of December 1820. Mrs. Stewart, with whom the children resided in Ireland, was the sister of Eleanor Lowry, the testator's mother. She took care of the infant children till she died in 1828; and they were then placed with Mrs. Spitter. The expenses of their maintenance and education were defrayed by remittances made by Colonel Casement, through Mackintosh & Co., to Rickards, Mackintosh & Co., which were applied by Mr. Fulton and his widow, and it is not suggested that the remittances were not duly applied. On the 22d of January 1830 Mr. Fulton died. By his will he appointed the Defendant Anne Fulton his executrix,

and she proved it in the Prerogative Court of Canterbury on the 6th of March 1830. On the 4th of January 1833 Mackintosh & Co. stopped payment. [122] At that time a large portion of the testator's assets was in their hands as the agents of Colonel William Casement, and the testator's estate suffered a considerable loss. The substantial question in the cause is whether Mr. Fulton's estate is liable for that loss; for no question is made about the payment of the small legacies or the application, for maintenance of the children, of the funds remitted for that purpose.

It is said that Mr. Fulton held himself out to be an executor; and that therefore he is liable; and the case of *Conyngnam v. Conyngnam* was relied upon. The facts of that case do not clearly appear, but it does appear that the Defendant had actually received the produce of the trust estate, and, on that foundation, he was directed to account. Those are the very words of Lord Hardwicke, according to the report; and Lord Hardwicke said that the Defendant had acted as he had done merely to put the Plaintiff to difficulty in coming at his right. In *Urch v. Walker* (3 Myl. & Craig, 702) there was a clear acceptance of the trust; for Blackburnow joined with Wood in conveying the leasehold trust estate. In *Boardman v. Mosman* Kyme, the trustee, not merely knew that the trust stock was sold, but the proceeds of the sale were paid to him and his partner. He therefore was responsible. *French v. Hobson* has no resemblance to the present case. There all the executors joined in selling the trust stock, and of course all were liable.

What was laid down by Lord Camden at the Privy Council in *Orr v. Newton* (2 Cox, 274) is very important. He held that Newton, who had not proved, but had, in some manner, acted, was, by the strictest rule, not chargeable except for his own acts personally, and was [123] not chargeable for the acts of his colleagues. Lord Camden also, in page 277 of the report, notices that the want of a probate in Newton would have been a bar to his recovering in any suit whatever.

Now the object of this bill is not to make Mr. Fulton's estate liable for what he received, but liable for what he not only did not receive, but for what he had no means of receiving. If he never proved either in England or in India, it was not possible for him to recover the assets of the testator in the hands of Mackintosh & Co. While he was a partner in that house for a short time after the testator's death, he was answerable, as a debtor jointly with his co-partners, for the debt due from their partnership to the estate of the testator. But, as executor, he was not answerable for the debt, either while he was a partner or after he had ceased to be a partner. No one is bound by law to prove a will. No case has been cited to shew that an executor not proving is liable for the default of an executor who does prove. As long as he does not prove, he is merely liable for what he receives. There is a loose and general charge in the bill that Mr. Fulton colluded with Col. Casement, but there is no evidence to support it: nor is there any evidence of concealment. A letter from Mackintosh & Co. to James Lowry, which has been proved in the cause, stated the plan upon which Col. Casement meant to act with respect to the small legacies of £100 to Mrs. Stewart and Mr. Gowdey, the legacy of £2000, the maintenance and education of the testator's children, and the management of their funds; and that plan was acted upon. Out of the great number of letters in the admissions, eleven are all that were written by Mr. Fulton: ten of those are referrible to his character of agent. The expressions in the remaining [124] letter, dated the 3d of July 1823, from Mr. Fulton to Mrs. Stewart, are extremely inconclusive. In one sense Mr. Fulton was an executor, and they may refer to that. But, if written declarations that he made are to be relied upon, they must all be taken together; and then the answer in the Irish cause becomes most material; because it contains a declaration upon oath, when the attention of Mr. Fulton was distinctly called to the circumstances of which he was speaking. Upon the whole evidence of Mr. Fulton's declarations taken together, I consider him to have represented no otherwise than that he was an agent of Col. Casement; and that he did not mean to be taken as an acting executor.

Evidence has been given that Colonel Casement holds a high office in Bengal; and, without doubt, he is a man of integrity; and it is therefore to be assumed that, if the case is merely what the Plaintiffs represent, when they apply to him he will at once indemnify them for the loss occasioned by his leaving the testator's assets in the hands of Mackintosh & Co. But they have not chosen to make him substantially a

party to this suit; and my opinion is that, upon the case which the Plaintiffs bring forward against Mrs. Fulton, they are not entitled to relief against her; for, in my opinion, there is no evidence whatever that Mr. Fulton received anything, except as an agent of Colonel Casement, to whom alone he could be responsible.

Upon the whole, my opinion is that, as against Mrs. Fulton, the bill must be dismissed with costs. But, as to Mr. Handley, the cause must stand over till Colonel Casement and Mr. Lowry come within the jurisdiction, or appear, if the Plaintiffs wish it. If not, the bill must be dismissed, with costs, altogether.

[125] SMITH v. DUDLEY. Jan. 26, 27, 1838.

[S. C. 2 Jur. 322.]

Construction. Settlement. Executors and Administrators.

In a marriage settlement, the ultimate trust of the wife's chattels was for the executors or administrators of the wife of *her own family*, and the ultimate trust of the husband's chattels was for his executors or administrators of *his own family*. Held, that though the same words were used, *mutatis mutandis*, in both limitations, yet the Court was justified in holding that, with respect to the wife's chattels, they meant her next of kin at her death, and with respect to the husband's chattels, his executors or administrators simply.

By the settlement on the marriage of Benjamin Pountney with Mary Wheeler, bearing date the 26th of May 1801, and made between Henry Barnsley and Elizabeth, his wife, of the first part, Mary Wheeler (who was described as the daughter and only child of Elizabeth Barnsley by her former husband Thomas Wheeler, deceased), of the second part, Benjamin Pountney of the third part, and Thomas Dudley and George Briscoe, of the fourth part; Henry Barnsley and Elizabeth, his wife, conveyed and assigned certain freehold and leasehold hereditaments to Dudley and Briscoe, their heirs, executors, administrators and assigns, in trust for Barnsley and wife, according to their several and respective estates and interests in the premises at the execution of the settlement, until the solemnization of the marriage, and, after the solemnization thereof, to the use of Barnsley and wife, for their lives and the life of the longer liver of them, and, after their deceases and the decease of the survivor of them, then upon trust that Dudley and Briscoe, and the survivor of them, his heirs, executors, &c., should permit Benjamin Pountney to receive the rents of the freehold and leasehold premises, according to the nature and tenure of such estates respectively, for his life, provided he so long remained in good and solvent circumstances, and, after his decease, failure, insolvency or bankruptcy, then upon trust that Dudley and Briscoe, and the survivor of them, his heirs, executors, &c., should receive the rents and pay the same to Mary Wheeler for her life, for her separate use, independent of Benjamin Pountney, and, after the decease, failure or bankruptcy of Pountney and the decease of Mary Wheeler, then upon trust that Dudley and Briscoe, and the survivor of [126] them, his heirs, executors, &c., should convey and assign the freehold and leasehold premises to such child or children of the marriage, and in such shares, &c., as Pountney and Mary Wheeler during their joint lives, or as the survivor of them after the death of one of them, should by deed or will appoint, and, in default of such appointment, then in trust for all the children of the marriage, their heirs, executors, &c., according to the nature and tenure of such estates respectively, equally as tenants in common, and, if but one child, then to such only child and his or her heirs, executors, &c.; and, in default of such issue, then, as to his freeholds, to the use of the right heirs of Mary Wheeler, and, as to the leaseholds, "in trust for the executors and administrators of the said Mary Wheeler's own family, and to and for none other use, intent or purposes whatsoever."

And Barnsley, for himself and his wife, and for his and her heirs, executors and administrators, and Mary Wheeler, for herself and her heirs, executors and administrators, covenanted with Dudley and Briscoe, that they, Barnsley and wife and

Mary Wheeler, would, as soon as conveniently might be after the solemnization of the marriage, surrender certain copyhold hereditaments mentioned in the settlement, to the use of Dudley and Briscoe and their heirs, upon such and the same trusts, intents and purposes as were thereinbefore limited of and concerning the freehold and leasehold hereditaments and premises.

And Barnsley and wife assigned to Dudley and Briscoe, their executors, &c., all their household goods and furniture which were contained in a schedule bearing even date with the settlement, upon such and the same trusts, and for such and the same uses, intents and pur-[127]-poses as therein declared and hereinafter mentioned of and concerning the property of Mary Wheeler under the will of Sarah Pitt deceased, and to or for no other use, trust, intent or purpose whatsoever: and, after reciting that, under the will of Sarah Pitt, Mary Wheeler was entitled, subject to the life-estates of her mother and Mary Horton and Ann Bissett, to a third part of the monies to arise by sale of the freehold estates of Sarah Pitt, and, also, to a third part of the personal estate of Sarah Pitt: Mary Wheeler assigned to Dudley and Briscoe, their executors, &c., all her share and interest of and in all the sums of money to arise by sale of the freehold hereditaments and real estate of which Sarah Pitt died possessed, and of and in all the personal estate and effects directed to be sold, called in and received, by the will of Sarah Pitt, after the several deceases of her mother and Mary Horton and Ann Bissett, in trust for Mary Wheeler, her executors, administrators and assigns, until the solemnization of the marriage, and, after the solemnization thereof, upon trust, as soon as the thereby assigned monies and premises should be received by Dudley and Briscoe, to place out the same either in some public stock, bank or fund, or else upon one or more good and sufficient real or personal security or securities, and to pay the interest, dividends and produce arising therefrom to Benjamin Pountney, for his life, provided he should so long remain in good and solvent circumstances, and, after his death, failure, insolvency or bankruptcy, upon trust to pay the interest, dividends and produce aforesaid to Mary Wheeler and her assigns, for her life, and, in case the same should accrue to her during the lifetime of B. Pountney by his failure, bankruptcy or insolvency, then the same to be for her separate use, and, after the decease, failure or bankruptcy of B. [128] Pountney, and the decease of Mary Wheeler, then, upon trust to pay the trust monies to the children of the marriage, equally to be divided amongst them, the portions of sons to be paid to them at 21, and the portions of daughters at that age or on their marriage, and, in case there should be no child of the marriage, or, there being such, all of them should die before their portions should become vested, then upon trust to assign the trust monies "unto and for the executors and administrators of the said Mary Wheeler's own family and to and for no other trust, intent or purpose whatsoever."

And B. Pountney, for himself, his heirs, executors, &c., covenanted with Dudley and Briscoe, their executors, &c., that in case Mary Wheeler should survive him, or in case there should be any issue of the marriage living at his decease or born in due time after, his heirs, executors or administrators should, within three calendar months after his decease (after first paying all his debts), pay to Dudley and Briscoe, or the survivor of them, his executors, &c., the sum of £800, upon trust to place the same out on real or Government securities, or in the purchase of stock in any of the public companies or funds, and to pay the interest and dividends thereof to Mary Wheeler and her assigns, for her life, for her and their own proper use and benefit, and, after the decease of Mary Wheeler, upon trust to pay the £800 unto and amongst all and every or any the child or children of the marriage, at such time or times, and in such shares, &c., as B. Pountney and Mary Wheeler should by deed appoint, and, in default thereof, as the survivor of them should by deed or will appoint, and, in default thereof, then upon trust to pay the last-mentioned trust monies to all the children of the marriage, equally, as tenants in [129] common, the portions of sons to be paid to them at 21, and the portions of daughters, at that age or on their marriage; and, in case there should be no child of the marriage, or, there being such, all of them should die before their portions should become vested, then upon trust to pay the £800 "unto and for the executors, or administrators of the said Benjamin Pountney of his own family, and to and for none other trust, intent or purpose whatsoever." The settlement then contained provisos for the maintenance and education of the

children of the marriage during their minorities, and for the indemnity and reimbursement of the trustees.

Henry Barnsley died in August 1808; and his wife died in April 1821. Mary Pountney died on the 23d of August 1825, intestate, and without having had any issue. Benjamin Pountney died on the 9th of January 1832, having made his will, dated the 22d of August 1827, and three codicils, the last of which was dated the 29th of January 1830, and thereby he appointed the Defendant, Slater, his executor.

The Plaintiff, Deborah Smith, the wife of the other Plaintiff, John Smith, was one of the next of kin of Mary Pountney; and, on the 16th of November 1832, letters of administration to Mary Pountney were granted to Deborah Smith.

The bill, which was filed against the other next of kin of Mary Pountney living at her death, Slater, the executor of Benjamin Pountney, and the personal representatives of the trustees of the settlement, alleged that, under the letters of administration, the Plaintiff, Deborah Smith, or the Plaintiff, John Smith, in her right became and then was beneficially entitled to the [130] *leasehold estates, household goods, furniture and effects, monies, securities for money and chattels* comprised in the settlement; and it prayed that the Plaintiff, Deborah Smith, as the administratrix of Mary Pountney, or the Plaintiff, John Smith, in her right, might be declared to be entitled to the leasehold estates and premises, monies, securities for money and effects comprised in the settlement, for his and her own use and benefit, and that the same might be paid, assigned and conveyed to her or him accordingly.

Such of the next of kin of Mary Pountney as were Defendants insisted that the Plaintiff, Deborah Smith, was not, under the settlement or as administratrix of Mary Pountney or otherwise, entitled to the trust estate, effects, monies and premises, for her own absolute use and benefit or otherwise than as a trustee for the next of kin of Mary Pountney living at her decease.

The question in the cause was who was entitled to the chattels real and personal comprised in the settlement, under the words, "the executors or administrators of Mary Wheeler's own family."

THE SOLICITOR-GENERAL [Sir R. M. Rolfe] and Mr. K. Parker, for the Plaintiffs, contended that, under the above-mentioned words, either the administrator or the next of kin of Mary Wheeler, to the exclusion of her husband, were entitled, and that the words, "of Mary Wheeler's own family," were added for the purpose of excluding him; that the ultimate trust of the property settled by the husband was declared in the same words, *mutatis mutandis*; and it was the intention of the parties to the settlement that, if there should be no issue of the marriage, the property settled by the wife and her parents [131] should return to her family, and the property settled by the husband to his family; that it was clear that the words, "the executors or administrators," &c., were not meant to be words of limitation; for, where they were intended so to be, the expression was in the following form, namely, "to A. B., his executors, administrators and assigns." *Evans v Charles* (1 Anstr. 128); *Jennings v. Gallimore* (3 Ves. 146); *Stevens v. Bagwell* (15 Ves. 139); *Bulmer v. Jay* (*ante*, vol. 4, p. 48; 3 Myl. & Keen, 197); *Collier v. Squire* (3 Russ. 467).

Mr. Collyer, for some of the Defendants, the next of kin of Mrs. Pountney, contended that her executors or administrators were intended to take the property as trustees for her next of kin. *Palin v. Hills* (1 Myl. & Keen, 470).

Mr. Cooper and Mr. Hall appeared for the rest of the next of kin.

Mr. Jacob and Mr. G. Richards, for the representatives of the trustees of the settlement, said that the limitation in question was void for uncertainty; or, at all events, no person who should be living at the death of Mrs. Pountney could be intended to take in his own character; but that the parties to the settlement intended to designate the executors or administrators of some person whom they expected would be dead at the time when the limitation took effect. *Doe v. Joinville* (3 East, 172), *Harland v. Trigg* (1 Bro. C. C. 142), *Holloway v. Holloway* (5 Ves. 399).

Mr. Knight Bruce and Mr. Stinton, for the Defendant Slater, the executor of Benjamin Pountney, said that [132] the ultimate limitation of the freeholds to the right heirs of Mrs. Pountney united with her previous estate for life and gave her the absolute interest, and that the ultimate limitation of the leaseholds and other chattels

was intended to have the like effect. *Genery v. Fitzgerald* (Jac. 468), *Sanders v. Franks* (2 Madd. 147).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I apprehend that, where the Court has to put a construction upon expressions in an instrument the meaning of which is doubtful, it is justified in departing from the literal meaning of the words where it is obvious, taking the whole of the instrument together, what the intention of the parties was; and that, for that purpose, the Court is at liberty to consider the same general words as having one meaning in one part of the instrument, and a different meaning in another part of it. Thus the same words have been held to have one meaning in limitations of freeholds, and a different meaning in limitations of chattels.

On looking into the settlement in this case, it appears to me not only that there was a very small exercise of understanding in the use of words, but a gross ignorance of law, in all respects, on the part of the person who prepared the settlement. There are no covenants for title, and, therefore, we cannot resort to them in order to make out who is entitled to the property comprised in the settlement. With respect to the freeholds and leaseholds, which are taken together, it does not appear that Mrs. Pountney had any interest in either; nor does it appear whether Barnsley and wife were seised of the freeholds *jure uxoris*; but, by the first witnessing [133] part, they are made to grant and release as if the wife were *sui juris*; and nothing whatever is said about a fine or recovery. The leaseholds appear, on the face of the instrument, to have belonged to Barnsley and wife; and though Mr. Barnsley might have assigned the whole chattel interest, yet his wife is made to join with him. [His Honor here read the limitations of the freeholds and leaseholds.] It is obvious, with respect to the freeholds, that Barnsley and wife intended to make such a limitation of them as would have the effect of giving the fee to Mary Pountney on failure of issue of the marriage. With respect to the copyholds it may be fairly inferred, from the language of the covenant, that Mary Pountney had an interest in them [His Honor read the covenant] and, when we come to the ultimate limitation of the copyholds, we find that it is to such and the same trusts, intents and purposes as had been before declared concerning the freehold and leasehold hereditaments and premises. Here is another instance of ignorance; for the ultimate limitation of the freeholds must, anyhow, be taken to be different from the ultimate limitation of the leaseholds. If the Court were called upon to put a construction upon this part of the settlement, I think it would be bound to hold that the copyholds were intended to go according to the same course of limitation as the freeholds.

The next subjects of the settlement are the household furniture, and Mary Pountney's interest under Mrs. Pitt's will: and, with respect to them, the ultimate limitation is the same as the corresponding limitation of the leaseholds. Now, as the leaseholds and the household furniture were the property of Barnsley and wife, and the share of Mrs. Pitt's estate was the property of Mary Pountney herself, it is fair to put such [134] a construction upon the foolish words which are found in the ultimate limitations of trust as to them, as will have the effect of restoring them to Mary Pountney's own family.

Then we come to the husband's covenant. Now it would be absurd to say that he intended, in case there should be a failure of issue of the marriage, to give away from himself his own property, which was only intended to be a provision for his wife and children, and to make a provision for those unascertained persons who might be his next of kin at the time of his death. The consequence is that I must hold that the words "the executors or administrators of Mary Pountney's own family" mean, with respect to the property of herself and her father and mother, her next of kin at the time of her death; and that the words "the executors or administrators of the said Benjamin Pountney of his own family" mean, with respect to his property, his executors or administrators; in other words, my opinion is that it was the intention of the parties to the settlement that, on failure of the issue of the marriage, the property of the wife should be restored to her family, and that the property of the husband should revert to him or to his estate.

[135] PENNY v. PRETOR. Jan. 26, 1838.

11 Geo. 4 and 1 W. 4, c. 47. *Infant.*

An infant devisee in tail may be ordered to convey under 11 Geo. 4 and 1 W. 4, c. 47, s. 11.

The testator in this cause devised his real estates to J. P. Barrow for life, with remainder to J. P. Barrow's first and other sons successively, in tail male, with remainder to J. P. Barrow's daughters as tenants in common in tail, with remainder to his own right heirs.

The suit was a creditors' suit. The original bill was filed in May 1832, at which time J. P. Barrow was a bachelor. In the progress of the cause he married and had issue two daughters, Mary and Catharine; and, on their births, supplemental bills were filed in order to bring them before the Court.

The testator's real estates having been sold under the decree, a petition intituled in the original and supplemental suits and also in the matter of the Act of Parliament for Consolidating and Amending the Laws for Facilitating the Payment of Debts out of Real Estate (11 Geo. 4 and 1 Will. 4, cap. 47) was presented by the Plaintiff, praying that the infant Defendants, Mary and Catharine Barrow, might be directed to convey the estates to the purchaser, by lease and release to be duly enrolled in the Court, pursuant to the above-mentioned Act and the Act for the Abolition of Fines and Recoveries and for the Substitution of more simple Modes of Conveyance (3 & 4 Will. 4, cap. 74), or by such other assurance as the Court should deem proper.

Mr. Chandless appeared in support of the petition.

[136] Mr. Paynter appeared for the purchaser and said that it was doubtful whether the 11th or the 12th section of the 11 Geo. 4 and 1 Will. 4, cap. 47, applied to the present case; that, as the estates were "devised in settlement," there was ground for contending that the case was within the 12th section; and, if so, the Court had no jurisdiction to make the order, as that section applied to cases where the persons who had limited interests in the estate directed to be sold were adult, and not to a case like the present, where the parties having such interest were infants.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the 12th section of the Act applied to tenants for life and persons having smaller interests; and that the 11th section applied to tenants in tail: and His Honor made an order according to the prayer of the petition. (See *Radcliffe v. Eccles*, 1 Keen, 130.)

[137] HUTCHINGS v. SMITH. Feb. 14, March 26, 1838.

[S. C. 7 L. J. Ch. 128; 2 Jur. 231.]

Husband and Wife. Chose in Action.

A married woman, being entitled to one-fifth of a residue, joined with her husband and the four other residuary legatees in filing a bill to have the testator's estate administered, and the residue ascertained and distributed amongst the parties entitled. Pending the suit, but before the rights of the parties had been declared, the husband and wife joined in assigning the wife's share to A., as a security for a debt due to him from the husband. The husband died; and, afterwards, a decree was made directing one-fifth of the residue to be paid to the wife. A. never presented a petition in the suit or took any other step to enforce his security until after the decree was made. Held that, by the decree, the wife became entitled to her share free from her husband's debt.

Whether an assignment, by a husband and wife, of the wife's chose in action, to a particular assignee for value, is binding on the wife surviving: *Qu.*

Under the will of Watkins Herbert, the residue of his real and personal estates became vested in his nephew and four nieces. Some time prior to the year 1828 a

suit, the name of which was *Conden v. Lord*, was instituted in the Court of Chancery by the nephew and nieces and the husbands of the latter against the trustees and executors of the will, for the usual accounts of the testator's personal estate, debts and legacies, and to have the residue of the personal estate ascertained and divided amongst the parties entitled under the will. On the 1st of February 1828 a decree was made in that suit, which directed the usual accounts to be taken, and the debts and legacies to be paid; but it did not declare any rights.

Ann Hutchings, the Plaintiff in the present suit, was one of the testator's nieces; and she and her late husband, Joseph Hutchings, were two of the Plaintiffs in the suit of *Conden v. Lord*. Pending that suit, the testator's nephew died intestate, leaving his two sisters, Ann Hutchings and Mary Englefield, his co-heirs at law; and Ann Hutchings took out administration to him.

Joseph Hutchings, being indebted to Messrs. Langton, brewers and co-partners, in the sum of £414, by an [138] indenture, dated the 17th of November 1830, and made between himself and his wife of the one part, and Messrs. Langton of the other part, after reciting that Hutchings, in right of his wife, was entitled under the will of Watkins Herbert, to one equal fourth (1) part or share of the produce of the estate and effects of Watkins Herbert, and which would shortly be paid into the hands of the Accountant-General of the Court of Chancery, under an order or decree in the cause of *Conden v. Lord*; and that Hutchings was indebted to the Langtons in the sum of £414; and, for the better securing the payment thereof with interest at five per cent., he and his wife had agreed to assign their said fourth part or share under the will of Watkins Herbert, or under or by virtue of the decree or order made or about to be made, in the suit of *Conden v. Lord*: Hutchings and wife assigned the said fourth part or share and every or any other part or share, vested, accruing, surviving or contingent of him, Hutchings, in right of his wife, of and in the produce arising under or by virtue of Herbert's will, or under or by virtue of an order or orders, decree or decrees, either then made or to be thereafter made, in the suit of *Conden v. Lord*, upon certain trusts for securing to the Langtons the payment of their debt and interest, and, subject thereto, in trust for Hutchings, his executors, administrators and assigns; and Hutchings appointed the Langtons to be his attorneys for receiving the assigned premises and to give receipts for the same.

This deed was prepared by the Defendant Smith, [139] who was the solicitor of the Langtons, and the execution of it by Hutchings and wife was attested by him.

After the execution of the deed, the four nieces and their husbands instituted another suit, which also was called *Conden v. Lord*, against the trustees and executors of Herbert's will, praying for the usual accounts of the testator's real estates, and that those estates might be sold and the proceeds divided amongst the parties entitled.

In November 1831 Hutchings died insolvent and intestate, and no person took out administration to him. On the 17th of that month a decree was made in the second suit, directing the usual accounts to be taken of the testator's real estates, and referring it to the Master to inquire who were his nephews and nieces or the persons entitled to the produce of his real estates under his will. In July 1834 the Master reported that Mrs. Hutchings was one of the parties so entitled: and, on the 9th of August following, the decree on further directions was made, in both causes, by which it was ordered that one-fifth of the bank annuities therein mentioned, being the produce of the testator's residuary real and personal estates, should be transferred to Mrs. Hutchings in her own right, and that another fifth should be transferred to her as administratrix of her late brother; and, on the 21st of the same month, those shares were transferred to her accordingly. On the 18th of that month the Defendant Smith was informed that the decree on further directions had been made: upon which he sent for Mrs. Hutchings to his office, and, after telling her that her cause had been heard, and that she would receive her money in a few days, he prevailed on her to sign a memorandum which he had prepared, and which was as follows: "Whereas by a certain deed of assignment, bearing date the 17th of November 1830, and made

(1) This was a mistake. Mrs. Hutchings was beneficially entitled to one-fifth in her own right and to half of another fifth, as one of her brother's next of kin, subject to the payment of his debts.

[140] between my late husband, Joseph Hutchings, deceased, and myself, of the one part, and Messrs. Langton of the other part, certain funds payable to me under the will of Watkins Herbert, were assigned to the said Messrs. Langton in trust to secure payment of the sum of £414 and interest thereon. Now, in consideration of the said Messrs. Langton having agreed to waive presenting a petition to the Court of Chancery, I do hereby agree to ratify and confirm the said deed of assignment and the several trusts therein mentioned, and do hereby promise and agree, to and with the said Messrs. Langton, to pay unto them the said sum of £414, and interest secured by the said deed of assignment, within five days from the date hereof." Messrs. Langton knew nothing of this memorandum until after it was signed; and they never had agreed to waive presenting a petition to the Court of Chancery, as recited in the memorandum, but that recital was introduced into it by the Defendant Smith of his own accord. In September 1834 Messrs. Langton brought an action, on the memorandum, against Mrs. Hutchings; and, in November following, she filed the bill in the present suit, against them and Smith, alleging that Smith obtained the memorandum from her by intimidation, and that she signed it without the advice of any friend or professional adviser and without having received any consideration, and when she was ignorant that the deed of assignment was wholly inoperative and void as against her. The bill prayed that the memorandum might be declared void and delivered up to the Plaintiff to be cancelled, and that the Langtons might be restrained from proceeding with their action.

The cause now came on to be heard. The main question was whether the assignment was not void as against the Plaintiff, in consequence of her having survived her husband.

[141] Mr. Knight Bruce and Mr. Moore, for the Plaintiff. It cannot be disputed that Mrs. Hutchings is entitled at the least to a settlement out of the funds comprised in the assignment: but we contend that the assignment is wholly void as against her. There is no case in which the question, whether an assignment by the husband of the wife's chose in action to a particular assignee for value is good against the surviving wife, has been argued and decided; but there are the strongest expressions in the recent cases against the affirmative of the proposition. In *Lord Carteret v. Paschal* (3 P. W. 197) the subject in dispute was an *elegit*, which is considered as a chattel real; and on that account it was held that the husband's assignment bound the wife. The next case that is usually cited against the right of the wife is *Bates v. Dandy* (2 Atk. 207; but see a much fuller report of the case in 1 Russ. 33, note, and 3 Russ. 72, note). There Lord Hardwicke went so far as to hold that the wife had no right even to a settlement. That, undoubtedly, is not now the law of the Court. In *Lord Salisbury v. Newton* (1 Eden, 370) it was expressly decided that the wife was entitled to a settlement as against the husband's particular assignee for value: that case, however, did not touch the present question; as the point was not brought before Lord Henley. In *Mitford v. Mitford* (9 Ves. 87; see 97, *et seq.*) it was decided, and for the first time, that the general assignment in bankruptcy did not defeat the right of the surviving wife. Sir W. Grant, M.R., in his judgment in that case discusses the question now before the Court at considerable length; and in page 99 of the [142] report His Honor says: "It may seem strange that a man should in any way be able to transfer to another a larger or better interest than he has in himself. The interest that he has in her chose in action or equitable interest is only a right or power to reduce it into possession. But what is supposed to pass to an assignee for valuable consideration is the absolute right to the property wholly freed from her contingent right by survivorship." In *Hornsby v. Lee* (2 Madd. 16) the wife's interest in the stock was reversionary at the time of the assignment, but it came into possession in the lifetime of the husband; and yet the wife was held to be entitled to the stock in consequence of her having survived her husband. *Hornsby v. Lee*, therefore, decides the very point. Sir T. Plumer, V.-C., in his judgment in that case, says: "The assignment puts the assignee of the husband in the same situation as the husband; and if the husband survives the wife, the assignee is entitled to the property; but here the husband died before the wife; and the assignee, therefore, is not entitled to the property. According to *Mitford v. Mitford* it is clear that the general assignment in bankruptcy does not pass a reversionary interest in the wife, she surviving her

husband. It must be the same as to the assignment under the Insolvent Debtors Act: nor do I see what answer can be given to the observation of Mr. Cooke, that a particular assignee cannot be in a better situation than an assignee under the general assignment in bankruptcy. The case cited of *Woollands v. Crowcher* is strong to shew the insufficiency of the assignment to bar the wife's claim in case she survives her husband." There is another case which is not reported in any [143] regular book of reports, but which is also an authority in our favour. *Chapman v. Curtis*.(1)

In *Pierce v. Thornely* (*ante*, vol. 2, p. 167; see 177, *et seq.*) the question arose between the assignee in bankruptcy of a deceased husband and the widow: but your Honor's judgment contains observations applicable to the present question. Everybody must be aware that there can be no distinction in principle between the assignment in bankruptcy and an assignment by the husband to a particular assignee for valuable consideration. *Purdew v. Jackson* (1 Russ. 1; see particularly pp. 19 and 20), *Honner v. Morton* (3 Russ. 65; see pp. 68 and 85).

Mr. Jacob and Mr. Koe, for the Defendants, the Langtons. Mrs. Hutchings is not entitled to come for relief against our clients, unless she replaces them *in statu* [144] *quo*, that is, unless she retransfers to the Accountant-General, in trust in the cause of *Conden v. Lord*, the funds that were standing in his name on the 18th of August 1834.

It is true that the question now in discussion never has been decided after argument, for it has been always taken as too clear for argument. *Bates v. Dandy*, as reported by Mr. Russell, is a conclusive authority upon the point. In *Bash v. Dalway* (3 Atk. 530; see 533) Lord Hardwicke said that the assignment by the husband of the wife's reversion would have been valid if the reversion had fallen into possession in his lifetime, although he died before he received the money: and in *Medcalfe v. Ives* (1 Atk. 63) the same learned Judge expresses himself to the same effect. The Plaintiff's counsel have admitted that the case of *Lord Salisbury v. Newton* is an authority against them; and they have not been able to find any case in their favour except *Purdew v. Jackson*, in which they say there is a *dictum* which supports their case. But that *dictum* was not adopted, but was expressly repudiated by Lord Lyndhurst, L.C., in his judgment in *Honner v. Morton*. His Lordship says: "When the husband assigns the chose in action of his wife, one would suppose on the first impression that the assignee would not be in a better situation than the assignor; and that he too must take some steps to reduce the subject into possession, in order to make his title good against the wife surviving. But equity considers the assignment by the husband as amounting to an agreement that he will reduce the property into possession; it likewise considers what a party agrees to do, as actually done: and, therefore, where the husband has [145] the power of reducing the property into possession, his assignment of the chose in action of the wife will be regarded as a reduction of it into possession." This is consistent with the opinion of every other Judge before whom the question has arisen; and it is impossible for the Court to decide the contrary without overruling what has been considered to be the law for the last 100 years. *Johnson v. Johnson* (1 Jac. & Walk. 472).

Mr. Wakefield and Mr. Bethell, for the Defendant Smith, cited *Steel v. Cragh* (9 Mod. 43), *Honner v. Morton*, *Bates v. Dandy*, and *Lord Salisbury v. Newton*.

Mr. Knight Bruce, in reply, referred to *Burnett v. Kinaston* (Prec. Ch. 118), and to Mr. Jacob's edition of Roper on Husband and Wife, pp. 226, 227.

(1) 5 Bythewood's Precedents in Conveyancing, Jarman's edit. p. 572, note. Reg. Lib. A. 1827, fol. 1658. On referring to Reg. Lib. the statement of the case in Mr. Bythewood's note appeared to be accurate, except that the sum which was ordered to be paid to Mrs. Chapman was not the whole of her fifth share of the funds in the cause, but the residue of it after deducting certain sums which had been applied in satisfaction of incumbrances on the share. The whole amount of the share was £770: the sum which the Court ordered to be paid to Mrs. Chapman was £155: and as she had presented a petition, praying to have the last-mentioned sum settled on herself and her children, the Court may have ordered it to be paid to her, as being the provision to which she was entitled out of her share. The case, therefore, does not appear to be an authority in the Plaintiff's favour.

THE VICE-CHANCELLOR [Sir L. Shadwell], after stating the case, proceeded as follows:—

The assignment of November 1830 was prepared by Mr. Smith, who was the attorney of Messrs. Langton; and it is evident, on the face of that instrument, that the parties did not know what was the share of Watkins Herbert's estate which Mrs. Hutchings was entitled to. She was, in fact, entitled to one-fifth in her own right, and to another fifth as the personal representative of her late brother; and, after payment of his debts, that fifth would be divisible between her and her sister; so that the utmost that she was entitled to beneficially was one-fifth and the half of another fifth, subject to her brother's debts.

In the progress of the two suits of *Conden v. Lord*, Mr. Hutchings died, and it does not appear that any [146] bill of revivor was filed, or that any notice whatever was taken of his death. On the 9th of August 1834 the decree on further directions was made in both causes; from which it appears that a considerable sum, in the whole, was forthcoming to Mrs. Hutchings in respect of her shares; and, on the 21st of the same month, the amount of those shares was transferred to her. But, on the 18th of that month, Mr. Smith obtained from her the memorandum which is the subject of the present suit.

It is plain, from the evidence in the cause and from the answers of the Messrs. Langton, that the situation in which Mrs. Hutchings stood, with respect to her shares, could not be explained to her; and that Messrs. Langton knew nothing at all about the memorandum, and that they never had any intention of presenting a petition to this Court, and, consequently, the statement that they had agreed to waive presenting a petition was merely the invention of Mr. Smith for the purpose of making it appear that Mrs. Hutchings had received some consideration for signing the instrument.

In the course of the argument a great deal was said upon this question, namely, whether an assignment by a husband and wife of the wife's chose in action to a particular assignee for valuable consideration is binding on the wife, where the husband dies in her lifetime and before he has reduced the chose in action into possession: and the cases of *Bates v. Dandy*, *Lord Salisbury v. Newton*, and a great many other cases were cited. It is not, however, necessary for me to enter into the general question in order to decide the case now before me. But, when it becomes necessary to decide that question, the Court will have to consider whether the [147] cases of *Bates v. Dandy* and *Lord Salisbury v. Newton*, which the Defendant's counsel mainly relied upon, can be considered as authorities which absolutely and conclusively establish the position that, where the wife has survived her husband, the assignee for value of the wife's chose in action can be entitled to any portion of it. In *Bates v. Dandy* Lord Hardwicke seems to have felt that the question was one of some difficulty; but, on the authority of a case which he cites, he comes to the conclusion that the assignment ought to be established; and he directs that the claim of the assignee should be first satisfied out of the chose in action, and that the residue should go to the wife. (See 3 Russ. 72, note.) In *Lord Salisbury v. Newton* it seems to have been taken for granted that the assignment was binding on the wife; for the only question that was discussed was whether the wife was entitled to a provision out of her chose in action as against the assignee.

Now, in this case there is this peculiarity: nothing was done by the assignee in order to reduce the chose in action into possession, and, before the memorandum was signed, there had been a decree directing Mrs. Hutchings's chose in action to be transferred into her name; and it appears to me that there is an important difference between the case where the chose in action is fluctuating, and the case where there has been a decree directing that it shall be paid to the wife who has survived her husband. In *Forbes v. Phipps*, which was decided by Lord Henley subsequently to the case of *Lord Salisbury v. Newton*, a decree had been made which directed that the wife's chose in action should be [148] paid to the husband; and, after that decree, the wife died leaving her husband surviving; and the question was whether the effect of the decree combined with the fact that the husband had survived the wife was to give the chose in action to the husband as against the creditors of the wife. It was contended, on behalf of the creditors, that the effect of the decree and

survivorship was not to give the chose in action to the husband, but that it still remained the property of the wife. Lord Henley gave judgment on the point, and said that a decree was equal to a judgment at law which operates to vest the property; and his Lordship held that the husband, under the decree, and by having survived his wife, became entitled to the property not subject to the debts of his wife. If then a decree of this Court will have the effect of vesting the chose in action of the wife in the surviving husband, what effect ought a decree to have which directs the chose in action of the wife to be paid to the wife who has survived her husband? It seems to me that, in the latter case, the decree must, *à fortiori*, have the effect of vesting in the wife her own chose in action. It is very extraordinary that no petition was ever presented to the Court by Messrs. Langton. But whatever may be the right of the husband's assignee for value of the wife's chose in action before decree, it is difficult to see how a petition presented by the assignee, after a decree has been made which directs the chose in action to be paid to the wife, can be of any avail; and, in my opinion, if Messrs. Langton, after allowing the decree to be made which directed Mrs. Hutchings's chose in action to be transferred to her, had presented a petition praying that their debt might be satisfied out of it, the Court would have paid no attention to the application. The manœuvre of taking the memorandum [149] was intended to have the effect of placing Mrs. Hutchings in a worse situation, with respect to her property, than she would have been in if she had not signed the memorandum. Mr. Smith never explained to her the effect of the act which she was doing when she signed the memorandum; and there is great reason to think that if the real position in which she stood with respect to her property and the difficulties which had occurred in the case had been stated to her, she never would have signed the memorandum. The Messrs. Langton were no parties to it, nor had they ever thought of presenting any petition to the Court: and, consequently, the statement that they had consented to abstain from taking that step was merely colourable.

My opinion, upon the whole of the case, is that the memorandum cannot stand, but that it must be delivered up to be cancelled. The money in Court must be paid to the Plaintiff, and Mr. Smith and Messrs. Langton must pay the costs of the suit.(1)

[150] TENCH v. CHEESE AND STEPHENS.(2) Feb. 1838.

New Orders of 1837.

The last order upon merits previous to the orders of 1837 coming into operation, had been made at the Rolls, against one of the Defendants alone. The other Defendant afterwards moved to dismiss before the Vice-Chancellor. The motion was refused with costs, as the Defendant was bound to see that the application was made in the proper Court.

Mr. Bayley, on behalf of the Defendant Stephens, moved to dismiss the bill for want of prosecution.

Mr. Beavan objected that this motion, under the 12th Order of 1837, sect. 3, ought to have been made at the Rolls, inasmuch as the last order upon merits, namely, an order for the Defendant Cheese to produce papers, &c., admitted by his answer to be in his possession, had been made at the Rolls. He claimed the costs of the motion.

(1) Immediately after the Plaintiff had signed the memorandum mentioned above, Mr. Smith prevailed on her to sign another, by which, in consideration of his not presenting a petition to prevent her from receiving the funds payable to her in *Conden v. Lord*, she undertook to pay to him a debt which was partly due from her late husband and partly from herself. The suit related to the latter memorandum as well as the former; and (no objection having been made on the ground of multifariousness), the decree directed them both to be delivered up: but it was thought advisable not to inumber the report with any statement relative to the latter memorandum.

(2) *Ex relatione*, Mr. Beavan.

Mr. Bayley, in reply, insisted that, as the order at the Rolls had been made against Cheese and not against his client Stephens, who was not aware of it, no costs ought to be given; but,

THE VICE-CHANCELLOR [Sir L. Shadwell] said he knew it to be the opinion of the Lord Chancellor that those who made applications after the orders of 1837 had come into operation were bound to see that they were made in the proper Court; and he therefore refused the application with costs.

[151] COLBURN v. DUNCOMBE. Feb. 19, 1838.

Copyright. Pleading. Parties.

The publisher of a book filed a bill for the usual relief on an invasion of copyright: but, though he had purchased the work of the author and paid for it, it did not appear that the copyright had been assigned to him. Held that the bill was demurrable because the author was not a party to it.

The bill alleged that, on the 1st of July 1836, an agreement in writing was made and signed between the author of the work thereafter mentioned of the one part, and the Plaintiff, who was a bookseller and publisher, of the other part, whereby the author, in consideration of a large sum of money mentioned to be paid to him by the Plaintiff, agreed to dispose of, to the Plaintiff, the entire copyright, in perpetuity, of an original work consisting of extracts from a private journal of occurrences, conversations and anecdotes, kept during the years 1813 and 1814, and comprising particulars relative to the late King George the Fourth, the Princess of Wales, the Princess Charlotte and other persons; and that it was thereby agreed that the work was to consist of not less than two volumes of at least 400 pages each, printed in the type therein mentioned: that, in pursuance of the agreement, the author wrote and composed an original work, which had since been published by the Plaintiff, under the title of "Diary Illustrative of the Times of George the Fourth;" and that, on the 1st of November 1836, the author delivered the manuscript of the work to the Plaintiff, and thereupon the Plaintiff paid the author the sum agreed to be paid for the copyright of the work by the agreement of July 1836; and the author, thereupon, signed a memorandum in writing, bearing date the 1st of November 1836, whereby he acknowledged to have received, of the Plaintiff, the before-mentioned sum of money, as the consideration for the entire copyright, in perpetuity, of the work in the said memorandum or receipt called, "Memoirs of the Latter Times of George the Fourth," and agreed to [152] deliver a regular assignment to the Plaintiff whenever called upon so to do: that, after the Plaintiff had purchased the copyright of the work as aforesaid, he caused the work to be printed and published under the title of "A Diary Illustrative of the Times of George the Fourth, interspersed with Original Letters from the late Queen Caroline and from Various other Distinguished Persons:" and that the work so printed and published and the copyright thereof was then the sole and exclusive property of the Plaintiff. The bill then alleged that the Defendant had printed, published and sold several copies of a pirated edition of the work: and it prayed that he might be restrained from selling or disposing of any more of such copies, and might account to the Plaintiff for the profits made by the sale of the copies that had been sold.

The Defendant demurred for want of equity, and because the author was not a party to the suit.

Mr. Jacob and Mr. Torriano, in support of the demurrer. The Plaintiff, if he has any title at all, has, at the utmost, an equitable title to the copyright in question.

There was no such thing as copyright at common law. It is a new species of property created by 8 Anne, c. 19: and it has been decided, repeatedly, that copyright cannot be assigned except in writing. *Power v. Walker* (3 M. & S. 7), *Morris v. Kelly* (1 Jac. & Walk. 481), *Latour v. Bland* (2 Stark. N. P. C. 382), *Moore v. Walker* (4 Camp. N. P. C. 9, note). The documents referred to in the bill are not assignments, but mere executory agreements to assign the copyright at some future time. At the

time [153] when the first document was signed, there was no existing copyright; for the work was not then written. The work mentioned in the second document does not appear to be identical with that mentioned in the first; and, therefore, it is not clear that the work mentioned in the second instrument was a performance of the previous agreement. Those two instruments, therefore, throw considerable doubt upon the Plaintiff's title. At the utmost they are merely agreements for a future assignment.

A bill of this description is in aid of the legal title; therefore, the first question to be considered is whether the Plaintiff has that legal title. If he has not, he is bound to bring before the Court the person having the legal title; and, if he does not do so, the bill is demurrable for want of parties. *Cathcart v. Lewis* (1 Ves. jun. 463), *Ray v. Fenwick* (3 Bro. C. C. 25), *Harrington v. Long* (2 Myl. & Keen, 590).

Mr. Knight Bruce and Mr. Sharpe, for the bill. We are dealing here, not with land but with a mere chattel interest; and all that is required is that the intention to pass the copyright should appear in writing. No particular form is necessary. Where the title depends wholly upon contract, there is no difference between a legal and an equitable title: all that is requisite is that there should be a writing which evidences the intention of the parties. *Poole v. Bentley* (12 East, 168). In *Rundell v. Murray* (Jac. 311; see 316), Lord Eldon seems to assume that a mere gift by parol, unsupported by value, would be sufficient to pass a copyright.

[154] Besides, this Court will always presume against the wrongdoer; and, in *Morris v. Kelly*, Lord Eldon acted upon that principle. His Lordship there says, "I shall assume that your title is regular until they shew the contrary:" and, in *Barnett v. Glossop* (1 Bing. N. C. 633), the Court of Common Pleas acted upon the same principle.

The instrument of November 1836 is a receipt for the consideration for the entire copyright of the work in perpetuity; and the agreement at the end of it is not to deliver an assignment but a regular assignment, that is, a more formal one. A declaration of an intention to do some further act does not prevent the legal title from passing. *Doe v. Ries* (8 Bing. 178).

Moreover, the bill contains an allegation that the copyright has become the sole and exclusive property of the Plaintiff. That is a distinct averment that everything has been done to complete the legal title. But we are not compelled to rely on that allegation; as we have a writing stated in the bill which is a complete exhibition of intention that the copyright should pass.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This suit is manifestly defective in not having the name of the work a party to it.

I am clearly of opinion that the first instrument set forth in the bill cannot be held to have had the effect of assigning the copyright; for it was not then in existence: and it is distinctly laid down by Littleton that a release of all the right which a party may have at any future time is clearly void in law.

[155] If then the first instrument did not operate as an assignment, the question is whether the second instrument had that operation. Now it is observable that that instrument contains no words of assignment at all, but is merely an acknowledgment on the part of the author that he had received the consideration for the copyright of the work therein called, "Memoirs of the Latter Times of George the Fourth," and had agreed to deliver a regular assignment to the Plaintiff whenever called upon so to do. The word "regular" I consider to be purely superfluous: and, in my opinion, this second instrument is nothing more than an agreement to assign the copyright when called upon to do so; which is widely different from an actual, present assignment. It seems to me, therefore, that this second instrument did not operate as an assignment at law.

The bill next alleges that, after the Plaintiff had purchased the copyright of the work as aforesaid, he caused the work to be printed and published under the title of, "Diary Illustrative of the Times of George the Fourth, interspersed with Original Letters from the late Queen Caroline and from Various other Distinguished Persons;" and that the work so printed and published and the copyright thereof was then the sole and exclusive property of the Plaintiff. Now that allegation, in the way in which it is found in the bill, cannot be taken as a substantive, independent allegation

of right; but it must be read in connexion with the allegation which immediately precedes it: and, that being so, I am not at liberty to hold that it is tantamount to an averment that an assignment has been made which would pass the copyright at law. The consequence is that the party who has the legal copyright is not before the Court; and the demurrer, for want of parties, must be allowed. [156] But as the bill contains sufficient to shew that the Plaintiff has a good title in equity, I shall give him leave to amend his bill without prejudice to the injunction.(1)

[156] SLATER v. WHEELER.(2) Feb. 27, 1838.

Pleading. Parties.

A. and B., the executors of C., employed D. to act as their agent in the business of the executorship. A. died, and afterwards B. filed a bill against D. for an account of his dealings and transactions as such agent as aforesaid. Held, that A.'s personal representatives were not necessary parties to the suit.

The bill was filed for an account of the transactions and bills of costs of Messrs. Nash & Rumsey, solicitors, who had been employed by Slater and Lansdale, executors of a testator.

After Lansdale's death the suit was commenced by Slater alone, and the representatives of Lansdale were not parties to the record.

Mr. Knight Bruce and Mr. Shadwell, for the Plaintiff.

Mr. Jacob and Mr. Bethell, for the Defendants, objected, at the opening, that the legal personal representatives of Lansdale ought to be made parties.

The Plaintiff seems not to have contemplated that the accounts sought for may turn out in two different ways. If there should be a balance due to the executors, there may be the proper party before the Court to receive it; but if there should be a balance due from the executors, then we have not the security we are entitled to for the payment of it. The contract of employ-[157]-ment binds the deceased executor's estate as well as the surviving executor; and his assets are liable to make good the balance, if any should be found due to the Defendants. There are several transactions stated in the answer which render it necessary to go into evidence; but if such evidence were taken in the absence of the personal representatives of the deceased executor, it would not be binding on them though it may materially affect them; and, therefore, the Court cannot, on this record, finally settle the rights of the parties. It has been said that this doctrine applies only to trade transactions: but that is not correct. In *Thorpe v. Jackson* (2 Younge & Coll. 553), a case recently before Mr. Baron Alderson in the Exchequer, the same doctrine was applied; and, in that case, most of the authorities were referred to. The account is sought on the footing of there having been a joint contract; and Slater is bound to account over for the assets of which an account is sought from Messrs. Nash & Rumsey. On the other hand, the Defendants will have a right to have any balance that may be found due to them paid out of the trust estate of the executors, or by Lansdale's representatives, or by Slater, and they ought not to be deprived of the security of any of them.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Where two persons representing a joint estate employ certain attornies, and one dies, I never heard that, because you want an account against those agents, you must make the legal personal representatives of the deceased parties to the suit. I cannot allow this objection. I think that the language of Mr. Baron Alderson is too large; and, moreover, it was not necessary for his decision.

(1) An injunction had been granted to restrain the Defendant from selling the pirated work.

(2) *Ec relatione*.

[158] TURNER v. CAPEL. March 2, 1838.

Will. Construction. Survivorship.

Testator bequeathed his residuary estate to his wife for life, and, after her death, to his son and daughter, share and share alike, and their respective issue, with benefit of survivorship between his said children or their issue respectively. Held, that the survivorship was to take place only in the event of the issue of a child failing in the lifetime of the testator's widow.

James Turner, by his will, dated the 21st of December 1805, gave the residue of his estate and effects, after payment of his funeral expenses, debts and legacies, to his executors, in trust to sell the same and lay out the proceeds in Government securities in their names, and to pay the interest or dividends thereof to his wife, for her separate use for her life, she releasing the testator's estates and effects from all dower or thirds which she might be entitled to: but, in case she should refuse to execute such release, then he revoked his said bequest to her; and, from and after the death of his wife or her refusing to execute such release, he gave all the residue of his estate and effects *unto and between his son John Turner and his daughter Clarissa Turner, share and share alike, and their respective issue, with benefit of survivorship unto and between his said children or their issue respectively.*

The testator died shortly after the date of his will, leaving his widow and his son and daughter surviving. The widow executed the required release, and died in June 1837.

John Turner had had eight children, of whom five were still living: two died before the testator's widow, and one after her. Clarissa Turner married Thomas Fordham, and had had two children; one of them died before the widow, and the other was still living.

The Plaintiff in the cause was John Turner, the testator's son: the Defendants were the executors and [159] trustees of the will, the Plaintiff's surviving children, the representative of his child who died after the widow, and Mr. and Mrs. Fordham and their surviving child. The bill prayed that the rights and interests of the Plaintiff and the Defendants in and to the testator's residuary estate under his will might be declared, and that the residue might be distributed amongst the several parties entitled thereto according to their interests therein.

Mr. and Mrs. Fordham, by their answer, submitted that, on the death of the testator's widow, Mrs. Fordham, or her husband in her right, became entitled absolutely to a moiety of the residue.

Two of the Plaintiff's children, who were adult, submitted that, according to the true construction of the will, the Plaintiff became entitled, upon the testator's decease, subject to the life-interest of the widow, to one moiety of the residue for his life, with remainder to all his issue born in his lifetime, subject to survivorship between or among such issue in the event of the death of any one or more of them during the life of the Plaintiff, with similar limitations to Mrs. Fordham and her issue in the event of the Plaintiff dying without leaving issue living at his decease: and that Mrs. Fordham became entitled, upon the decease of the testator, subject to the life interest of the widow, to the other moiety of the residue for her life, with remainder to all her issue born in her lifetime, subject to survivorship between or among such issue in the event of the death of any one or more of them during her lifetime, with similar limitations to the Plaintiff and his issue in the event of Mrs. Fordham dying without leaving issue living at her decease. The Plaintiff's other children and [160] the child of Mr. and Mr. Fordham, who were infants, submitted their rights and interests to the care and protection of the Court: and the representative of the Plaintiff's child who died after the widow claimed such interest as that child would have been entitled to if living.

The cause was heard as a short cause.

Mr. Knight Bruce and Mr. Romilly, for the Plaintiff, contended that the Plaintiff

was entitled to a moiety of the residue absolutely. *Montagu v. Nueella* (1 Russ. 165), *Pearson v. Stephen* (2 Dow. & Clark, 328).

Sir W. Horne and Mr. Stratton, for the Defendants Fordham and wife, cited *Lyon v. Mitchell* (1 Madd. 467).

Mr. Jacob, Mr. Bailey and Mr. C. C. Barber appeared for the children of the Plaintiff and Mr. and Mrs. Fordham.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that in this case the survivorship was to take place in the event of there being a failure of issue of either of the testator's children in the lifetime of the widow; and that *Pearson v. Stephen* was a stronger case in favour of the issue of the children than the present; for, in that case, there was a gift to the sons and their issue, followed by a direction that the issue should take *per capita* and not *per stirpes*: and His Honor declared that, in the events that had happened, the Plaintiff and Mrs. Fordham were each entitled to a moiety of the residue absolutely.

[161] ARCHIBALD v. WRIGHT.(1) March 2, 30, 1838.

[S. C. 7 L. J. Ch. 120. See *Humble v. Bowman*, 1877, 47 L. J. Ch. 64; *In re Flower* 1885, 55 L. J. Ch. 202.]

Will. Construction. Interest or Power.

Testator directed that, after his wife's death, part of his stock should be transferred to Johanna G. for her sole and entire use during her life; that she should not alienate it, but enjoy the interest during her life; and that at her decease she might dispose of it as she thought fit. Held, that J. G. took an interest for life, with a power to dispose of the stock by her will.

Henry Wright, by his will, dated 12th September 1824, after reciting that he had executed a deed of trust settling a certain portion of his property, proceeded thus: "I stand possessed of the remaining sums, viz., £1000 in the Old four per cents., £630 in the late Navy fives, and £100 in the three per cent. consols, which I dispose of in the following manner: viz., I bequeath the £100 in the three per cent. consols to Johanna Grant of No. 7 Charlotte Street, Pimlico; I give the interest of all the rest to my dear wife Eliza, to be enjoyed by her during her life; at her decease I give the same to my child Henrietta. I further will that, at the decease of my wife, the sum of £1000 in the Old four per cents. be transferred to Johanna Grant, *for her sole and entire use during her life; that she shall not alienate it, but enjoy the interest of it during her said life, and at her decease she may dispose of it as she thinks fit.*" I further will that, after the decease of my wife, and should Henrietta also die (without issue), and the above-named Johanna Grant be living at the time of the decease of the said Henrietta, I, in that case, will and bequeath to Johanna Grant before-named the further sum of £2800 in the three per cent. Reduced stock, which sum is referred to in the trust deed alluded to in the first part of this document. I further will and bequeath to my dear wife my house and furniture, and everything appertaining to Ham,(2) during her life; at her decease I give the same to my child Henrietta; [162] I also give to my wife the seven Lancaster Canal shares during her life, and at her decease I give the same to Henrietta. Dated at Ham, the 12th of September 1824. H. Wright. I appoint my brother sole executor of this my last will."

The testator afterwards made a codicil as follows:—"Codicil made 19th October 1824. *In addition to the provision hereinbefore made for Johanna Grant at the decease of my wife, I give and bequeath to her the further sum of £430 in the late Navy fives for her disposal.* Henry Wright."

The testator died on the 7th April 1825, and his brother John Wright, a Defendant, proved the will and codicil on 21st July 1825.

(1) *Ex relatione*, Mr. Greene.

(2) His residence.

The £1000 four per cent. annuities and £630 Navy five per cents. were reduced in the testator's lifetime to three and a half per cent. annuities, and by reason of a deficiency of the general personal estate for payment of debts, &c., those sums were partly applied for that purpose, and abated in proportion, £200 and £126, leaving £800 of the one and £504 of the other for the legatees.

On the 16th February 1831 Johanna Grant married John Archibald, and died on the 9th September 1832, and letters of administration of her effects were granted to her husband by attorney, he being then resident in the East Indies.

John Archibald, the husband, died in July 1834, having made a will, dated the 20th of the same month, but did not appoint an executor; and John Archibald, the [163] Plaintiff, obtained letters of administration both of the estate of John Archibald and of Johanna, his wife, deceased.

Eliza Wright, the widow of Henry Wright, the testator, died on the 6th of November 1835, and thereupon the Plaintiff filed his bill against John Wright, the executor, and Henrietta Ann Wright Place, who was a natural daughter of the testator, claiming a transfer, not only of the £430 bequeathed by the codicil, but also of the £800 residue of the £1000 bequeathed by the will.

The cause came on to be heard on bill and answer; and, owing to the parties differing on the minutes, was twice argued, first, on the 2d March, and again this day.

Mr. Knight Bruce and Mr. Rudall, for the Plaintiff. The question is what were the rights of Johanna Grant in reference to the £1000 bequest; whether she took an absolute interest, or had only a power coupled with an interest for her life. One construction of this will is to read the passage beginning, "I further will, that at the decease of my wife," and ending "Johanna Grant," as if it were in a parenthesis, and then there would be an absolute gift, which the subsequent declaration as to the enjoyment during life, and the power of disposal at her death, would not abridge. There is another construction, which refers the words "during her life," "she may dispose of it," not to Johanna Grant but to Henrietta, and this has been suggested by an eminent counsel as the true reading of the will. [164] [Mr. Jacob. If the passage referred to be read as a parenthesis, you must make Johanna Grant a trustee for Henrietta.] There is no authority for construing the word "dispose," or "disposal," to mean other than an *absolute interest*, unless a special class to take, or a special instrument or mode of executing the power be pointed out. *Tomlinson v. Dighton* (1 P. Wms. 149), *Doe v. Thorley* (10 East, 438). The codicil is very important in explaining the disposition intended by the will; there is no question as to Johanna Grant taking an absolute interest in the £430; and the words "in addition," "the further sum," "for her disposal," clearly import that the additional provision is of the same nature as the former gift at his wife's decease. [THE VICE-CHANCELLOR. There are two different gifts to Johanna Grant by the will; the testator does not in his codicil distinguish either, but refers to the provision he has made for her in general terms; the gift by the codicil, therefore, cannot be of the same nature as both.] The testator has here said "You shall not spend your income," that is, "You shall not anticipate by alienation." Testators like the present, who seek not the aid of legal skill, never contemplate any distinction between power and property. In *Doe v. Thorley* the words were "to leave," and all the Judges thought that word to signify *ex vi termini*, a disposition by will. *Reid v. Shergold* (10 Vesey, 370) also was decided on the same rule of construction, the appointment by will being specially limited.

The following cases were also cited:—*Irwin v. Farrer* (19 Ves. 86), *Jennor and Hardie's case* (1 Leon. 283), *Robinson v. [165] Dugdale* (2 Vern. 181), *Goodtitle v. Otway* (2 Wils. 6), *Elton v. Sheppard* (1 Bro. C. C. 532), *Hales v. Margerum* (3 Ves. 299), *Comber v. Graham* (1 Rus. & M. 450), *Simmons v. Simmons* (*ante*, 8 vol. p. 22), *Doe dem. Herbert v. Thomas* (3 Adol. & Ellis, 123), *Hixon v. Oliver* (13 Ves. 108).

Mr. Jacob and Mr. Roupell, for the Defendant Henrietta Ann Wright Place, were not heard. (See *Bradly v. Westcott*, 13 Ves. 445; *Reith v. Seymour*, 4 Rus. 263.)

Mr. Greene, for the Defendant John Wright.

THE VICE-CHANCELLOR. The words in the present case do not appear to me to give an *absolute interest* with a superadded power, as in most of the cases referred to, but a *life interest* and testamentary power; they seem to negative the possibility of

Johanna Grant disposing of the fund during her life, and are very different from the words in *Doe v. Thomas*.

Mr. Knight Bruce. With great deference, I think the restraint on alienation good for nothing.

THE VICE-CHANCELLOR [Sir L. Shadwell]. That may be, so far as it is a limitation of the *interest*, but it appears to me available as indicative of an intention to prescribe the mode of executing the *power*, viz., by will and not by writing *inter vivos*. I think this lady was not to have a power to alienate during her life; [166] and if not, then she took a life interest, coupled with a testamentary power of appointment, and, having died intestate, Henrietta Ann Wright Place is entitled to the £800 Bank three and a half per cent. annuities in the pleadings mentioned.

I should not object, if it were desired, to send a case to a Court of law, but there would be great difficulty in framing one that would be satisfactory.

Mr. Knight Bruce agreed as to the difficulty of framing a case, and did not press it.

[167] *RUSSEL v. BUCHANAN*. March 2, April 21, 1838.

[See *Cooper v. Ewart*, 1847, 15 Sim. 564; 2 Ph. 362; 41 E. R. 983; *In re Le Brasseur and Oakley* [1896], 2 Ch. 492.]

Practice. Costs. Taxation. Exception.

A solicitor presented a petition, complaining that the Master, in taxing his bill, had taken into consideration matters not referred to him, and praying for leave to except to the certificate. It was objected that the solicitor ought to have filed exceptions to the certificate, but the Court overruled the objection.

Under the common order for taxing a solicitor's bill, the Master is bound to take a general account of receipts and payments by the solicitor, as agent to the client.

The Plaintiff had employed the Defendant Buchanan as her solicitor and attorney in this suit and in divers other suits, matters and things. In September 1836 the Plaintiff having become dissatisfied with Buchanan's conduct, ceased to employ him, and obtained, by petition at the Rolls, an order that he should deliver to her a bill of all such fees and disbursements as he claimed to be due to him in this suit and in all other causes, suits and matters in which he had been employed as her solicitor or attorney; and that it should be referred to the Master to whom this cause stood referred to tax such bill. In obedience to this order Buchanan delivered to the Plaintiff four bills, amounting together to £512, 3s. 9d. The Master taxed them at £361, 14s. 6d., and thereupon made his certificate stating that he had done so, and that, on the 9th of January 1836, £582, 15s. 3d. had been paid to Buchanan by the receiver of the rents and profits of the estates in question in this cause, to which the Plaintiff was entitled, in discharge of certain costs in this cause, not included in the before-mentioned bills, and which had been taxed at £421, 5s. 9d.: that, by the order on further directions in this cause, [168] dated the 20th of January 1836, it was ordered that Buchanan should retain the sum of £42, 2s. 7d. found, by a report in the cause, to be due from him, towards payment of the Plaintiff's costs; and that it was submitted to the Master, on the Plaintiff's behalf, that the sum of £161, 9s. 6d., being the difference between the £582, 15s. 3d. and the £421, 5s. 9d., and also the £42, 2s. 7d., and the further sum of £113, 11s. 5d., alleged to be due from Buchanan upon an account between him and the Plaintiff (which sums amounted together to £317, 3s. 6d.) should be deemed and considered as payments on account of the £361, 14s. 6d., the amount at which the four bills had been taxed. But the Master was of opinion, for the reasons stated in his certificate, that Buchanan was not bound by the taxation of the costs not included in the four bills, and, therefore, could not be charged with the £582, 15s. 3d. And as to the £42, 2s. 7d., the Master found that the same was received by Buchanan on account of the personal estate of the testator in the cause, and for which he was accountable only as executor, and was not accountable to the Plaintiff for the same; and, therefore, it appeared to the Master that the

£42, 2s. 7d. could not be charged against Buchanan as a payment to him on account of his demand against the Plaintiff as her late solicitor. And as to the £113, 11s. 5d., the Master found that the same was an assumed balance of an unsettled account (1) between the Plaintiff and Buchanan; and he conceived he was not authorized, by the order of September 1836, to take a general account of Buchanan's receipts and payments as agent for the [169] Plaintiff; and that, until such an account had been rendered and settled, it could not be ascertained what sum, if any, was due from Buchanan in respect thereof. And, under the circumstances before stated, the Master certified that he was unable to ascertain how much, if any, of the £361, 14s. 6d., the taxed amount of the four bills, then remained unpaid.

Buchanan, being dissatisfied with the certificate, presented a petition in the cause, stating that the £113, 11s. 5d. mentioned in the certificate as claimed from him must depend upon the result of certain money dealings and transactions between the Plaintiff and himself in the character of *cestui que trust* and trustee, and not in the character of principal and agent, or solicitor and client; and that, in fact, no such sum was due from him to the Plaintiff: that he was advised that the Master was not authorized, by the order of September 1836, to enter into, and ought not to have entered into, the consideration of any questions touching the costs which had been taxed at £421, 5s. 9d., or of any retainer or payment in respect thereof, or touching the dealings and transactions between him and the Plaintiff in respect of which the £113, 11s. 5d. was alleged to be due to the Plaintiff: and that the certificate was erroneous in stating any circumstances in respect of the last-mentioned costs, or of the retainer of the £42, 2s. 7d., or the payment of the £582, 15s. 3d., or of the alleged sum of £113, 11s. 5d.; and that he was advised that the Master, instead of certifying that he was unable to ascertain how much, if any, of the £361, 14s. 6d., the taxed amount of the four bills, remained unpaid, ought to have certified that the whole of that sum was unpaid and remained due to the Petitioner: that the Petitioner was aggrieved by the certificate, inasmuch as, by reason [170] thereof, he could not proceed to enforce from the Plaintiff the payment of the £361, 14s. 6d. The petition prayed that it might be referred back to the Master to review his certificate by striking out, therefrom, what he had reported respecting the costs which had been taxed at £421, 5s. 9d., and in respect of the £42, 2s. 7d. and £582, 15s. 3d., and in respect of the £113, 11s. 5d., and by certifying that the £361, 14s. 6d., the taxed amount of the four bills, was still unpaid and remained due to the Petitioner.

On the petition being opened,

Mr. Knight Bruce and Mr. Bagshawe, for the Plaintiff, said that the mode of objecting to the certificate which Mr. Buchanan had adopted was irregular; and that, instead of presenting a petition, he ought to have taken exceptions to it in the usual manner. *Chennell v. Martin* (*ante*, vol. 4, p. 340), *Drever v. Maudesley* (*ante*, vol. 7, p. 240).

Mr. Wakefield, Mr. Jacob and Mr. Hislop Clarke, in support of the petition, cited *Holbecke v. Sylvester* (6 Ves. 417), *Hunt v. Fownes* (9 Ves. 70), *Lucas v. Temple* (*Ibid.* 299), *Purcell v. Macnamara* (12 Ves. 166), *Fenton v. Crickett* (3 Madd. 496), *Ex parte Leigh* (4 Madd. 394), *Shewell v. Jones* (2 Sim. & Stu. 170; and 3 Russ. 522), *Alsop v. Lord Oxford* (1 Myl. & Keene, 564), *Attorney-General v. Brown* (*Ibid.* 567), *Brodie v. Barry* (1 Jac. & Walk. 470), *Bozon v. Williams* (3 Youn. & Jer. 378), *Jenkins v. Briant* (*ante*, vol. 6, p. 603), and 2 Smith's Pract. 353, *et seq.*

[171] Mr. Treslove, *amicus curiæ*, mentioned *Ex parte Anthony* (2 Glyn & Jam. 55).

THE VICE-CHANCELLOR, in the course of the argument, said that the case of *Chennell v. Martin* was certainly not a decision with respect to the present question; and, at the conclusion of the argument, His Honor observed that this was not a case in which particular *items* were objected to, but the conduct of the Master in taxing the bills was quarrelled with; that he was disposed to think that the course which the Petitioner had adopted was the right one; but, as the question was an important one, he should look into the cases before he decided it.

April 21. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case a petition was

(1) This account was an account of rents and dividends of stock received by Buchanan, for the Plaintiff, and payments made by him on her account.

presented by Mr. Buchanan, the late solicitor of the Plaintiff and also a party in the cause, whose bills of costs have been taxed by the Master under the common order for that purpose; and he, by his petition, objects to certain things which were done by the Master in proceeding with the taxation. The petition, as I understand it, is a petition which objects, not to particular items, but to certain matters which were brought under the observation of the Master by the solicitor who attended the taxation on behalf of the Plaintiff; and the question is, whether the propriety of bringing those matters under the consideration of the Master can be examined into by means of a petition.

Now: I must first observe that, although the order for taxation was headed in the cause, yet, in effect, the taxation had nothing to do with the cause, further than that some of the items in the bills were for business [172] done in the cause. The Plaintiff had employed Mr. Buchanan as her solicitor in the cause and also in other matters, and although Buchanan made out four separate bills, yet, in fact, they all constituted but one bill; and it was a mere accidental circumstance that the order for taxation was headed in the cause. As there was a cause depending, and as some of the items in the bills were for business done in that cause, the order was, as a matter of course, headed in the cause. The question then that I have to decide is, simply, whether what the Master has done can be examined into on petition.

That a petition may be presented for such a purpose is manifest from the order made by Lord Hardwicke in *Skipp v. Harwood* (Seton on Decrees, 335). [His Honor here read the order.]

Similar orders are made where creditors and other persons who are not parties to a cause, but who have gone in before the Master, present petitions complaining of what has been done by the Master respecting their rights. It is mentioned in Mr. Smith's book on Practice that, where a petition is presented praying for leave to except to a Master's report, the Court does not put the Petitioner to the trouble and expense of filing exceptions, but determines the matter on the hearing of the petition, and, in that way, disposes of the objections which otherwise would have been brought before the Court in the form of exceptions.

The language which is used in the reports of subsequent cases is, in some respects, loose and inaccurate; but in *Pitt v. Mackreth*, which came before Lord [173] Thurlow in 1791, his Lordship said that an exception had never been admitted for costs only; that the regular method was to state the articles the party meant to object to, in a petition, and to pray leave to except. The facts of the case are not fully stated; and it does not appear whether what the Lord Chancellor said was meant to apply to items; though it shews that he thought that a petition, and not an exception, was the right method of objecting to the report; and, in *Purcell v. Macnamara*, Sir W. Grant seems to have been of the same opinion. In *Holbecke v. Sylvester* exceptions were taken to a Master's report on taxing costs, and the exceptions were allowed: but that case decided only that there might be an exception, and did not decide that there could not be a petition. In *Lucas v. Temple* Lord Eldon said that his opinion was that exceptions would not lie for costs; his meaning being that, ordinarily, the Court would not allow exceptions to be filed for *quantum* of items in bills of costs. In *Hunt v. Fownes* a petition was presented against a disallowance of costs; and the Court did interfere and supported the petition. In *Fenton v. Crickett* a petition was presented for leave to file exceptions to a Master's report of his taxation of a solicitor's bill, in respect of items which the Petitioner conceived had been improperly allowed by the Master; and Sir John Leach, Vice-Chancellor, said: "Upon a special case made by petition, either of irregularity in the proceedings or that the Master has acted upon a mistaken principle, the Court will interfere." In *Ex parte Leigh* a petition was presented for leave to except to the Master's report on taxation of costs; and the order was made. In *Shewell v. Jones* Sir John Leach says: "In ordinary cases the Master's report upon the subject of costs is final. But, if it is thought that the Master has, in the taxation, adopted some [174] general principle which cannot be supported, the party complaining is entitled to bring that point before the Court; and petitions of this nature are not unfrequent in practice." The cases of *Alsop v. Lord Oxford* and *The Attorney-General v. Brown* are no otherwise of importance than as one shews that, where a petition was presented for a review of taxation of costs,

no objection was made either by counsel or the Court to the mode of objecting ; and, in the other, the Lord Chancellor said that the way to object to taxation of costs was not by motion ; by which his Lordship plainly implied that the mode was by petition.

When I call to mind that petitions are constantly presented praying for leave to except to the reports of the Masters on taxation of costs ; and that, in the case of *The Skinners' Company v. The Irish Society*, which was recently before me, a petition was presented for that purpose ; and, after Lord Hardwicke has made an order on petition and so much has been said by subsequent Judges asserting that a petition is necessary, it does appear to me that the objection which has been taken in this case ought not to be allowed.

Nor. 10. The preliminary objection having been overruled, the petition was heard ; and, at the conclusion of the argument,

THE VICE-CHANCELLOR said that it was not generally true that all matters pending between a solicitor and his client were to be investigated under the common order for taxation of the solicitor's bill ; that he was clearly of opinion that the Master in this case had nothing to do with either of the two sums of £421, 5s. 9d. and [175] £42, 2s. 7d. ; that, with respect to the account between the Plaintiff and Petitioner on which a balance of £113, 11s. 5d. was alleged to be due to the Plaintiff, he was inclined to think that the Plaintiff ought to have had a special direction for taking that account inserted in the order ; but that he would consult the Masters upon the point.

Nor. 20. On this day, HIS HONOR said that he had consulted the Masters on the point mentioned above, and that they were of opinion that, under the common order for taxing a solicitor's bill, the Master was bound to take a general account between the solicitor and client ; and, therefore, he should refer it back to the Master to review his certificate so far as he had certified that he conceived that he was not authorized by the order to take a general account of the receipts and payments of the Defendant as agent for the Plaintiff, and that he was unable to ascertain how much (if any) of the sum of £361, 14s. 6d. then remained unpaid.

[176] STAMPER v. PICKERING. March 12, 1838.

Annuity.

A testator charged his estates with payment of his debts, and of an annuity to his wife in lieu of dower. The real estates having been sold to pay the debts, and the income of the remaining proceeds being insufficient to pay the annuity : Held, that the widow was entitled to have her annuity paid out of the capital as well as the income of the remaining fund. Held, also (the annuity being wholly in arrear), that the arrears were to be computed from the testator's death.

H. Pickering devised his real estates to his six children as tenants in common in fee, subject to the payment of such part of his debts, funeral and testamentary expenses as his personal estate should be insufficient to pay, and subject also to an annuity of £50 to his wife, for her life, in lieu of dower ; and he appointed his wife his executrix.

The testator's personal estate being insufficient to pay his debts, his real estates were sold to supply the deficiency. The income of the fund produced by the sale of the real estates which remained after payment of the testator's debts being insufficient to pay the annuity in full, one question, on the hearing of the cause for further directions, was whether the widow was entitled to have the deficiency made good out of the capital of the fund : and, the annuity being wholly in arrear, another question was whether the arrears ought to be computed from the testator's death or from the end of the year after.

Mr. Knight Bruce and Mr. Wilbraham appeared for the Plaintiffs, who were creditors of the testator.

Mr. Purvis, for the widow, cited *Cupit v. Jackson* (Maclel. Rep. 495, and 13 Price, 721).

Mr. Witham, for the testator's children.

THE VICE-CHANCELLOR [Sir L. Shadwell] declared that the widow was entitled to have her annuity paid out of the capital as well as the income of the fund, and that the arrears ought to be computed from the death of the testator.

[177] POPE v. LORD DUNCANNON. *March 14, 1838.*

[S. C. 2 Jur. 178.]

Arbitration. Injunction.

Where an award is made after the submission has been revoked by the Plaintiff, equity will not restrain the Defendants from acting on the award, unless the Plaintiff had good grounds for revoking the submission.

The Plaintiffs were the owners of a wharf on the banks of the Thames. The Defendants were the Commissioners of Woods and Forests; and, being empowered by 1 & 2 Vict. c. 7 to purchase the wharf to complete the site for the new Houses of Parliament, they made an agreement with the Plaintiffs for the purchase of the wharf, at a price to be fixed by three referees, or any two of them, one of whom was to be named by the Plaintiffs, another by the Defendants, and the third by the two so named; but the agreement did not provide that the submission to the reference should be made a rule of Court.

The referees were nominated accordingly, and proceeded to ascertain the value of the premises: but, before they had come to a decision, the Plaintiffs revoked their authority, and served the Defendants with notice of the revocation. The Plaintiffs' nominee thereupon withdrew from the reference, but the other two proceeded with the valuation, and made their award. Upon which the bill was filed, praying for an injunction to restrain the Defendants from taking possession of the wharf and pulling down the buildings thereon.

The injunction was now moved for. According to the bill, the ground on which the Plaintiffs had revoked the authority of the arbitrators was that the Plaintiffs had discovered that the arbitrators were incompetent to pronounce as to the value of the premises, and, accord-[178]-ing to the affidavit in support of the motion, that the Plaintiffs considered that they had just ground to be dissatisfied with the conduct of the arbitrators, and were desirous of having the value of the premises ascertained by a jury, pursuant to the 11th section of the Act of Parliament.

Mr. Jacob and Mr. Romilly, in support of the motion, cited *Cooth v. Jackson* (6 Ves. 12), *Milnes v. Gery* (14 Ves. 400), *Blundell v. Brettargh* (17 Ves. 232), and *Agar v. Macklew* (2 Sim. & Stu. 418).

THE SOLICITOR-GENERAL [Sir R. M. Rolfe], Mr. K. Bruce and Mr. Reynolds, for the Defendants, referred to *Morse v. Merest* (Madd. & Geld. 26), and *Harcourt v. Ramsbottom* (1 Jac. & Walk. 505).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In my opinion, it was the intention of the parties that the contract should be binding on them from the time at which it was made: for it contains a stipulation that the Commissioners shall have immediate possession of part of the premises for the purpose of constructing a coffer-dam. But, as I understand, the Commissioners have not as yet taken possession of any portion of the premises.

By the terms of the contract, the Commissioners agreed to purchase, and the Messrs. Pope agreed to sell, the premises at such a price as any two of the referees should determine; and there can be no doubt that the authority thus given to the referees to fix the price was an authority which the Messrs. Pope might revoke [179] at law; and, as they have revoked it, the power of the arbitrators is completely

destroyed at law. The Plaintiffs then apply to this Court to restrain the Commissioners from taking possession of the wharf, and pulling down the buildings upon it; but, neither in the bill nor in the affidavit in support of the motion, is any sufficient reason stated for revoking the authority of the arbitrators. The affidavit alleges, not that the Plaintiffs *had* just grounds, but merely *that they considered* that they had just grounds for being dissatisfied with the conduct of the arbitrators; and, in my opinion, that mode of allegation is not sufficient to induce this Court to interfere; but the grounds ought to have been distinctly stated, in order to enable the Court to judge whether the revocation was a wanton and capricious act, or a fair and reasonable exercise of authority; for, though there can be no doubt that the Plaintiffs might revoke the power which they gave to the arbitrators at law; yet, if they have revoked it without just and reasonable grounds, they have not a case on which a Court of Equity ought to relieve them.

According to the language of Lord Eldon in *Harcourt v. Ramsbottom*, although the authority of the arbitrators is gone at law, yet this Court will consider the agreement as in some measure subsisting. In this case, however, I am asked to interfere as if there were no agreement at all.

I observe that, in *Morse v. Merest*, Sir John Leach, Vice-Chancellor, states that in equity a Defendant is not permitted to set up a legal defence which grows out of his own misconduct; so, varying the terms of the proposition, I say that a Plaintiff is not at liberty to ask the aid of a Court of Equity in respect of an act [180] done by him against good faith. And as, in this case, there is nothing whatever to shew that the power which the Plaintiffs had given to the arbitrators was revoked upon any just or reasonable grounds, I am bound to conclude that the revocation was a wanton and capricious exercise of authority on their parts, and, consequently, the motion must be refused.

[180] BENT v. YOUNG. *March* 19, 1838.

[Considered and followed, *Dreyfus v. Peruvian Guano Company*, 1889, 41 Ch. D. 151, in which case *Crowe v. Del Rio*, 9 Sim. 185 (n.), was observed upon.]

Discovery. Foreign Court. Demurrer.

Demurrer allowed to a bill of discovery in aid of the defence to a suit in a foreign Court.

The case of *Crowe v. Del Rio* stated and observed upon.

The bill stated that the Plaintiff, who was described as of the colony of Surinam in South America, was the owner and was in the possession of a plantation in that colony which was subject to a mortgage some time ago made by him for securing originally £10,000 and interest, to Rickards & Co., of London, who for some time acted as the agents and consignees of the Plaintiff of the produce of the plantation, and an account current subsisted between them and the Plaintiff, the balance of which was secured by and formed the subject of the mortgage: that the account current was still an open and unliquidated account, and had never been adjusted or settled, and that disputes had been for some time depending, in regard to the balance claimed by the firm to be due to them from the Plaintiff upon the account, the Plaintiff contending that the proceeds of shipments of produce of the plantation had, or ought long since to have, liquidated the whole, or at all events a considerable part of such balance, and that at all events only a small sum, and far less than the amount claimed to be due, was then due from the Plaintiff upon the mortgage: that Rickards & Co. some time since became insolvent, and an assignment of [181] their estate and effects, including their interest in the mortgage, was made by them to certain persons, of whom the Defendant was one, as trustees upon certain trusts for the benefit of the creditors of the firm: that Surinam was part of the dominions of the King of Holland, and the laws of Holland prevailed there, and the Courts were in all things governed and regulated by those laws: that, according to the laws of Holland and of the colony, the purchaser

of any mortgage debt upon any plantation in Surinam could not lawfully set up or make available any greater demand under the mortgage than the amount which he actually paid upon the purchase of it, with interest from the time of such payment, and that the owner of the plantation was entitled to redeem it upon payment of the amount so paid, together with interest: that the Defendant, some time since, purchased the mortgage from Rickards & Co. and their trustees, and had lately commenced a suit, or had taken measures, and had given instructions to his agents in Surinam to commence a suit there, for the purpose of recovering from the Plaintiff and raising out of the plantation the whole of the £10,000, together with a large arrear of interest, to an amount in the whole greatly exceeding the sum actually paid by him; the fact being, as the Plaintiff had lately discovered, that the Defendant purchased the mortgage debt for a much smaller sum than he sought to recover by his suit, without having regard to and in breach of the said laws in that behalf, to the benefit of which the Plaintiff was advised he was entitled as against the Defendant, and of which he intended to take advantage in the suit, and to make out and establish therein the fact of such purchase at an undervalue, in order to redeem his plantation by paying to the Defendant such sum only as he [182] actually paid for his purchase, together with interest; but the Plaintiff had not been able to obtain any sufficient evidence of the fact of such purchase at an undervalue; and inasmuch as the Defendant had never been resident in Surinam, but had been and was resident in this country, the Plaintiff had no means of obtaining a personal discovery from him touching the said matters for the purpose aforesaid, except by the aid of a Court of Equity in this country, to the process of which the Defendant was personally amenable, and which discovery the Plaintiff was advised he was entitled to receive from the Defendant, and which the Defendant refused otherwise to give. The bill charged that the Defendant ought to discover at what time and for what price he purchased the mortgage debt; and when and to whom and in what manner, and whether by cash, bills, notes or other securities, and when, how, and to whom payable he paid the purchase-money; and by what deed, and of what date the mortgage debt was conveyed to him; and all the other material particulars relating to such purchase, and the consideration for the same: that before and at the time of the purchase the Defendant was well acquainted with the differences and disputes which existed between the Plaintiff and Rickards & Co., respecting the amount of the balance claimed to be due upon their account and secured by the mortgage, and that the Plaintiff insisted that a much smaller amount was actually due than was claimed by the firm; and that the Defendant was well aware that the Plaintiff had entered into a treaty with, and had made a proposal to the firm and their trustees, including the Defendant, for a settlement of such differences and disputes by way of compromise; that the Defendant was before and at the time of his purchase well aware of the law of Holland and of the colony in the *partieu*-[183]-lar, and had taken the opinion of some person skilled in the said law upon the subject, and such opinion was then in his possession; and that it would appear from the same, if produced, that the Plaintiff, under the circumstances before set forth, was by the law of Holland and the colony entitled to such relief as before set forth: that the Defendant had in his custody or power divers deeds, conveyances, &c., relating to the matters thereinbefore contained, and which, if produced, would tend to the discovery of the truth of the premises. The bill prayed that the Defendant might make a full discovery touching the matters aforesaid, and might be restrained in the meantime from prosecuting his suit in the Court at Surinam, and from in any manner prosecuting or enforcing a claim upon the plantation, for any greater sum than he actually paid for the purchase of the mortgage debt, together with interest thereon; so that the Plaintiff might have the benefit of the laws of Holland and of the colony, and might be enabled effectually to defend himself in the suit as to the Defendant's claim, so far as the same exceeded the amount actually paid by him with interest.

The Defendant demurred because the Plaintiff had not made such a case as entitled him to any discovery from the Defendant, touching the matters contained in the bill.

Mr. K. Bruce, Mr. Jacob and Mr. Blunt, in support of the demurrer. The Plaintiff is described in the bill as being resident at Surinam; therefore, *prima facie*,

he must be taken for all purposes to be a Dutch subject. If the [184] Defendant should require any discovery from the Plaintiff, he will not be able to obtain it; for he could not compel the Plaintiff to answer a cross-bill: there is, therefore, no mutuality between the parties. Besides, this Court never compels discovery in aid of the proceedings in a foreign Court, especially in respect of land abroad. The discovery, if given in this case, might work a forfeiture of all the Defendant's property in Surinam; at all events, it would be productive of great injustice to him, for nothing can be more repugnant to justice than the law of Holland, according to the statements in this bill. Is then this Court to aid a foreign law which is not only unjust, but which is contrary to the English law, and takes away from the Defendant those rights which the English law gives him? At all events, this Court ought to have been informed what is the style and species of the Court at Surinam; what are its powers; on what evidence it proceeds. The bill, however, seems to take it for granted that in every case in every foreign Court this Court is to give discovery without regard to the details of facts and circumstances; for all that it states with respect to the Court and the intended proceedings is that the Defendant has lately commenced a certain suit and is prosecuting the proceedings, or has taken measures and has given instructions to his agents in Surinam to commence or institute a suit or proceedings in the competent Court there, for the purpose of enforcing and making available the mortgage debt against the plantation. Unless a party requires the discovery for the purpose of shewing him what form of action he ought to bring, it is necessary that some proceeding should be actually commenced before the bill of discovery is filed: but it does not clearly appear from the above statement that any proceeding has been, in fact, commenced, or that the discovery is wanted [185] before any proceeding can be instituted. *Angell v. Angell* (1 Sim. & Stu. 83), *Cardale v. Watkins* (5 Madd. 18), *Stewart v. Lord Nugent* (1 Keen, 201; see 205), *Few v. Guppy* (1 Myl. & Craig, 487), *Wigram on Discovery*, 212, 213.

Lord Redesdale nowhere states, in the text of his Treatise on Pleading, that this Court will compel discovery in aid of proceedings in a foreign Court. All that he says upon the subject is inserted in a note to the following effect:—"A discovery has been compelled to aid the jurisdiction of a foreign Court" (Treat. on Plead. 3d edit. 151), and his Lordship cites an unreported case of *Crowe v. Del Rio and Vallego*, the proper name of which is *Crowe v. Del Rio and Vallejo*: (1) but he does not mean to

(1) The following is the substance of the case as entered in Reg. Lib. :—

The Plaintiffs were W. Crowe, W. Taylor, B. Hancock, J. Tuthill the elder and J. Tuthill the younger: and the Defendants were F. A. Del Rio and A. Vallejo. The Plaintiffs were either manufacturers or tradesmen at Norwich, and the two first of them were co-partners together, as were also the two last. The Defendants were merchants and co-partners in London. In 1767 the Plaintiffs had furnished one Villalobos, a merchant residing at Seville in Spain, with goods in their respective ways of business to different amounts, and had drawn bills of exchange upon him for those amounts, which he had accepted, but having become insolvent was unable to pay. The Plaintiffs having inquired as to the cause of the bills being unpaid discovered that Villalobos had purchased goods of the Defendants, and paid them for such as had become payable for; and that, on or about the 3d of November 1767, although no money was then due from him to them nor would any become due for some time, the Defendants, or Rodriguez and De la Vega, merchants at Seville, and agents there for the Defendants, by some undue practices or influence, prevailed upon Villalobos to deliver to Rodriguez and De la Vega divers parcels of goods, amongst which was a bale of Norwich stuffs which had been sent him by the Plaintiffs, Crowe and Taylor, and divers bills of exchange and sums of money to the amount in the whole of £2182, 9s. 10d. (being all the monies and effects which Villalobos then had in his custody), in discharge of the accruing demands of the Defendants on him. The goods, effects and monies having been obtained from Villalobos in such undue manner to the prejudice of the Plaintiffs and several other creditors who then had demands on him, immediately on the discovery thereof, a suit was properly instituted at Seville on behalf the Plaintiffs against Rodriguez and De la Vega, in order to attach the goods, effects and money, or the amount thereof in their hands, and to

approve of it. [186] It is true that the demurrer in that case was overruled: but it is no authority for the position that this Court [187] will aid the proceedings of a foreign Court, especially with respect to land abroad. The grounds on which the demurrer was overruled nowhere appear. It was clearly a speaking demurrer, and it may have been overruled on that ground. Besides, the parties to that suit were all of them resident in this country: the proceedings in the foreign Court had been actually instituted; and the persons against whom the bill was filed were not parties to the foreign suit.

Mr. Wigram, in support of the bill.

Sir Wm. Young is the suitor in the Court at Surinam; and his counsel suggest that that Court is one in which justice will not be done. But does it lie in the mouth of the party who is suing in that Court to make that suggestion? If the party who is sued there had made the suggestion, it might be a reason for this Court not giving the discovery. The Courts of this country assume that the proceedings of foreign Courts are just; otherwise, foreign judgments would not be allowed to be given in evidence here.

It is next said that this Court will not give the discovery, because the Defendant is resident out of the jurisdiction; and, consequently, there is no mutuality. The Court, however, does not refuse to give relief because the Plaintiff is out of the jurisdiction and the [188] Defendant is in this country: all that it does is to require the Plaintiff to give security for costs.

Lord Redesdale states, in general terms, that a Court of Equity will exercise its jurisdiction to compel discovery in aid of the administration of justice in the prosecution or defence of some other suit, either in the Court itself, or in some other Court: and he specifies only three cases of exception. First, that the Court has in some instances refused to give this aid to the jurisdiction of Inferior Courts; secondly, that it will not interfere to aid the prosecution or defence of any proceeding, not merely civil, in any other Court; and, thirdly, that it will not interfere in the case of suits merely civil, in a Court of ordinary jurisdiction, if that Court can itself compel the discovery required (Treat. on Plead. 3d edit. 42, 150, 151). His Lordship, therefore, means to lay it down as a general proposition, that this Court will, in all cases except those which he accepts, compel discovery in aid of the proceedings of another Court.

If the bill in this case had prayed relief, the Court would have given the relief as well as the discovery. Consequently, if the bill had prayed to redeem the mortgage, and had alleged the law of Surinam to be as stated, the Court would have directed an inquiry as to the *lex loci rei sitæ*, and, when it was ascertained, it would have

compel them to refund or pay the same, so that the same might be applied in discharge of such demands as the Plaintiffs then actually had upon Villalobos; but Rodriguez and De la Vega, upon an examination before a magistrate, on or about the 10th of November 1768, denied that they had then in their hands any effects whatsoever belonging to Del Rio and Vallejo, or that they were indebted to them in any sum of money whatever; in consequence of which it became necessary for the Plaintiffs to prove the contrary. The bill then charged that the Defendants had in their custody or power accounts, letters, &c., from which it would appear that, on the 10th of November 1768, Rodriguez and De la Vega had in their hands goods, effects or monies belonging to the Defendants to a considerable value or amount, or were then indebted to the Defendants in some considerable sum. The bill prayed that the Defendants might make discovery of all the matters thereinbefore stated and charged. The Defendants put in a demurrer, stating that they were advised that the substance of the bill was to compel a discovery from them of certain accounts, letters, papers and writings, which related to the matter of a certain suit commenced by the Plaintiffs against Rodriguez and De la Vega, and still depending in a foreign country, to wit, at Seville, in the kingdom of Spain, and out of the jurisdiction of this Court, and to which suit the Defendants were no parties; and also for that the bill (in case the allegations contained therein were true, which the Defendants in nowise admitted) did not contain any matter of equity whereon this Court could ground any decree, or give the Plaintiffs any relief or assistance as against the Defendants.

governed the decision of the Court as to the amount to be paid by the Plaintiff to redeem the mortgage. If, then, this Court would have given the discovery as incidental to the relief, why should it not give the discovery which the Plaintiff requires in order to ascertain what is justly due to Sir William Young on [189] his mortgage, and which the Plaintiff is willing to pay to him: for the demurrer admits the law of Surinam to be correctly stated and all the other allegations in the bill to be true. The object of the Plaintiff is not to deprive Sir W. Young of anything that he is justly entitled to, but to give him all that he actually purchased or contracted for.

[THE VICE-CHANCELLOR. What authority is there to shew that this Court has interfered to give discovery in aid of a proceeding in a foreign Court?]

Crowe v. Del Rio and *Earl of Derby v. Duke of Athol* (1 Vez. 202) are authorities in favour of giving the discovery. In the former of those cases, the Plaintiffs in equity had selected the foreign Court, and yet Lord Camden, C., overruled the demurrer. In the present case, Sir W. Young, who is the demurring party, has selected the foreign Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Lord Redesdale lays it down generally, that this Court will give discovery in aid of proceedings in the Courts of this country; and he puts in a note that discovery has been compelled to aid the jurisdiction of a foreign Court; and he cites *Crowe v. Del Rio* as an instance in which it has been done. But Lord Redesdale did not mean that what is in the note should be considered as equivalent to what is stated in the text of his work. In the bill you allege that inasmuch as the Defendant has never been resident in Surinam, but has been and is resident in this country, the Plaintiff [190] has no means of obtaining a personal discovery from him touching the matters and for the purposes aforesaid, except by the aid and interference of a Court of Equity in this country. That is not a positive averment that the discovery required cannot be had in Surinam; for you do not say positively that a suit has been commenced in Surinam, but only that a suit has been, or will be commenced there; *non constat*, therefore, that Sir William Young may not be in Surinam when the suit there is commenced; and, in that case, the grounds on which you allege that you are unable to obtain the discovery will cease to exist. It is material, therefore, according to my view of the case, that it should have been averred that the Court in Surinam cannot, under any circumstances, enforce the discovery.

Mr. Anderdon, who was with Mr. Wigram, referred to *Cooke v. Marsh* (18 Ves. 209); *Glyn v. Soares* (1 Youn. & Coll. 644; see the observations on this case in *Irving v. Thompson*, ante, p. 17); and *Rondeau v. Wyatt* (3 Bro. C. C. 154).

THE VICE-CHANCELLOR. I am of opinion that if the Plaintiff really required that which he insists he is entitled to by the law of Surinam, he might have it at once by filing a bill in this Court for relief, praying that an account might be taken of what is justly due on the mortgage, and that, on payment by him to Sir William Young of what should be found due, Sir W. Young might reassign the mortgage to him: for I am quite willing to admit that the *lex loci rei sitæ* must prevail in the present case. It does not, however, follow that, because this Court, [191] in administering relief in the case of a Surinam security, will follow the law of that country, therefore it will make itself auxiliary for the purpose of compelling a discovery in aid of an action not yet commenced, but which may be brought in the colony of Surinam.

It seems to me to be singular, considering the vast number of appeals that British subjects as well as foreigners have made to the Privy Council in respect of foreign plantations, that no instance can be produced of this jurisdiction having been exercised except the solitary one in the note in Lord Redesdale's book: and it is equally singular if, in his opinion, the case was good law, that he should not have cited it with greater confidence than he has done.

In the case of *The Earl of Derby v. Duke of Athol* Lord Hardwicke seems to think it clear that this Court will not compel discovery in favour either of an Inferior Court, or of a Court which has power in itself to compel a discovery. Those two propositions are plainly deducible from the language which his Lordship uses towards the conclusion of his judgment; and I consider that, in the contemplation of the Court of Chancery, every foreign Court is an Inferior Court.

In the case of *Crowe v. Del Rio* (which is the only authority to be found on the point now before me) the Defendants were compelled to answer by the overruling of the demurrer; and it seems to me that, without entering into the merits of the case, the demurrer was defective in point of mere form, and, therefore, it might have been overruled on that ground. In that case two grounds of demurrer were assigned. One was the general want of equity; but, as the bill was not filed for [192] relief but for discovery only, *that* would be no objection. The other ground was that the Defendants were not parties to the suit in the foreign Court. That, therefore, was a speaking demurrer; for there was no allegation on the face of the bill that they were parties to the suit; and the Lord Chancellor may, very probably, have overruled the demurrer on that ground without at all entering into the consideration of the question whether this Court will enforce discovery in aid of proceedings in a foreign Court.

I also think that there is not, in the present case, a sufficient averment that the discovery cannot be obtained in the Court at Surinam. The allegation, in my opinion, does not amount to anything more than a sort of argumentative statement that Sir W. Young has been and now is resident in this country, and, *therefore*, the Plaintiff cannot have the discovery abroad. But *non constat* that he may not change his residence, and when the suit is commenced be in a place where the discovery may be enforced.

It appears to me that the observations of Lord Hardwicke, in *The Earl of Derby v. Duke of Athol*, apply to the present case; and I should be extremely sorry to be the first Judge to decide that this Court is, in all cases, to give its aid in compelling discovery in aid of the prosecution or the defence of an action in a foreign Court. And my opinion is that this demurrer must be allowed.

[193] WHEELER v. VAN WART. March 21, 1838.

Joint Stock Company Partnership. Dissolution.

Three members of a company which was unlimited as to its duration, executed a deed dissolving the company, and left a notice of it at the company's office. They then filed a bill on behalf of themselves, and all other members except the Defendants, against the officers of the company, alleging that the company consisted of upwards of 400 members, and that the Plaintiffs were ignorant of and had no means of learning their names and residences, and praying that the company might be declared to be dissolved. Held, that all the members ought to have been served with notice of the deed, and a demurrer to the bill, for want of equity, was allowed.

The Plaintiffs were three members of the Birmingham Equitable Gas Light Company. By the deed by which the company was formed one-fourth of the profits of the concern was to be divided amongst the customers by way of *bonus* at the end of every five years; but no time was fixed for the duration of the company. On the 3d of March 1838 the Plaintiffs executed a deed-poll, by which, after reciting that the objects and purposes of the company had not been carried into effect, and that it was expedient to dissolve it, they took upon themselves to declare the company dissolved, and left a notice of the deed at the company's house of business, where the directors held monthly meetings. Shortly afterwards they filed a bill on behalf of themselves and all the other members of the company except the Defendants against the directors and trustees and the solicitor to the company, alleging, amongst other things, that the original shareholders in the company were 400 in number; that many of them had since sold and transferred their shares to other persons; that many others had died and their shares had become vested in their representatives or legatees, and many others had become bankrupt or insolvent, and their shares had passed to their assignees, and the Plaintiffs were ignorant of and had no means of learning the names, descriptions and places of abode of the persons who constituted the company at the date and execution of the deed-poll, but they amounted to 400 and upwards.

[194] One of the Defendants demurred to the bill for want of equity, and because all the shareholders ought to have been made parties to it.

Mr. Jacob and Mr. G. Richards, in support of the demurrer, contended, amongst other things, that every member of the company, including the customers (who by the provisions of the deed were made partners), ought to have been served with notice of the alleged dissolution.

Mr. Knight Bruce and Mr. Parry, in support of the bill, said that the Plaintiffs had no means of ascertaining either the name or place of residence of every individual member of so numerous a body, and, consequently, that notice of the dissolution had been given in the only way that was practicable.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The notice which was given of the intended dissolution was clearly insufficient.

This company, like an ordinary partnership, could not be dissolved without notice being served upon every individual member of it.

By the deed by which the company was constituted every consumer of gas was to share in the profits of the business, and, consequently, became a partner. The Plaintiffs have chosen to enter into a partnership consisting of an unlimited number of members, and therefore they have themselves created the difficulty they complain of.

All the relief prayed by the bill is incidental to the [195] alleged dissolution; and, as I am of opinion that there has been no dissolution, the demurrer for want of equity must be allowed.

[195] WOOD v. LAMBIRTH.(1) March 29, 1838.

Practice. Exception. Report.

Leave given, under the circumstances, to except to a report, although the party had not carried in objections to it.

The Defendant having objected to the title to an estate which he had agreed to purchase of the Plaintiff, it was referred to the Master to inquire whether a good title could be made to it. The Master, after the objections had been argued before him, expressed an opinion in favour of the title; but said that he would consider the matter more fully, and would apprise the Defendant's solicitor when he had made up his mind, and that counsel should afterwards attend him if the solicitor wished it. The Master, however, reported in favour of the title, without making any further communication to the Defendant's solicitor; and the order *nisi* to confirm the report was afterwards made and served. Whereupon

Mr. Jacob and Mr. Lee, for the Defendants, moved for liberty to file an exception to the report, notwithstanding no objection had been carried in to the draft of it. They cited *Vallance v. Welton* (1 Dick. 291), and *Pennington v. Lord Muncaster* (1 Madd. 555).

THE VICE-CHANCELLOR [Sir L. Shadwell] granted the motion.

[196] WHATMAN v. GIBSON. April 5, 6, 1838.

[S. C. 7 L. J. Ch. 160; 2 Jur. 273. See *Keates v. Lyon*, 1869, L. R. 4 Ch. 223; *Russell v. Watts*, 1885, 10 App. Cas. 603; *Rogers v. Hosegood* [1900], 2 Ch. 397.]

Covenant. Notice.

A., the owner of a piece of land, divided it into lots for building a row of houses, and a deed was made between him of the one part and X. and Y. (who had purchased some of the lots from him) and the several persons who should at any time execute

(1) *Ex relatione.*

the deed of the other part; by which, after reciting that A. had determined and proposed and thereby expressly declared that it should be a general and indispensable condition of the sale of all or any of the lots that the proprietors thereof for the time being should observe and abide by the several stipulations and restrictions thereafter contained; it was mutually covenanted between A., X., and Y., and the several other persons who should at any time execute the deed, and each of them, A., X. and Y., and the several persons, &c., for himself, his heirs, executors and administrators, thereby covenanted with all and every the other and others of them, and with the heirs, executors, administrators or assigns of all and every the other and others of them mutually and reciprocally, that none of the proprietors of any of the lots for the time being should at any time carry on thereon the business of an innkeeper. A. sold and conveyed one of the lots to B., and another to C., both of whom executed the deed of covenant. The Plaintiff afterwards purchased B.'s lot, and the Defendant purchased C.'s lot *with notice* of the deed of covenant. The Defendant intending to use the house on his lot as a family hotel; an injunction was granted to restrain him from so doing.

By an indenture, bearing date the 28th of February 1799, and made between John Fleming of the one part, and William Petman and George Gibson and the several other persons who should at any time execute the indenture of the other part, after reciting that Fleming was seised in fee-simple in possession of a piece or parcel of land containing two acres and a half, situate in Ramsgate on the south cliff there, part of which he had laid out in separate lots or divisions for the erection of a row of houses thereon, intended to be called Nelson's Crescent, the form of the front building line of which intended row of houses was delineated in a ground plan thereof in the margin of the indenture, and did contain, including the curve in length, 400 feet in front towards the south-east; and, in order to preserve some degree of similarity and uniformity of appearance in such intended row of houses, Fleming had determined and proposed, and thereby expressly declared, that it [197] *should be a general and indispensable condition of the sale of all or any part of the land intended to form such row, that the several proprietors of such land respectively for the time being should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars, and that Fleming and his heirs should and would, at all times, observe the like stipulations and restrictions as to such of the lots or divisions of the same land as, for the time being, should remain unsold by him or them; and, after further reciting that William Petman and George Gibson had severally agreed to purchase of Fleming certain lots in the intended row, subject to the proposed stipulations and restrictions: it was witnessed that, in consideration of the premises and in pursuance of and in conformity to the conditions thereinbefore expressed of and for the sale of the several lots of land in the row, and for effectuating, establishing and rendering perpetual the plan, design and purposes aforesaid, it was thereby mutually covenanted, concluded and agreed upon, by and between the said J. Fleming, W. Petman, George Gibson and the several other persons who should, at any time or times, execute the same indenture (the respective times of the execution of the indenture by the several parties being expressed in the several attestations thereof), and each and every of them, the said J. Fleming, W. Petman, George Gibson and the several other person or persons who should at any time or times execute the indenture for himself and herself, for his or her heirs, executors and administrators, and for every of them, did thereby covenant, promise and agree to and with all and every the other and others of them, and to and with the several heirs, executors, administrators, or assigns of all and every the other and others of them, mutually [198] and reciprocally, in manner following, that is to say: that the front wall of every house in the intended row should be brought immediately up to, but should not, on any account, project beyond the building line: that none of the houses should have bow-windows of any sort: the area in front of the houses should be of the width of five feet in the clear, and should extend the whole length thereof: the forecourt in front of each house should be surrounded by a uniform railing of iron or wood, which should not extend the height of four feet from the surface of the ground there: the wall of partition between the several houses and the areas in front and the yard and garden behind such houses,*

respectively, should be placed equally on the ground of the two proprietors of adjoining houses or ground, and should, at all times, be considered as party-walls, and should be built at the joint and equal expense of the two proprietors of adjoining houses or ground; but, if any of them should be first and originally built at the sole expense of either of the proprietors of adjoining houses or ground, then the proprietor, who should so first and originally build such walls, should build a brick party-wall nine inches thick, and at the height of seven feet from the surface of the ground from the front building ground throughout, and one-half part of the expense thereof should be paid to the proprietor who should have so built the same, his or her heirs, executors or administrators by the proprietor of the adjoining house or ground, his or her heirs, executors, administrators, or assigns, within three months after the proprietor of the adjoining house or ground should begin to erect his or her house in the principal front; and the proprietor of such adjoining house or ground, his or her heirs, executors, administrators and assigns, should also pay one-half part of the expense of so much of the residue of the party-wall as [199] he should make use of and build to, within one month after he should make use of and build to the same; and the expense in both cases, if any difference should arise thereon, should be determined by admeasurement and value: that none of the proprietors of houses or ground in the intended row should lay any chalk or mould which should be dug out of any of the lots of land on the foot, horse or earriage-ways in front of the row, or on the land lying between the said way and the edge of the seacliff there; that the piece or cliff of land of the breadth of 29 feet, intended to be mentioned in the conveyances to the several purchasers beyond the area, steps of entrance and forecourt, should, at all times thereafter, remain open and unincumbered, as and for a free foot, horse and carriage-way in front of the intended row, and should be formed, made, maintained and kept repaired at the expense of the several proprietors of the houses in the row, in proportion to the extent of front towards the south-east of each respective house: *none of the proprietors of any of the lots for the time being should, at any time or times, or on any account or pretence whatsoever, erect or suffer to be erected on any of the several lots which should be to them respectively belonging for the time being, or on any part of them, or any of them, any public livery-stables, or public coach-house, or use, exercise or carry on, or suffer to be used, exercised or carried on, through or on any part thereof, the trade or business of a melting foundry, tobacco-pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern-keeper, common alehouse keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business whereby the neighbourhood might be, in any respect, endangered or annoyed, or burn or make, or suffer to be burnt or made, on any of the lots, or on any [200] part of any of them, any bricks or lime; and that no other building or buildings than good dwelling-houses or lodging-houses should be erected in front of any of the said lots.*

By lease and release, of the 5th and 6th of December 1800, made between Fleming of the one part, and Henry Cull of the other part, in consideration of £115, 10s. paid to Fleming by Cull, and *in consideration that Cull had, before the execution of the release, executed the indenture of the 28th February 1799*, Fleming conveyed to Cull and his heirs one of the lots on which the house No. 6 in Nelson's Crescent was afterwards built.

By lease and release, of the 4th and 5th of March 1818, Cull, in consideration of £1200 paid to him by the Plaintiff, conveyed to the Plaintiff and his heirs the piece of ground on which the house No. 6 was erected, "*subject, nevertheless, to the stipulations and restrictions relative to the said place called Nelson's Crescent, contained in a certain indenture bearing date the 28th of February 1799.*"

All the other lots were, from time to time, sold by Fleming to different persons; and a row of houses was built on the piece of land, in conformity to the covenants, stipulations and agreements in the deed of February 1799. All the houses except No. 7, which was in the occupation of the Defendant Gomm, and which he had recently opened as an inn or tavern, had been occupied ever since they had been built as private dwelling-houses or respectable lodging-houses.

The bill, after stating as above, alleged that the De-[201]-fendant, John Holmes Gibson, was the proprietor of the house No. 7, which was in the occupation of the other Defendant Gomm, and that Gibson claimed and derived his title to it by, from,

through and under Fleming, and that he had agreed to grant a lease of it to Gomm for seven years, for the express purpose of its being used as an inn or tavern; that, if the Defendants did not execute the deed of February 1799, they, at the times when they purchased their respective interests in the house No. 7, had notice of that deed, and of the declarations, covenants, agreements, stipulations and restrictions therein contained, and, particularly that the proprietors of houses in the crescent were restricted by that deed from opening or using any of the houses as an inn or tavern; that, whether John Holmes Gibson and Henry Cull executed the deed of February 1799 or not, the Defendants John Holmes Gibson and Gomm, having had notice of that deed, were bound, in conscience, to keep and observe the stipulations and restrictions therein contained. The bill prayed that the Defendants might be restrained from using or permitting or suffering the house, No. 7, to be used as an inn or tavern, or in any other manner contrary to the covenants, provisions, stipulations and restrictions contained in the deed of February 1799; and that the Defendant, J. Holmes Gibson, might be restrained from executing a lease to the Defendant Gomm, authorizing him to carry on the business of an innkeeper or tavern-keeper in that house, or to use it in any manner contrary to the covenants, stipulations and restrictions in the deed of February 1799.

John Holmes Gibson, in his answer, said he believed that an indenture of the 28th of February 1799 was made between the parties and to the purport or effect [202] mentioned in the bill, and that it was executed by J. Fleming, Wm. Petman and George Gibson; but he denied that he ever executed it; he admitted that he was seised in fee of the house No. 7, and that he claimed and derived his title to it by, from, under and through Fleming, and that the other Defendant Gomm occupied it under an agreement for a lease from him, and had recently opened it, with his consent, as the Royal Victoria Hotel, previously to which, it and all the other houses in the crescent had been used and occupied as private dwelling-houses or lodging-houses, and for no other purpose; that, in December 1823, he purchased the house No. 7 from one Sawyer, for £2500, and thereupon an abstract of the title to the house was delivered to him, and the same contained an abstract of indentures of lease and release of the 5th and 6th of May 1802, by which, in consideration of £138, 12s. paid to Fleming by one Austin, and in consideration *that Austin did*, before the execution of the release, *execute the deed of February 1799*, Fleming conveyed the house, No. 7, to Austin in fee: (1) that, in fact, Austin never executed the deed of February 1799; that, although he, Gibson, had, *in legal construction, notice of the deed of February 1799*, yet he had not, at the time when he entered into the agreement with Gomm, any personal knowledge of any covenants, restrictions or stipulations contained in that deed. He submitted that he had power to deal with his interest in the house in any manner he might choose, notwithstanding the deed of February 1799, and that the covenants and restrictions therein contained were not, in law, binding upon him; for that [203] such covenants were not only void, as being in restraint of trade and without consideration or mutuality and against the policy of the law, *but were collateral or personal covenants, and not covenants running with the land*: that there did not exist any privity of estate between the Plaintiff and himself, and that the Plaintiff had no reversion, interest or title in or to the house No. 7, or the land upon which it was built, and that no privity in respect of reversion or other unity of title existed, upon or in relation to which the Plaintiff had or could set up, in law or equity, any right to enforce, as against him and his tenant Gomm, any of the covenants, stipulations or restrictions contained in the deed of February 1799; *that he did not*, and he believed that Gomm did not, *pretend to be a purchaser of any estate or interest in the house for a valuable consideration without notice of the last-mentioned deed, or of the declarations, covenants, agreements, stipulations or restrictions therein contained*; but he insisted that he ought not to be affected thereby.

Gomm, in his answer, said that he intended to use the house, not as a common inn or tavern, but as a private or family hotel, and, particularly, if he could obtain the proper licences for selling in it wine and spirits by retail, which he had applied to

(1) It appeared from the *schedule* to the answer that, in 1805, Austin conveyed the house to Hunter, and that in 1810 Hunter conveyed it to Sawyer.

the magistrates to grant him, but which they had refused, owing to the rates and taxes for the house being paid by J. H. Gibson. He admitted that, about two months after he entered into the agreement with J. H. Gibson, he received from the Plaintiff a notice of the deed of February 1799; and he denied that he pretended to be a purchaser of his interest in the house for a valuable consideration without notice of that deed, or of the declarations, covenants, agreements, stipulations or restrictions contained in it; [204] but he insisted that he ought not to be affected thereby.

Mr. Wigram and Mr. Bosanquet, for the Plaintiff, now moved for the injunction against the Defendant Gomm. It is laid down by Sir John Leach, Vice-Chancellor, in *The Duke of Bedford v. The Trustees of the British Museum* (Sugden on Vendors, App. 57, 10th ed., reported on appeal in 2 Myl. & Keene, 552), that a person who is possessed of a particular property, of which he has the personal enjoyment, has a right so to deal with contiguous land which belonged to him, if he thought fit to alienate it, as to restrain any use of it which may tend to diminish either the pleasure or the profit of the land which he retains; and that a covenant entered into by the alienee with the alienor, for the purpose of preventing such a use of the land aliened, will be enforced both at law and in equity.

[THE VICE-CHANCELLOR. Fleming contained, in himself, both the future covenantors and the future covenantees. I do not see how a party can covenant with himself. Besides, the Plaintiff never executed this deed of February 1799: how then can he claim relief under it?]

It is recited, in the conveyance to Austin, who purchased from Fleming the lot which now belongs to the Defendant Gibson, that Austin executed the deed of February 1799: it appears also that Cull, under whom the Plaintiff claims, executed that deed: they therefore became parties covenanting mutually with each other; and, in that way, the difficulty in regard to [205] Fleming being both covenantor and covenantee is removed. It is true that it does not appear that the Plaintiff executed the deed; but the Defendants admit that they had notice of it, and therefore they are bound in conscience to observe the covenants contained in it.

It is, however, immaterial whether the Defendants had or had not notice of the deed; for the covenant, which is now sought to be enforced, is one which, of necessity and from the very nature of it, runs with the land. *Holmes v. Buckley* (Prec. in Ch. 39); *City of London v. Nash* (3 Atk. 512); Fonbl. on Eq. 353, *et seq.*

THE SOLICITOR-GENERAL [Sir R. M. Rolfe] and Mr. Harwood, for the Defendant Gomm. The covenant in question does not run with the land; but, so far as Fleming was concerned, it was a mere personal covenant. The Defendant Gibson does not claim under the Plaintiff; but both of them claim, as absolute alienees in fee, under Fleming. There is no reversion existing, nor any privity of estate between them. The object of the covenant is to restrain for ever an absolute owner of land from using it in a particular manner. It is exceedingly doubtful, at the least, whether any such restriction can be imposed. *Keppell v. Bailey* (2 Myl. & Keene, 517; see 2 Sugd. Vend. 10th edit. 500, where this case is observed upon). The authority of *The Duke of Bedford v. The Trustees of the British Museum* is considerably diminished by that case. *The Mayor of Congleton v. Pattison* (10 East, 130). Although Austin's purchase [206] deed recites that he executed the deed of February 1799, the answer expressly denies that he did execute it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Defendant Gomm admits, by his answer, that he does threaten and intend to use the house numbered seven as a family hotel and inn and tavern: there can be no doubt therefore that he has brought himself within the words of the covenant in the deed of February 1799.

Now, though neither the conveyance to Cull nor the conveyance to Austin (under which the parties severally claim) has been produced, yet I must take it as a fact that those deeds recited that Cull and Austin had executed the deed of February 1799; and, with respect to that deed, it seems to me that the matter is to be considered, in this Court, not merely with reference to the form in which the covenants are expressed, but also with reference to what is contained in the preliminary part of the deed, namely, that Fleming had determined and proposed, and did thereby expressly declare that it should be a general and indispensable condition of the sale of all or any part of the land intended to form the row, that the several proprietors of such

land respectively for the time being should observe and abide by the several stipulations and restrictions thereafter contained or expressed in regard to the several houses to be erected thereon, and in all other particulars. Then follow the stipulations; and, whatever may be the form in which the covenant is expressed, the stipulations are plain and distinct. One of them is that none of the proprietors of any of the several lots or parcels of land intended to form the row shall, at any time or times, or on any account or [207] pretence whatsoever, erect or suffer to be erected on any of the several lots or parcels of land, which shall be to them respectively belonging for the time being, or on any part of them or any of them, any public livery stables or public coach-house, or use, exercise or carry on, or suffer to be used, exercised or carried on thereon or on any part thereof, the trade or business of a melting founder, tobacco-pipe maker, common brewer, tallow chandler, soap boiler, distiller, innkeeper, tavern keeper, common alehouse keeper, brazier, working smith of any kind, butcher or slaughterman, or any other noxious or offensive trade or business whereby the neighbourhood may be, in any respect, endangered or annoyed, or burn or make, or suffer to be burnt or made, on any of the said lots or parcels of land, or on any part of any of them, any bricks or lime; and that no other building or buildings than good dwelling-houses or lodging-houses shall be erected in front of any of the said lots.

It is quite clear that all the parties who executed this deed were bound by it: and the only question is whether, there being an agreement, all persons who come in as devisees or assignees under those who took with notice of the deed are not bound by it. I see no reason why such an agreement should not be binding in equity on the parties so coming in with notice. Each proprietor is manifestly interested in having all the neighbouring houses used in such a way as to preserve the general uniformity and respectability of the row, and, consequently, in preventing any of the houses from being converted into shops or taverns, which would lessen the respectability and value of the other houses.

As the release of 1802 recites that Austin executed [208] the deed of 1799, I must take it as a fact that he did execute it: and then, whatever may be the form of the covenant, or whatever difficulty there may be in bringing an action on it, I think that there is a plain agreement which a Court of Equity ought to enforce: and, as the Defendant Gomm admits that he intends to carry on one of the prohibited businesses, he comes within the purview of the deed, and ought to be restrained from so doing by the injunction of this Court.

I do not think that I could state a case which would satisfactorily extract, from the Judges of a Court of law, such an opinion as a Judge in a Court of Equity would require in forming his judgment; inasmuch as a Court of law might look at the covenant only, without taking into consideration the preliminary matter in the deed.

But, although no case may arise at law upon the covenant, there may be a question on the deed, which will demand the opinion of a Court of Equity.

Injunction granted.

[209] SEMPLE v. THE LONDON AND BIRMINGHAM RAILWAY COMPANY.(1)
March 23, 1838.

Nuisance. Pleading. Parties. Bankrupt.

A. demised to B. (who was alleged to be an uncertificated bankrupt) a wharf, with the use of a road, in common with the occupiers of adjoining wharfs. C. obstructed the road. B. filed a bill against him to restrain the nuisance. Held, that neither A. nor the occupiers of the adjoining wharfs, nor the assignees of B., were necessary parties to the bill.

By an indenture of the 24th of August 1824, the Regent's Canal Company demised to the Plaintiff, for 57 years, a wharf, with the warehouses, erections and buildings,

(1) *Ex relatione.*

and two small dwelling-houses thereon, situate on the north side of the canal, in the parish of St. Pancras, and abutting north on a road leading into the Hampstead Road, and called the Commercial Road: and the Plaintiff covenanted to bear and pay to the company a fair and reasonable proportion of the expense of keeping that road in repair, in common with the owners and occupiers of the adjoining wharfs. In December 1824 the Plaintiff became bankrupt, and, by an indenture of the 17th of May 1830, his assignees assigned the leasehold premises to Hollingsworth, by way of mortgage. By an indenture of the 4th of December 1834 Hollingsworth demised the premises to the Plaintiff for the residue of the term of 57 years, except the last day, subject to the terms and conditions of the indenture of the 24th August 1824.

The road mentioned in the lease was the only road leading to the Plaintiff's wharf, and the only way by which goods could be conveyed to it by land.

The London and Birmingham Railway Company having purchased land on the north side of and adjoining to the Commercial Road, and also at the west end of and adjoining to the termination of that road, built a [210] high wall on the north side and west end of the road, so as to fence off the road from their land. By their Act of Parliament, they were expressly prohibited from using, damaging, passing along, or interfering with the road. In 1836, however, they commenced using the road for drawing timber, stone, and other articles, for the purposes of the railroad, and had ever since continued to use the road at intervals, and, in so doing, had cut up and damaged it, and rendered it impassable. They also made what is called a run, with planks, over the wall, from the west end of the road, for the purpose of removing to their works a large quantity of earth and clay, which had been provided for their use and deposited on the road; and, thereby, access to the Plaintiff's wharf with carts and carriages was rendered impossible.

The bill, after stating as above, prayed that the railway company might be restrained from using, damaging, passing along, or interfering with the Commercial Road, and from laying down, carting, or wheeling any clay, soil, or other matter on the same; and from continuing the obstruction to the use of the road by the Plaintiff.

The Defendants demurred for want of equity and for want of parties.

Mr. Jacob and Mr. Booth, in support of the demurrer. There is no averment shewing what property the Plaintiff has in the road, if it be a private road. If it be a public road, he has only the same interest as the rest of Her Majesty's subjects. Supposing it to be a [211] private road, other persons are entitled to use it, and the Regent's Canal Company are the proprietors of it.

The Plaintiff is an uncertificated bankrupt, and he derives title under a lease, obtained subsequent to his bankruptcy. Does not that make the assignees (who are not alleged to have disclaimed), necessary parties to the bill? The application is discountenanced by *Deere v. Guest* (1 Myl. & Craig, 516).

Mr. K. Bruce and Mr. Stinton, in support of the bill. This is a possessory bill. An uncertificated bankrupt has a title against all the world except his assignees. *Webb v. Fox* (7 T. R. 391); *Fowler v. Down* (1 Bos. & Pull. 44). The Plaintiff has a mere possessory interest: but he has a right to maintain the bill upon possession. It is for the purpose of protecting a present and possessory interest that the bill is brought. The road in question is the only road leading to the Plaintiff's wharf. A man has a right to come into a Court of Equity to protect a mere possessory right. He has a right to come for an injunction against a person for darkening ancient lights without bringing landlords and reversioners before the Court. *Drayton v. Dale* (2 Barn. & Cres. 293).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The demurrer must be disallowed. The Plaintiff, it is obvious, has a possessory right to the wharf; and it appears to me that the Commercial Road is not a general carriage-road, but is only used by persons going [212] to the Plaintiff's wharf and the adjoining wharfs, and to the two houses.

The railway company are restrained by their Act from taking, using, damaging, passing along, or interfering with the Commercial Road. The Plaintiff is virtually in the situation of sub-lessee of the Regent's Canal Company. The acts complained of are that, at different times, the Defendants have interfered with the road by using it with their carriages, and that they have deposited a quantity of clay opposite the entrance of the wharf in such a way that the Plaintiff is actually deprived of the use

of his wharf; and independently of this, they have contrived to make a road for their carriages by means of a run over their wall which bounds the road, into their own land; and by means of a trespass or nuisance on the Plaintiff, they effect an access to their own land which they would not otherwise have had.

I apprehend that the Plaintiff has a clear right to file a bill alone against these persons who are doing him an injury of a private and particular nature. He has the same right that the mere tenant of a house would have if the railway company had raised a building which blocked up his ancient lights.

I conceive that there is nothing in the objection that the Plaintiff's assignees ought to be made parties, because it is settled that an uncertificated bankrupt has a right against all the world except his assignees. Here the contest is not between the bankrupt and his assignees, but between the bankrupt and the railway company.

[213] WOODS v. WOODS. April 20, 1838.

Construction of Lord Lyndhurst's 12th Order. Practice.

Under Lord Lyndhurst's 12th Order the Master may, of his own authority, and whether he is attended by any one on behalf of the parties or not, allow himself further time to make his report as to scandal, impertinence or insufficiency.

By Lord Lyndhurst's 12th Order it is directed that, when any order is made for referring an answer for insufficiency, or for referring an answer or other pleading or matter depending before the Court for scandal or impertinence, the order shall be considered as abandoned, unless the party obtaining it shall procure the Master's report within a fortnight from the date of the order, or unless the Master shall, within the fortnight, certify that a further time, to be stated in his certificate, is necessary in order to enable him to make a satisfactory report.

The bill in this cause having been referred for impertinence, the Master, of his own authority, and without being attended either by the parties or by their solicitors, certified, within the fortnight, that a further time was necessary to enable him to make his report.

On the hearing of a motion made by Mr. Koe, and opposed by Mr. K. Bruce and Mr. Anderdon, one question was whether the Master had power to allow himself the further time, except in the presence of the parties or their solicitors.

THE VICE-CHANCELLOR said that he was clearly of opinion that, under the order, the Master had a right, of his own authority, and whether he was attended by the parties or their solicitors or not, to allow himself further time for making his report.

[214] WOODLEY v. BODDINGTON. April 23, 1838.

Contempt. Injunction.

After the first proclamation had been made under a writ of *exigi facias*, which the Defendant had issued in an action which he had brought against the Plaintiff, the Plaintiff served the Defendant with the common injunction. The sheriff, upon receiving notice of the injunction, applied to the Defendant's solicitor for instructions as to the course which he was to pursue, but the solicitor said that he had no instructions to give; upon which the sheriff proceeded to make three of the remaining proclamations. Held, that the Defendant had been guilty of a contempt.

Motion, by the Plaintiff, to commit the Defendant for a breach of the common injunction.

The Defendant had sued out a writ of *exigi facias* in an action which he had brought against the Plaintiff. After the writ had been delivered to the sheriff and the first proclamation had been made under it, the Plaintiff obtained the common

injunction, and served the Defendant with it. The sheriff, as soon as he had notice of the injunction, applied to the Defendant's solicitor for instructions as to the course which he was to adopt: but the solicitor said that he had no instructions to give. Upon which the sheriff proceeded to make three of the remaining proclamations.

Mr. Jacob and Mr. Hislop Clarke, for the Plaintiff. The sheriff is, in truth, the agent of the party at whose instance a writ has issued. If a party is arrested, irregularly, at law, the party who issued the writ is liable to an action for damages. Boddington, as soon as he was served with the injunction, was bound to stop the proceedings which had been commenced at his instance. The refusal of his solicitor to give the sheriff any instructions was, in effect, referring the sheriff back to his original instructions, and was equivalent to giving him to understand that he was to proceed upon those instructions. Boddington, therefore, [215] has been guilty of a contempt. *Marsack v. Bailey* (2 Sim. & Stu. 577), *Bullen v. Orey* (16 Ves. 141), *Bolt v. Stanway* (2 Anst. 556).

Mr. Knight Bruce and Mr. Loftus Wigram, for the Defendant. This application is one of the first impression. In *Marsack v. Bailey* the Defendant took an active step after the injunction issued; for he sued out a new writ of *allocatur exigent* to compel the sheriff to proceed with the proclamations. Here the Defendant has taken no active step since the issuing of the injunction; and the question is whether it is incumbent on a Defendant in equity, after a writ has been issued and placed in the hands of the sheriff, to put an end to the authority of the sheriff, if he can do so. Where a writ has been well issued before the party who obtained it has been served with the common injunction, he is entitled to the full benefit of the writ. We admit that the party cannot take any new step; but he is not to lose the benefit of his writ. The party is not bound to stop the sheriff. The sheriff has a right to execute every process that is in his hands prior to the issuing of the injunction. If the proclamations had been stopped, the writ would have been wholly useless, and the Defendant must have sued out a new writ of *exigent* after the injunction had been dissolved. (Tidd's Pract. tit. Outlawry.) Is there any authority which shews that an injunction issued after a writ has been placed in the sheriff's hands is to destroy the writ? The injunction never has the effect of destroying a step well taken before it was issued. *Franklyn v. Thomas* (3 Mer. 225; see 234).

[216] The relief to be administered (if any) is in the discretion of the Court, according to the particular circumstances of the case. This, however, is not an application to modify or regulate any benefit that the Defendant may derive from the proceedings that have taken place; but it is an application grounded on this, namely, that a contempt has been committed; and, therefore, the Court has no jurisdiction on the present motion.

Mr. Jacob, in reply, said that *Franklyn v. Thomas* did not apply, for it was not a case of contempt; but the question was whether the injunction which issued on the demurrer being overruled ought not to have a retrospective effect, that is, whether the Plaintiff was not entitled to be placed in the same situation as he would have been in if the Defendant had not delayed him in obtaining the injunction, by putting in the erroneous demurrer.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This application seems to me to be new in specie, and must be decided on principle. *Franklyn v. Thomas* was a strong case; for there, on a given day, the Plaintiff in equity would have been entitled to the common injunction, if the demurrer had not been filed. After the demurrer had been put in, execution was taken out at law. The demurrer was afterwards overruled, and the common injunction was moved for; and then an application was made to the effect that the Plaintiff in equity might be placed in the same situation as if no demurrer had been filed, and the common injunction had issued on the day on which the demurrer was filed; and Lord Eldon thought it right to do so; and he devised an order accordingly. That case, however, does not exactly apply. But it is plain, from the way in [217] which Lord Eldon discusses it, that this Court will interfere to prevent the final execution of the process which is put into the sheriff's hands before the issuing of the injunction. In this case the writ was in the sheriff's hands, and the first proclamation was made before the injunction issued. The sheriff who

receives the writ is, to a certain extent, the agent or servant of the Plaintiff at law; for any intimation, given by the Plaintiff at law to the sheriff, not to go on, would be an indemnity to the sheriff, and he would be bound not to proceed. Here no step was taken by the sheriff in execution of the process without knowing what had taken place in this cause. A communication took place between the solicitor of Boddington and the sheriff; and the solicitor said that he would give no order. After that communication was made, I must consider that the refusing to countermand the writ was an actual continuance of the order previously given.

I cannot but think that the conduct of the solicitor was not proper, and that this is a case of contempt. I do not, however, think that it is a case in which I ought to make an order for committal; but I shall order Boddington to pay the costs of the motion, and that he is not to have the benefit of any proclamation made subsequent to the service of notice of the present motion.

[218] BOYS v. TRAPP. *April 23, 1838.*

Construction of 3 & 4 W. 4, c. 94, sect. 13. Publication.

The Master having been prevented by illness from attending at his office on the day appointed for hearing an application to enlarge publication; held, that the application might be made to the Court.

The Defendant being desirous to enlarge publication, the parties attended at the Master's office on the day appointed for making the application; but the Master was ill and did not attend.

Mr. Koe, for the Defendant, now moved to enlarge publication.

Mr. Stuart, *contrà*, said that the application ought to have been made to the Master; as the power of the Court to make an original order to enlarge publication was taken away by 3 & 4 Will. 4, c. 94, s. 13. (See also the 15th and 20th of the Orders of 1833.)

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the circumstance of the Master's not making the order on account of his illness gave the party the same right to appeal to the Court as if the Master had exercised his judgment on the application and refused to make the order; and His Honor granted the application.

[219] LORD ST. JOHN v. BOUGHTON. *May 1, 1838.*

[S. C. 7 L. J. Ch. 208; 2 Jnr. 413.]

Statute of Limitations, 3 & 4 W. 4, c. 27. Debt.

Where an estate is devised to a trustee in trust to sell and pay the testator's debts, and, subject thereto, in trust for A., an acknowledgment of a debt in writing, signed *by the trustee or his agent*, is sufficient to preserve the creditor's right of suit for 20 years after the giving of the acknowledgment.

In 1802 Lady St. John executed two bonds to a gentleman named Aubert, one for securing the payment of £322, with interest, on the 1st of January 1803, and the other for securing the payment of £330, with interest, on the 1st of May in that year. Lady St. John died in 1805 having, by her will, dated the 26th of July 1804, devised her real estates to Richard Bennett and Thomas Townsend, in trust to sell, and, after paying off incumbrances, to apply the proceeds, together with her personal estate, in payment of her debts, funeral and testamentary expences and legacies; and to stand possessed of the residue upon certain trusts for the benefit of her son and his children; and she appointed Bennett, Townsend and her son her executors.

Lady St. John's will was proved by her three executors. At her death her

affairs were in a very embarrassed state; and on the 23d of October 1811 Townsend wrote to Aubert, stating that there was little prospect of her debts being paid for many years.

In 1814 Bennett died. In 1816 Aubert died, having appointed W. Davies and G. H. Wollaston his executors. After his death his executors made inquiries of Townsend as to the state of Lady St. John's affairs; and on the 2d of July 1816 Wollaston, in answer to a letter which he had received from Townsend, wrote as follows:—"I observe, by what you mention, that there is a distant likelihood of the demands on Lady St. [220] John's estate being gradually liquidated. I am not certain whether the late Mr. Aubert informed you that he was in possession of two of her ladyship's bonds for £330 and £322. I think it proper, therefore, acting for his estate, to give you notice of those bonds being in the possession of the executors, who must wait the extinction of prior demands on the estate."

On the 15th of October 1817 the testatrix's son died, leaving the Plaintiffs his only children. On the 24th of that month Wollaston wrote the following letter to Townsend:—"Sir,—On the 2d of July 1816 I had the pleasure of replying to your favour of the 24th of June. I then informed you that the executors of the late Anthony Aubert were in possession of two bonds of the late Lady St. John's, amounting to £652. Not having heard from you in reply, I conclude that you were aware of that demand upon her estate, or that the notice was sufficient, and that the claim would take its course of payment in due time. The decease of the late Lord St. John has lately brought this claim under the notice of her executors; and I have been requested to ascertain whether the claim to which I allude has been made in proper order, or whether it would be necessary to take any legal steps in order that the claim may be liquidated in due course with the other demands on her ladyship's estate." On the 27th of October 1817 Townsend wrote the following answer:—"Sir,—I am favoured with your's of the 24th instant. I do not apprehend the death of Lord St. John will anyway affect your claim on the late Lady St. John's estate, and that the notice you formerly gave is fully sufficient for every purpose. I beg leave to add that I hope, in a very few years, all her ladyship's debts will be fully paid." In February 1823 Davies wrote to Townsend [221] to inquire when it was probable that the bond debts would be discharged. On the 1st of March in that year the following answer was sent:—"I regret it is not in my power to return you a more satisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady St. John, &c., &c. *Be assured I shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power*; and of such I will give you or Mr. Wollaston the earliest notice. Should you visit Clifton I shall be glad to give you any further information on the subject. A severe attack of gout in the hand obliges me to employ an amanuensis.—I am, sir, your most obedient servant, for Thomas Townsend, L. T." This letter was written by Laura Townsend, the daughter of Thomas Townsend, at the dictation of her father, and was signed by her in his presence. In 1824 Townsend died; and thereupon a suit was instituted for the appointment of new trustees of Lady St. John's will; and in 1826 (at which time the incumbrances on her ladyship's real estates had not been paid off) the Defendants Sir W. R. Boughton and Sir Robert Heron were appointed the new trustees.

The object of the present suit was to have Lady St. John's assets administered, and the trusts of her will carried into execution. The usual decree was made in June 1833. In November 1836 the Master reported that certain debts were due from the testatrix's estate; but the before-mentioned bond debts were not included in the report. By the order on further directions, in January 1837, the debts mentioned in the report were ordered to be paid out of the funds in the cause. In January 1838 Davies and Wollaston presented a petition in the cause stating as above, and, further, that [222] Townsend was, from the year 1814 until his death, the sole surviving executor and trustee of Lady St. John's will: and that, in the correspondence before set forth and on other occasions within the period of 20 years last past, he gave acknowledgments in writing signed by himself or by some person duly authorized by him, acknowledging the validity of the Petitioners' demand against Lady St. John's estate; that the Petitioners were advised that, under the circumstances aforesaid, the debt due on the bonds was not barred by the Statute of Limitations; but the

Petitioners, being uninformed of the Master's advertisement for creditors, had no opportunity to claim the debt before the Master had made his report. The petition prayed that it might be declared that the debt on the bonds was not barred, and that the Petitioners might be at liberty to go in and prove it before the Master; and that they might be paid the same out of the funds in the cause.

On the hearing of the petition the question was whether the correspondence, and, especially, the letter of the 1st of March 1823, did not contain a sufficient acknowledgment of the bond debts within the meaning of 3 & 4 Will. 4, c. 27, sect. 40; which enacts that, after the 31st of December 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release of the same, unless, in the meantime, some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing [223] signed by the person by whom the same shall be payable or *his agent*, to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within 20 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given.

Mr. Temple and Mr. Ellis, in support of the petition, said that where, as in the present case, a trust was created for payment of debts, neither the 9th Geo. 4, c. 14 (for rendering a written memorandum necessary to the validity of certain promises and engagements) nor the 3d & 4th Will. 4, c. 27, was of any force, unless the debt was barred at the time when the trust came into operation: that here the bonds were only two or three years old when Lady St. John's will took effect. *Phillipo v. Munnings* (2 Myl. & Craig, 309). [THE VICE-CHANCELLOR. The debts in question are charged upon or payable out of land; and, therefore, it seems to me that they are within the 3d & 4th Will. 4, c. 27. No part of the fruit or produce of the land was severed or set apart for payment of the debts; and, therefore, *Phillipo v. Munnings* does not apply.] Supposing these debts to be within the Act, yet, as the incumbrances on the testatrix's estates were not paid off in 1826, the 20 years did not begin to run until after that period.

Next: the decree made in 1833, which directed the necessary accounts and inquiries to be taken with a view to the payment of the testatrix's debts, prevented the debts in question from being barred: at the date of that decree the 20 years had not expired. *Sterndale v. Hankinson* (*ante*, vol. 1, p. 393). [THE VICE-CHANCELLOR. *Sterndale v. Hankinson* [224] was decided before the 3d & 4th Will. 4, c. 27, was passed. That Act applies to every debt attempted to be proved after the 31st of December 1833.] At all events, Townsend's letters are sufficient to prevent the debts from being barred by the Act: the letter of the 1st of March 1823 contains not only an acknowledgment of the debts, but a promise to pay them.

Mr. Barber and Mr. Bacon appeared for the trustees, and Mr. K. Bruce and Mr. Sharpe, for the Plaintiffs, in opposition to the petition. An acknowledgment by a trustee is not sufficient to prevent a debt from being barred by the statute: it is not the trustee, but the estate that is liable to pay the debt. [THE VICE-CHANCELLOR. Supposing that an estate were devised to a trustee in trust to pay the testator's debts, and, subject thereto, in trust for A. for life, and after his death for his unborn children; would you say that an acknowledgment by the trustee would not be sufficient, but there must be an acknowledgment by the unborn issue?] None of the letters except that of March 1823 can be said to contain anything like an acknowledgment of the debts: and that letter is not sufficiently precise. Besides, that letter was not signed by Townsend, but by L. T., and, consequently, there must be extrinsic evidence to shew who L. T. was. Supposing that an acknowledgment signed by an agent for the party by whom a debt is payable is sufficient to prevent the debt from being barred by the Act, the signature is not sufficient if the agent signs his initials only. *Fearn v. Lewis* (6 Bing. 349); *Dickenson v. Hatfield* (5 Carr. & Payne, 46); *Hyde v. Johnson* (2 Bing. N. C. 776).

[225] THE VICE-CHANCELLOR [Sir L. Shadwell]. In my opinion there has been

a sufficient acknowledgment of the debts in this case, within the meaning of the 3d & 4th Will. 4, c. 27.

The decisions under 9 Geo. 4, c. 14, sect. 1, are not applicable to this case; for the word "agent" is omitted in the first section of that Act; and therefore an acknowledgment of a debt signed by an agent of the debtor would not take the debt out of the operation of that Act. In this case too the personal liability of the party is out of the question. The Act of the 3d & 4th Will. 4, c. 27, applies to sums of money charged upon or payable out of any land. The trustee, who is the party by whom the money is payable, may acknowledge the debt by a writing signed either by himself or his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt.

All that the Act requires is that *some* acknowledgment of the right to the sum claimed shall have been given in writing, signed by the person who represents the estate out of which it is payable, or by his agent. The Act, therefore, allows of considerable latitude as to the form of the acknowledgment: and, consequently, it is not necessary that the acknowledgment should state the amount of the sum alleged to be due. If it refers to the thing in question it is sufficient.

The letter of the 1st of March 1823 is part of a correspondence. It commences thus: "I regret that it is not in my power to return you a more satisfactory answer with regard to the claim of the late Mr. Aubert upon the estate of the late Lady St. John. Be assured I [226] shall be happy to discharge the bonds to the late Mr. Aubert as soon as it is in my power." Then there is this passage: "A severe attack of gout in the hand obliges me to employ an amanuensis;" and the letter concludes: "I am, sir, your most obedient servant, for Thos. Townsend, L. T." It is sworn that this letter was written by Miss Laura Townsend, the daughter of the trustee, according to her father's dictation, and that it was signed by her in his presence. I am of opinion, therefore, that the right of the Petitioners to the sums due on these bonds has been acknowledged by a writing signed by the agent of the person by whom the same are payable; and that the Petitioners ought to be at liberty to go in before the the Master and prove their debt.

[227] PHIPSON v. TURNER. May 5, 7, 1838.

[S. C. 2 Jur. 414. Followed, *Stark v. Dakyns*, 1873, 74, L. R. 15 Eq. 307; L. R. 10 Ch. 35.]

Power. Appointment. Will. Revocation.

Testator bequeathed a sum of stock in trust for all or such one or more exclusive of the others of the children of his niece, as she should by her will appoint; and, in default of appointment, in trust for all her children living at his decease. The niece by her will appointed £6000, part of the stock, to her daughter, for her separate use for life; and, after her death, *to such persons, &c., as the daughter should by will appoint*, and, in default of appointment, to the niece's two sons. The two sons and the daughter were the niece's only children, and they were all living at the testator's death. After the death of the niece, her two sons and daughter and the husband of the daughter executed a deed by which, after reciting that it was conceived that the testamentary power of appointment given to the daughter was invalid, as being an excessive execution of the power given to her mother, and that it was also conceived that, if that power should be valid and should not be exercised, then and in either event the reversion of the £6000 expectant on the daughter's death, belonged to her two brothers and to herself and her husband; the parties, in order to obviate any doubts respecting the same and to carry their mother's intention into effect, assigned the fund to two trustees, in trust for the daughter, for her separate use for life, and, after her death, for the husband for life, and, after his death, for the children of the daughter and her husband, and, if they should all die under 21, in trust for the daughter's next of kin; and the daughter alone was empowered to appoint new trustees of the deed. A few months afterwards the daughter made a will, in exercise of the power given to her by her mother, and

appointed the fund to her husband absolutely. Some time afterwards she executed a deed, by which she appointed a new trustee of the prior deed. Shortly afterwards she died, leaving her husband and four children surviving. Held, that the testamentary power of appointment given to the daughter was valid : that the first deed was not intended to operate, unless that power should be either void or not exercised : that the daughter's will was a good execution of the power, and was not revoked by the second deed.

William Goore, being possessed of £18,000 three per cent. consolidated, and £12,000 three and a half per cent. Reduced Bank annuities, by his will, dated the 5th of February 1825, bequeathed all the three per cent. consolidated annuities and the three and a half per cent. Reduced annuities then standing in his name [228] to Richard Allison and Thomas Allison Hoskins, in trust for his sister, Elizabeth Goore, for life, and, after her death, in trust for his cousin Martha Tomlinson for life, and, after the decease of the survivor of them, "*in trust for all or every, or such one or more, exclusive of the others, or other of the children of the said Martha Tomlinson, or of the issue of such of them as shall be dead, and, if more than one, in such parts, shares and proportions, with such provision for their respective maintenance and education, as she shall, by her last will and testament in writing, or any writing in the nature thereof, to be by her duly executed, direct or appoint, and, for want of such direction or appointment, and so far as any such if incomplete shall not extend, for all and every the child or children of the said Martha Tomlinson who shall be living at the time of my decease, or the issue of such of them as shall be then dead, such issue, nevertheless, taking no more than their deceased parent or parents would have been entitled to if living, to be divided equally between them as tenants in common, and, if there shall be but one such child, then the whole to be in trust for such only child.*" And the testator appointed Richard Allison and Thomas Allison Hoskins executors of his will.

The testator died in December 1829, and Richard Allison alone proved his will, and caused the stock to be transferred into his own name.

Elizabeth Goore died in 1831, and Martha Tomlinson died on the 17th June 1833. She had three children only, namely, Sampson Tomlinson, James Tomlinson, and Mary, then the wife of the Plaintiff, but since deceased ; and those children were living both at the decease of the testator and of their mother.

[229] Martha Tomlinson, by her will, dated the 9th of May 1832, and duly signed and published by her in the presence of three witnesses, after reciting the testator's will and his death and the death of Elizabeth Goore, expressed herself as follows :—"Now I, the said Martha Tomlinson, in pursuance and execution of the power and authority given to me by the said in part recited will, do, by this my last will and testament in writing by me duly executed, direct and appoint, from and after my decease, the sum of £6000 three per cent. consolidated Bank annuities, to and for the use and benefit of my daughter, Mary, the wife of John Phipson, and her issue, in manner following (that is to say), the interest, dividends and annual produce thereof to my said daughter Mary during her natural life, to and for her own sole and separate use and benefit, independent of her present or any future husband ; and, after the decease of my said daughter, then, as to the said principal sum and the interest, dividends and produce thereof, I hereby direct and appoint the same to and for the use and benefit of or in trust for *such person and persons, for such estate and estates, ends, intents and purposes, and with, under and subject to such powers, provisos, conditions, limitations, declarations and agreements as the said Mary Phipson, notwithstanding her coverture, in and by her last will and testament, or any writing in the nature of or purporting to be her last will and testament duly executed, shall direct, limit or appoint, and, for want or in default of any such direction or appointment, and so far as any such if made shall not extend, and if my said daughter shall not leave any child or children, or grandchild or grandchildren, then I direct and appoint the same principal, interest and dividends unto my two sons, Sampson Tomlinson and James Tomlinson, equally to be divided between them, as tenants in com-[230]mon, and to their respective executors, administrators and assigns.*" The testatrix then appointed the remaining £12,000 consols to her two sons, equally, as tenants in common, and to their respective executors, administrators and assigns ; and, as to the remainder of the three and a half per cent. annuities (part

having been sold to pay legacy duty), she appointed the same to her three children, equally, as tenants in common, and to their respective executors, administrators and assigns; and, after certain specific bequests, she gave all the residue of her real and personal estate to her three children and their respective heirs, executors, administrators and assigns, share and share alike; and she appointed her two sons and her nephew, George Baldwin, executors of her will.

Upon the testatrix's death Richard Allison transferred the whole of the three per cent. and three and a half per cent. stock into the names of Sampson Tomlinson, James Tomlinson and George Baldwin. After the testatrix's death doubts were suggested as to the validity of her appointment of the £6000 stock, and as to the rights and interest acquired by Mary Phipson under the same; and, thereupon, it was agreed, as the bill alleged between Sampson Tomlinson, James Tomlinson, and the Plaintiff and his wife, that a deed of arrangement should be entered into and executed by all those parties, with a view to effectuate the testatrix's intention as expressed in her will; and, accordingly, by an indenture, dated the 19th July 1833, and expressed to be made between Sampson Tomlinson, James Tomlinson, and the Plaintiff and his wife, of the one part, and Samuel Turner and William Palmer, of the other part, after reciting the testatrix's will, and that it was conceived that the gift or appointment of the interest and dividends of the [231] £6000 stock to Mary Phipson for her life was good, but that the power to enable her to dispose of that sum and the interest and dividends thereof was void, as having exceeded the power given to the testatrix by the testator's will; and that it was also conceived that, if such power should be valid and should not be exercised by Mary Phipson, then and in either event the reversionary interest in the £6000 stock expectant on the death of Mary Phipson belonged to Sampson Tomlinson, James Tomlinson and the Plaintiff and his wife, or some or one of them, and that Sampson Tomlinson, James Tomlinson and the Plaintiff and his wife, in order to obviate any doubts respecting the same, and to carry the testatrix's intention into effect, had agreed to assign the £6000 stock to Turner and Palmer, upon the trusts hereinafter declared: it was witnessed that, in pursuance of the said agreement and for carrying the testatrix's intention into effect, Sampson Tomlinson, James Tomlinson and the Plaintiff and his wife did assign the £6000 stock and all their powers and remedies for recovering, receiving or enforcing the payment of the same, and all benefit and advantage incident or belonging thereto, and all the estate, right, title, interest, use, trust, property, possession, possibility, claim and demand of them, any or either of them, of, in or to the said sum of £6000 stock, and the dividends, interest and proceeds to accrue thereupon, or to be paid or payable in respect thereof, in trust for Mary Phipson, for her separate use for her life, and, after her death, in trust for the Plaintiff and his assigns during his life or until he should become bankrupt, or make a composition with his creditors, or an assignment of his effects for their benefit, and, after the decease of the survivor of the Plaintiff and his wife, or, in case he should survive his wife, on his being declared a bankrupt, or making a composition with his creditors or an [232] assignment of his effects for their benefit, then upon trust to assign the £6000 stock unto all and every or such one or more of the child or children of the Plaintiff and his wife, in such parts, &c., as the Plaintiff and his wife should, by deed, jointly appoint, or as the survivor of them should, by deed or will, appoint, and, in default of appointment, in trust to assign the stock unto, between and amongst all the children of the Plaintiff and his wife, equally to be divided between them, the shares of sons to be paid to them at 21, and the shares of daughters at that age or on their marriage, and, if any of such children should be then dead having left issue then living, then such issue should take his, her or their parent's share; and in case Mary Phipson should die without issue, or in case there should be such issue and they should all die under age and without issue, then upon trust to assign the £6000 stock to such person and persons, &c., as Mary Phipson, notwithstanding her coverture, should, by deed or will, appoint; and, in default of such appointment, in trust to divide the same amongst such persons as, at Mary Phipson's death, should be her next of kin by blood under the Statutes of Distribution. The deed then contained a power enabling the trustees, with the consent of the Plaintiff and his wife, or the survivor of them, and, after the death of the survivor, of their own proper authority, to sell the £6000

stock, and invest the proceeds in other securities or in the purchase of real or leasehold estates; and also a power enabling Mary Phipson to appoint new trustees of the trust property. This deed was executed by all the parties except Sampson Tomlinson. He refused to execute it or to ratify or recognize the arrangement made thereby, the same having been entered into, as his answer alleged, without any notice to him.

[233] By an indenture, dated the 22d of December 1835, and made between Turner, of the first part, Mary Phipson, of the second part, and A. Ryland, of the third part, after reciting the deed of July 1833, and that Turner was desirous of resigning the trusts reposed in him thereby, Mary Phipson, in exercise of the power given to her by the same deed, appointed A. Ryland to be a new trustee of it in the place of Turner.

Subsequently to the date of the deed of July 1833 the Plaintiff and his wife were advised, as the bill alleged, that the appointment made by Martha Tomlinson's will, of the £6000 stock in favour of the Plaintiff's wife, was valid, and that they had executed that deed under a mistaken impression respecting the validity of the appointment, and that, by reason thereof and of the refusal of Sampson Tomlinson to execute the last-mentioned deed, they were entitled to treat the same as inoperative: and accordingly the Plaintiff's wife, for the purpose of exercising the power given her by Martha Tomlinson, made her will, dated the 26th of December 1833, and which was signed and published by her in the presence of two witnesses, and was as follows:—"I, Mary Phipson, wife of John Phipson, by virtue of the power and authority given to me in and by the several last wills and testaments of my late father and mother and of the late William Goore, and by virtue of all and every other power me thereunto enabling, do, by this my last will and testament, give, devise, limit, appoint and confirm, unto my said husband, the said John Phipson, absolutely, all sum and sums of money in any of the public funds in Great Britain and elsewhere, and all other monies and securities for money and other personal estate over which I have a disposing power or to which I am entitled, [234] either in possession, reversion or otherwise, under the said wills or any or either of them, or by any other means." Ryland was one of the attesting witnesses to this will.

Mary Phipson died on the 30th of December 1835, leaving the Plaintiff and four infant children her surviving; and, after her death, letters of administration with her will annexed were granted to the Plaintiff.

The bill was filed against Turner (in whose name part of the trust property still remained), Palmer, Ryland, James Tomlinson, Sampson Tomlinson and the children of the Plaintiff by his late wife, and, after stating as above, it charged that, under the trusts and powers contained in the will of William Goore, it was competent to Martha Tomlinson to appoint the trust funds to or in trust for Mary Phipson during her life, and, after her decease, to or in trust for such person or persons and for such estates and interests as she should by will appoint, and that, if Martha Tomlinson's will was a valid execution of the power reserved to her by Goore's will, Mary Phipson became fully authorized, under the said wills, to make the testamentary appointment so made by her as aforesaid in favour of the Plaintiff, and that the same was a valid disposition of the trust funds in the Plaintiff's favour; that in case the Plaintiff was not, by the means aforesaid, entitled to the trust funds, it was, at least, a question whether the same belonged to the infant Defendants, or whether the same passed, under the ultimate limitation in Goore's will, to the children of Martha Tomlinson living at Goore's death, or the issue of such of them as should be then dead, and that, in the last-mentioned case, Mary Phipson became entitled to one-third part thereof, as [235] one of the three children of Martha Tomlinson, and the Plaintiff, in her right, was then entitled thereto; that the Defendants pretended that, by reason of the execution of the deed of July 1833, the Plaintiff was precluded from raising any question with respect to the construction of the aforesaid wills, and from claiming any interest in the trust funds under the same, and that he was bound to give effect to that deed, and to permit the trust funds to be held and applied upon the trusts therein expressed, more especially as the Plaintiff and his late wife, and the latter in particular, had recognized and confirmed the last-mentioned deed by executing the deed of December 1835; but the bill charged that the deed of July 1833 was executed under a mistaken conception of Mary Phipson's rights and powers under Martha Tomlinson's will, and

that it was never intended that the trust funds should become liable to the trusts of that deed in case the power of appointment reserved to Mary Phipson by Martha Tomlinson's will was valid and should be exercised by her: and that the trusts of the deed of July 1833 were not framed in accordance with the intentions therein expressed, as would appear by reference to the recitals and trusts thereof; that the Plaintiff and his late wife would not have executed the deed of July 1833 if they had been aware that the testamentary appointment made by Martha Tomlinson was a valid execution of the power reserved to her by Goore's will, and that, under such testamentary appointment, the Plaintiff's late wife had herself the power to make a good testamentary appointment of the trust funds; that the deed of July 1833 was executed on the faith and in expectation that all the parties thereto would concur in executing it, and that it had been rendered nugatory by Sampson Tomlinson's refusal to execute or recognize it; that neither [236] the Plaintiff nor his late wife had done any such act for confirming or recognizing the last-mentioned deed as would preclude the Plaintiff from insisting that the same ought not to be held binding upon him; and, although his late wife executed the deed of December 1835, she did so for the purpose merely of insuring the proper management and protection of the trust funds, and did not mean thereby to recognize the deed of July 1833.

The bill prayed that the testamentary appointment made by the Plaintiff's late wife might be established and carried into effect, and that it might be declared that, by virtue thereof and of the several other wills or testamentary appointments aforesaid, and notwithstanding the deed of July 1833 the Plaintiff had become absolutely entitled to the £6000 stock; and, if necessary, that the last-mentioned deed might be declared inoperative and void, as against the Plaintiff, and might be vacated; and that Turner, Palmer and Ryland might be decreed to transfer the £6000 stock to the Plaintiff, discharged from the trusts of that deed; or, otherwise, that the rights and interests of the Plaintiff and all other parties claiming to be interested in the £6000 stock might be ascertained and declared and secured for their benefit.

Mr. Knight Bruce and Mr. Girdlestone, for the Plaintiff. The first question is as to the validity of the appointment made by Mrs. Tomlinson, in favour of her daughter Mrs. Phipson.

In *Bray v. Hammersley* (*ante*, vol. 3, p. 513; see also 2 Clark & Fin. 453) your Honor decided [237] that where a power was given to appoint a fund to the children of the donee, an appointment to a daughter of the donee, for her separate use for life, with a power to dispose of the capital after her death, was good. That case was affirmed by the House of Lords under the name of *Bray v. Bree*, and is a conclusive authority in favour of the validity of the appointment in question. The mother's appointment did, in effect, give the whole beneficial interest in the £6000 stock to her daughter, but in a particular manner. *Hales v. Margerum* (3 Ves. 299).

The next question is as to the effect to be given to the deed of July 1833.

That deed was executed under a mistaken conception of the rights of the parties. It recites that it was conceived that the appointment of the stock to Mrs. Phipson for her life was good, but that the power to enable her to dispose of it was void, as being an excessive execution of the power given to Mrs. Tomlinson by W. Goore's will; and that it was also conceived that, if such power *should be valid and should not be exercised* by Mrs. Phipson, the reversionary interest in the stock, expectant on her death, would belong to S. Tomlinson and James Tomlinson and the Plaintiff and his wife, or some or one of them. The deed, therefore, proceeds on the ground either that the power was not good, or that it would not be exercised by Mrs. Phipson. The recitals take no notice of the event that has happened, namely, of the power being good and being exercised. If, therefore, Mrs. Phipson had the power and exercised it, it was not the intention of the parties to interfere with her power; and, that being so, there is an end of the question. Besides, S. Tomlinson never executed the deed; [238] and it is immaterial whether he now assents to be bound by it or not, as he did not assent in the lifetime of Mrs. Phipson.

The next question is what was the position of the parties to the deed, and who were intended to be bound by it? The persons named as parties to it are Mr. and Mrs. Phipson (the latter of whom, according to the recitals of the deed, was considered not to have a valid power of appointment over the stock), and Sampson and James

Tomlinson, who were entitled to it if either she had not a valid power or did not exercise it. Mrs. Phipson had no interest in the fund which she could assign; she had merely a life interest with a testamentary power of appointment, the validity of which was questionable. The object of the deed was to bind the interests of Sampson and James Tomlinson in the event of the power not being valid or not being duly exercised. No intention whatever appears on the deed of binding the interest of any other person. How then can it be contended that the new interest of the husband is bound by this deed, which was executed with an entirely different view.

Then it will be said that Mrs. Phipson afterwards executed a deed by which a new trustee of the stock was appointed, and which altered the position of the parties. On the 26th of December 1833 Mrs. Phipson made the testamentary appointment in favour of her husband, and on the 22d of December 1835 she executed this deed, which was made between Turner of the first part, herself of the second part, and Ryland of the third part; and the only object of it was to appoint Ryland a trustee of the stock in the place of Turner. Mr. Phipson was not a party to that deed, and therefore [239] he cannot be affected by it. It proceeded on the footing of the deed of July 1833; and, if Mr. and Mrs. Phipson were not, as we contend was the case, bound by that deed before the subsequent deed was executed, they were not bound by it afterwards; for the subsequent deed gave no greater effect to the deed of July 1833 than it had before. We submit, therefore, that there is nothing in this case to preclude Mr. Phipson from claiming under the testamentary appointment made by his wife.

THE SOLICITOR-GENERAL [Sir R. M. Rolfe], for the Defendant Sampson Tomlinson. This is a most unfair attempt on the part of the Plaintiff. In his wife's lifetime he executed a deed which gave him all that he could reasonably require: and he now comes to the Court and says that he is not bound by the deed which he executed. He is seeking to undo his own voluntary act. The bill itself alleges that, after the death of Martha Tomlinson, doubts were suggested as to the validity of the appointment of the £6000 consols made or purporting to be made by her will, and as to the rights and interests acquired by Mary Phipson under the same; and, thereupon, it was agreed between Sampson Tomlinson and James Tomlinson and the Plaintiff and his wife, that a deed of arrangement should be entered into and executed by all the said parties, with a view to effectuate the intention of Martha Tomlinson as expressed in her will. The deed of 1833 is then set forth, which recites with greater particularity the doubts that were entertained respecting the validity of the appointment, and that S. Tomlinson and James Tomlinson and the Plaintiff and his wife, in order to obviate any [240] doubts respecting the same, had agreed to assign the stock upon the trusts therein-after expressed. So that the Plaintiff, being fully aware that there were doubts as to the validity of the appointment, agrees to settle them by executing this deed of 1833. He executed the deed accordingly, and concurred in transferring the fund to the trustees of that deed. The question then resolves itself into this, namely, whether, there being doubts existing between the parties as to their rights, and the Plaintiff having agreed to put an end to those doubts by settling the fund in a manner the most beneficial to himself that could be, is he now at liberty to say that he will not be bound by that settlement? [THE VICE-CHANCELLOR. How was Mrs. Phipson bound by the deed? The power given to her by Mrs. Tomlinson's will was testamentary. How then could any instrument executed by her, which was not testamentary, be an execution of her power?] Supposing that Mrs. Phipson was not bound by the deed; yet her husband must be bound by the agreement that he had entered into, and he must be held to have taken the fund, under her will, as a trustee for carrying the trusts of the deed into effect. What reason is there for supposing that she would have made such a will, if she had not known that her husband was bound by the deed? By executing the deed the husband bound himself to settle the property upon the trusts of that deed, and his wife made her will upon the faith that he was so bound. Besides, it is very doubtful whether the wife's will was not revoked by the deed of 1835.

Mr. James Russell with the Solicitor-General. The case of *Bray v. Hammersley* has no application to the present case. In that case there was only one child of the marriage, and the real question was whether [241]—ther, as the husband insisted in his bill, the power contained in the settlement of 1805 had not on that account become inopera-

tive. There the mother directed the trustees to pay the income of the fund to such person or persons, &c., as her child should, either by deed or by will, appoint, and, in default of appointment, to the child for her separate use for her life, and, after her death, to transfer the fund to her executors or administrators. Here the power given by Goore's will is to appoint the funds to the children of Mrs. Tomlinson, the donee, or the issue of such of them as should be dead; and Mrs. Tomlinson appoints to her daughter *and her issue* in manner following: the dividends are given to the daughter for her separate use for life, with a general power of appointment by will, not by deed; and, in default of appointment and in case the daughter should not leave any child or grandchild, the stock is given to other objects of the power. The endeavour to give Mrs. Phipson a power to appoint by will generally is altogether out of the terms of the power given by Goore's will. *Alexander v. Alexander* (2 Vez. 640). We submit, therefore, that the appointment made by Mrs. Tomlinson was invalid beyond the life-estate given to her daughter; and that this case differs from *Bray v. Hammersley*, as there the only appointee got the fund in the most beneficial manner possible, and there was no attempt to give it to any other person. [THE VICE-CHANCELLOR. The parties to the deed of 1833 profess it to be their intention to carry the intention of Mrs. Tomlinson into effect. Her intention was to exclude the husband of her daughter; but, by the deed, they give him a life interest in the stock. The deed, as I understand, does not at all point to this, namely, that [242] if the wife should appoint the stock to her husband, he should hold it as a trustee for his children. The parties might easily have bound any rights that they might have by expressly doing so; but I do not see that they have used any words for that purpose.]

Mr. Wigram, for James Tomlinson. The Plaintiff is suing in a representative character, but he was a party to the deed of 1833 in his individual character. In *Nail v. Punter* (*ante*, vol. 5, p. 555) the wife had a separate interest for life, with a power to appoint the capital by will. The trustees, at the request of the husband, sold out the stock. Afterwards the wife, by her will, exercised her power in favour of her husband; and he, after her death, sought to compel the trustees to replace the stock; but the Court said that, as he was a party to the transaction, he could not sue the trustees. That case is precisely in point; for here the husband was a party to the deed of 1833, and got a consideration for joining in the execution of it. Next, Mrs. Phipson perpetuated the trusts of the deed of 1833 by appointing the new trustees; and the Court, we apprehend, will hold that appointment to be a revocation of her will.

Mr. Turner with Mr. Wigram. It is apparent, on the face of Mrs. Tomlinson's will, that she intended to provide for the issue of Mrs. Phipson, although she could not legally do so. The parties to the deed of 1833 intended to carry into effect the intention of Mrs. Tomlinson in favour of the children and issue of Mrs. Phipson. The question is, whether that deed is to be defeated by Phipson's claim? The deed [243] is a contract, by all the parties, that the property shall be held upon the trusts of the deed. Can then Phipson, who is a party to it, claim against it and defeat it?

Mr. Jacob and Mr. Booth, for the Defendants Turner and the children of Mr. and Mrs. Phipson. The Court cannot, at the suit of the father, take from the children the interests given to them by the deed of 1833, which was executed by the father. If the father is right in saying that he is not bound by that deed, the consequence is that he has a right to file a bill against the executors of Goore and the executors of Mrs. Tomlinson, to compel them to replace the £6000 stock and to transfer it to him; but *Nail v. Punter* is a strong authority against that.

Supposing that the power given to Mrs. Phipson was valid, and that it was well exercised by her will, her will was revoked by the deed of 1835; for it purports to devote the fund to other trusts and purposes, namely, the trusts and purposes of the deed of 1833.

But we contend that the power was not valid. In *Bray v. Hammersley*, the power given by the settlement was given in much more extensive terms than the power given by Goore's will, and the appointment made under it was essentially different from the appointment made by Mrs. Tomlinson. By Goore's will, Mrs. Tomlinson was authorized to appoint the funds to all and every, or such one or more exclusive of the other or others of her children, or of the issue of such of them as should be dead, in such parts, shares or proportions as she should direct. In *Bray v. Hammersley*

the appointment was, in effect, an appointment to the daughter herself. The [244] power given to Mrs. Phipson, after her life-estate, was a mere naked power; it was not either a part, a share or a proportion. The power given to Mrs. Tomlinson was to give property, not a power, to her children. *Campbell v. Sandys* (1 Scho. & Lef. 281).

Mr. Girdleston, in reply, said that there was nothing in the deed of 1833 which shewed that the parties intended to bind any interest in the fund which Mr. Phipson might thereafter acquire; that there was an anxious intention, apparent on the face of the deed, to prevent its operating to defeat Mrs. Phipson's testamentary power; that in *Nail v. Punter* the husband had received the proceeds of the sale of the stock, and was seeking by his bill to avail himself of his own wrong.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Suppose that Mrs. Tomlinson had appointed the £6000 consols to her daughter, Mrs. Phipson, and then had directed that such part of the fund as should not be disposed of by will or otherwise should go to her two sons; it cannot be disputed that that would have been a good exercise of her power. Is not such a disposition the same in substance as a gift of the fund to her daughter, for her separate use, with a testamentary power of appointment, and, in default of that appointment, to the two sons? If Mrs. Tomlinson had named certain persons as appointees, who did not fall within the description of her own children or issue of her children, the appointment would have been void to that extent; but when she gives to Mrs. Phipson a separate interest for her life, and a separate power of [245] appointment by will, she is, in fact, giving her an interest, though it is a more limited mode of giving her the property.

If Mr. Phipson, when he executed the deed of July 1833, meant to deal with the interest he then had, that is one thing; but, if he meant to deal with the interest which he might subsequently acquire, that is quite a different thing. It is very extraordinary, if the parties to that deed meant to bind Mr. Phipson with respect to any interest he might thereafter acquire from his wife by testamentary appointment that they did not say so. It is a remarkable feature in this case (where it is quite obvious that, if the parties had meant the thing, they might have expressed it in definite words), that there should be any contention that though, in point of fact, the instrument has no such words, it must be said that the meaning of it is tantamount to such words.

Is there anything like a bargain on the face of the deed; is there any stipulation that Mrs. Phipson should not execute her power? If there had been a recital introduced into the deed to the effect that Mrs. Phipson had consented not to execute her power, though it would not have bound her, yet it would have been a good intimation of the intention of the parties; but, if there is no reference to her not executing the power, it seems to me, in the result, that they wished to leave it altogether to her to execute the power just as she pleased. It is so perfectly notorious among the profession that a party may bind the interest which he may at a future time acquire by a will, that I cannot but think that, if the intention of the gentleman who prepared this instrument, had been to bind any future [246] interest that might be acquired by Mr. Phipson under his wife's will, the deed would itself have contained a direct provision to that effect, or at any rate, a provision that nothing that might be done by Mrs. Phipson in the execution of her power, so far as it tended to vest the property in any other person, should be for any other purpose than the purposes of the deed, and that the natural and obvious inference from the deed itself is that it was not intended to prevent the execution of the power by the wife in any way she pleased.

In order that I may be certain as to the contents of the deed, I will read it over before I dispose of the case.

May 7. THE VICE-CHANCELLOR. I have read over this instrument which was executed after the appointment had been made by Mrs. Tomlinson.

I do not see any substantial difference between the appointment that Mrs. Tomlinson made, and that one which the House of Lords, in affirming my decision in *Bray v. Hammersley*, held to be good; for the power of appointment is, in effect, an interest given to the party.

But the question mainly turns upon this instrument of July 1833; and the question upon that instrument is whether it is to be taken as one which had the effect of

binding that interest which Mr. Phipson took by virtue of the appointment which was made by his wife after the execution of this deed. Now the deed professes to be made between Sampson Tomlinson, James Tomlinson and Mr. Phipson and his wife of the one part, and two gentlemen of the name of Turner and Palmer, as trus-[247]-tees, of the other part; and it recites, first of all, the will of William Goore, which gave the fund in question to Elizabeth Goore for life, and then to Mrs. Tomlinson for life, with remainder to her children, or the issue of such of them as should be dead, and, if more than one, in such parts, shares and proportions as she should appoint by her will, and, in default of appointment, in trust for the child or children of Mrs. Tomlinson who should be living at the time of the testator's decease, or the issue of such of them as should be dead. Then the deed recites the death of Goore and the death of Elizabeth Goore; and then it recites the appointment which was made by Mrs. Tomlinson; and the first question is, what is the effect of the appointment that Mrs. Tomlinson made? Why it gave the interest of the fund to Mrs. Phipson for her life for her separate use; and it then gave her a general power of appointment by will. That, therefore, was not an appointment of the whole interest in the fund; but the absolute reversion of the fund would remain undisposed of altogether if there was no testamentary appointment; and the consequence therefore was that that reversionary interest, subject to the contingency of there being a testamentary appointment, would belong to the two brothers of Mrs. Phipson, and to Mr. and Mrs. Phipson in her right. Then the parties, having recited the effect of the appointment, recite that it is conceived that the gift or appointment of the interest and dividends of the £6000 to Mary Phipson for her life is good, but that the power to enable Mary Phipson to dispose of the sum of £6000 and the interest thereof is void, as having exceeded the power given to Martha Tomlinson by the will of William Goore; that it is also conceived that if such power should be valid and should not be exercised by Mary Phipson, then, and in either event, the rever-[248]-sionary interest in the sum of £6000 consols expectant on the decease of Mary Phipson belonged to Sampson Tomlinson, James Tomlinson, John Phipson and Mary, his wife, or some or one of them. The expression, "either event," means, as I understand the instrument, either the event of the testamentary power of disposition given to Mrs. Phipson being void, or the event of its being valid and of her not exercising that power; and then it recites that the two Tomlinsons and Phipson and his wife, in order to obviate any doubts respecting the same, and to carry the intention of the testatrix Martha Tomlinson into effect, had agreed to assign the fund to two trustees on the trusts thereafter declared. Then it is observable that the parties of the first part, according to their several and respective estates and interests in the premises, assign and transfer the fund, describing it, "and all the estate, right, title, interest, use, trust, property, possession, possibility, claim and demand whatsoever, both at law and in equity, of them the said Sampson Tomlinson, James Tomlinson and the Plaintiff and Mary, his wife, or any or either of them, of, in and to the said sum of £6000:" and this assignment is expressed to be made to the gentlemen named as trustees in trust to pay the interest to Mrs. Phipson during her life for her separate use, and then to Mr. Phipson, and then to transfer the fund among their children, according to their joint appointment, or as the survivor should appoint; and, in default of appointment, among the children in the usual form; and in the event of there being no children to take vested interests, then the fund is to go to those persons who would be entitled to the clear residue of Mrs. Phipson's estate in case she died intestate and unmarried. That is the effect of the deed, though the words that are used are rather different. Then there follow [249] certain provisions which are analogous to the power of changing stocks and securities in a common settlement; and then there appears to me to be something rather material with respect to the construction of the instrument; because I observe that it is provided, "that, in case the trustees or either of them, or any future trustees should happen to die, or be desirous to be discharged from, or neglect or refuse to act in the trusts thereby created, at any time or times before the same should be fully performed or otherwise determined, then and in any such case it should and might be lawful, to and for the said Mary Phipson, to nominate and appoint any other person or persons to be a trustee or trustees for the purposes aforesaid;" and no power of

appointing new trustees is given to anyone but her ; and then there follows a covenant, in the nature of a covenant for further assurance ; and, in that covenant, no allusion whatever is made either to the execution or non-execution of the power given to Mrs. Phipson.(1) Then, in the same year 1833, Mrs. Phipson executed the testamentary instrument in question, which bears date in December in that year ; and then, in a subsequent year, namely, on the 22d of December 1835, she did, in professed execution of the power given by the trust deed, appoint Arthur Ryland to be a new trustee of that deed. It is remarkable that Arthur Ryland, who was so appointed to be the trustee of the deed, appears to be one of the witnesses to the execution of the testamentary power. Now, it certainly strikes me that, if the intention of the parties had been to bind, at all events, the power which Mrs. Phipson had, either in the way of providing that she should not exercise the testa-[250]-mentary power or by providing that, if she did exercise it in favour of any of the parties to the deed, then such interest as those parties took should be bound by the deed and should not be taken by the party for his own benefit, an object so simple as that might have been provided for in the easiest and simplest manner. But the parties do not do anything like that ; they merely make the deed in the form I have mentioned ; and then the question arises, has the deed, in that form, at all bound Mr. Phipson, in the event that has arisen, namely, of his being the appointee of his wife of the whole fund, to subject what he takes by virtue of the power of appointment to the trusts of the deed ? My opinion is that it has not. It is observable that the parties contemplated the interests which they then had ; for they recite, first of all, that it was conceived that the testamentary power given to Mrs. Phipson was void ; and, next, that if such power should be valid and not executed, then the reversionary interest in the fund would belong to S. Tomlinson, James Tomlinson and Mr. and Mrs. Phipson. They then assign and transfer, according to their respective estates and interests ; and they profess to convey the fund and all their estate and interest in it ; and it is perfectly plain that, at the time when the instrument was executed, Mr. Phipson and his wife and her two brothers had an interest which might have taken effect in possession if she never exercised her testamentary power ; and it is that, I apprehend, which is the subject of assignment by the deed, and that only ; and I am the more confirmed in that opinion by this fact, namely, that the power of appointing new trustees is given to Mrs. Phipson only. For what reason could the parties have done that, but for this, namely, that, during her own life, she had an interest in the fund [251] for her separate use, and she also had, in herself, that testamentary power which she might have exercised in the same manner as if she had been the plenary owner of the fund in question ; and, therefore, it was right and natural that she, who seemed to have all the dominion over the fund, should have the usual power of naming the persons who, from time to time, should succeed any one of the trustees who might happen to be incapable of acting in the trust ; and, for that reason, I think that this execution of the power to appoint new trustees cannot be taken to be a revocation of the will ; but it is also quite collateral to the execution of the testamentary power, and is only meant to be an execution of the power which is given by this deed in the event of Mrs. Phipson not executing her original testamentary power. And, on the best consideration I can give the subject, my opinion is that, so far as a resistance is made to Mr. Phipson's claim to the absolute ownership of the fund, it must totally fail.

[252] ESTCOURT v. EWINGTON. May 3, 8, 1838.

Practice. Husband and Wife.

An attachment having issued against a married man for want of answer of himself and wife, the sheriff returned *cepi corpus*, but that the husband was insane, and, therefore, incapable of answering.

Ordered that the wife should answer separately, and that the Senior Six Clerk not toward the cause should be appointed guardian to the husband to put in his answer.

(1) The brief did not contain this covenant.

A married man and his wife were two of the Defendants in this cause. An attachment having issued against the former for want of answer of himself and wife, the sheriff returned *cepi corpus*, but that the husband was insane, and, on that account, was incapable of answering.

Mr. Shadwell, for the Plaintiff, thereupon moved that the wife might be compelled to put in an answer for herself and her husband.

THE VICE-CHANCELLOR desired the registrar, Mr. Walker, to ascertain what was the proper order to be made in such a case.

Mr. Walker furnished His Honor with the following extracts from Reg. Lib. :—

Lethley v. Taylor.

Reg. Lib. 1763, fo. 139.

An attachment having issued against the Defendant, Taylor, for want of his and his wife's appearance, the sheriff returned *non est inventus*. The matters in question arose in right of the wife, and it appeared, by affidavit, that the husband was gone abroad. The Plaintiff, therefore, moved that he might be at liberty to sue out process of contempt against the wife, to compel her to appear to and answer the bill; which, upon hearing the affidavit and an affidavit of notice of the motion to her read, was ordered accordingly.

[253] Tarlton v. Dyer.

Hil. 1805, Reg. Lib. B. 227.

The Defendants, Dyer and wife, having answered the original bill, the Plaintiff amended the same: soon after which the husband went abroad, and his wife, the material Defendant, was served with a *subpoena* to appear to and answer the amended bill: but, she refusing to appear, the Plaintiff moved that an attachment might issue against her. But the Court ordered that service of a *subpoena* to appear to and answer the amended bill, on the Defendant Mary, the wife of the Defendant Dyer, should be deemed good service on her.

Nayler v. Byland. May 26, 1814.

Reg. Lib. B. 1813, fol. 845 and 908.

The bill was filed against the Count and Countess Byland, she being the executrix of the testator therein named, and charged that the count was out of the jurisdiction of the Court. On affidavit that he was residing in Holland, it was ordered that service of the *subpoena* to appear, &c., on the Defendant, the countess, should be deemed good service on her: and she having refused to appear, on affidavit of such service, the Clerk in Court was ordered to issue an attachment against her.

Dorrien v. Livingston.

On the sheriff's return, on the attachment that the Defendant was confined at the lunatic asylum at [254] Hoxton, and affidavit by the superintendent of the Defendant's insanity, the Senior Six Clerk not toward the cause was appointed guardian.

Ford v. Clough. Feb. 16, 1837.

Similar order on return to the attachment that the Defendant was insane, and that it was dangerous to remove him, and on affidavit of the Defendant's insanity.

THE VICE-CHANCELLOR ordered that the wife should answer alone, and that service of the *subpoena* upon her should be good service: and that the Senior Six Clerk not toward the cause should be appointed guardian to the husband to put in his answer.

[255] HARRISON v. WILTSHIRE. May 8, 9, 1838.

[S. C. 2 Jur. 679.]

Taxation. Security for Costs.

A solicitor being indebted to A., and being pressed by A. to give him a security for the debt, prevailed on one of his clients (against whom he had a demand for costs, which had not been taxed) to execute to A. a bond for £3000 as a part satisfaction of the costs due from the client to the solicitor; and the solicitor afterwards delivered the bond to A. A. knew that the sum secured by the bond was claimed by the solicitor to be due to him for costs, but had no notice that those costs had not been taxed.

A bill filed by the client against A. and the solicitor, praying that the costs might be taxed, and that the bond might stand as a security for so much only as should be found due from the client, on the taxation, was dismissed as against A. with costs.

The Defendant, Bevir, who was a solicitor, being indebted to the other Defendant, Wiltshire, in the sum of £4500, Wiltshire applied to Bevir to give him a security for the debt; upon which Bevir represented to Wiltshire that Estcourt Cresswell, since deceased (whose personal representatives the Plaintiffs were), and R. Harris were severally indebted to him in considerable sums for monies paid, laid out and expended, advanced and lent by him on their account, and *for business done by him as their solicitor and attorney*; and offered to assign to Wiltshire the debts so due from Cresswell and Harris as a security for the £4500. Wiltshire agreed to accept the security; and, thereupon, by an indenture, dated the 24th of November 1820, and made between Bevir of the one part and Wiltshire of the other part, after reciting that Harris was indebted to Bevir in the sum of £2000 or thereabouts, for monies paid, laid out and expended, advanced and lent to him or on his account, and for business done by Bevir as his attorney and solicitor in various transactions, and that Cresswell also was indebted to Bevir in the sum of £2500 or thereabouts, on the balance of account for monies paid, laid out and expended, advanced and lent to him and on his account, *and for business done by Bevir, as his attorney and solicitor* in divers transactions, Bevir assigned to Wiltshire all the debts and sums of money which then [256] were or thereafter should be found due and owing to him by Harris and Cresswell, in respect of any matter or thing whatsoever, to the day of the date of the indenture, and all interest which then was or might accrue due in respect thereof, and also all bonds, bills, notes, deeds, mortgages and other securities whatsoever, then in Bevir's custody or power, given or deposited for securing the same debts respectively, or either of them, or any part thereof, or on which Bevir had any lien in respect thereof; to hold the monies to be recovered or received by virtue of the assignment to Wiltshire, his executors, &c., in trust to retain thereout the £4500 and interest, and to pay over the surplus, if any, to Bevir, his executors, &c.

Wiltshire did not consider this assignment to be a sufficient security for his debt, without some acknowledgment from Harris and Cresswell of the amount due from them respectively to Bevir; and, therefore, he pressed Bevir either to procure such acknowledgment, or to give him some further security for his debt. In consequence of which Bevir, in February 1821, sent to him a bond, dated the 23d of that month, in the penalty of £6000, conditioned for payment by Cresswell, his heirs, &c., to Wiltshire, his executors, &c., of the sum of £3000, with interest at five per cent., on the 23d of August then next. This bond did not contain any recitals, but was a common money bond. It was executed by Cresswell at Bevir's request in part satisfaction of Bevir's demands on him. Cresswell's steward and two of his sons were present when he executed the bond; and one of his sons read it over and explained it to him. At the time when it was executed Bevir had not delivered either his accounts or his bills of costs to Cresswell; but at a [257] meeting held two days before, at which Cresswell's steward and several members of his family were

present, the probable amount of Bevir's demands upon Cresswell was taken into consideration and stated at £4000 and upwards.

The bill alleged that, at the time when the bond was executed, no bills of costs had been delivered to Cresswell by Bevir for the £3000, nor any account given to shew in what manner that sum had become due, and that it was a fraud on the part of Bevir to prevail on Cresswell to execute the bond; that no money was paid, nor was any consideration given, by Wiltshire to Cresswell for the bond; and that Wiltshire, at the time he accepted the bond, knew that Bevir was Cresswell's solicitor, and that Bevir had prevailed on Cresswell to execute it by representing the £3000 to be due to him for costs; that, under the circumstances aforesaid, the bond ought to be delivered up to be cancelled, or ought to stand as a security for such sum only as was really due from Cresswell to Bevir at the time it was executed; and that Bevir's bills of costs ought to be delivered and taxed. The bill prayed that it might be declared that the bond ought to stand as a security for such sum only as was justly due from Cresswell to Bevir at the time of the execution thereof; that an account might be taken of what was then due; and that Bevir might be decreed to deliver the bills of costs which were then due to him from Cresswell, and that the same might be taxed; and, if it should appear that nothing was then due from Cresswell to Bevir, that the bond might be delivered up to the Plaintiffs to be cancelled.

Cresswell in his answer admitted that, when he ac-[258]-cepted the bond, *he knew that Bevir was Cresswell's solicitor and that Bevir claimed the £3000 as due to him, as such solicitor, from Cresswell*; but he denied that he then knew or had been informed that Bevir had not delivered either his bills of costs or his accounts to Cresswell.

Mr. Wigram, Mr. Wray, and Mr. Monro, for the Plaintiffs. At the time when the bond was executed no bills of costs or accounts had been delivered by Bevir to Cresswell; and Wiltshire does not attempt to dispute that fact. If the bond had been given to Bevir there can be no doubt that we should be entitled to the relief sought by the bill. Wiltshire, when he took the bond, knew that it was given in respect of costs due from a client to his solicitor, and he does not affect to say that he had ascertained that those costs had been taxed. As he took the bond with notice of the circumstances under which it was executed, he stands in the same situation with respect to it as Bevir would have done, and must hold it subject to the same equities as Bevir would have been liable to, had it been given to him. If that were not so, it would always be in the power of a solicitor to evade the liability to have a security for costs reduced on taxation, by prevailing on his client to give the security to a third person. If a person takes a bill of exchange that is overdue, he takes it subject to all the equities to which it is liable, whether he had notice of them or not. There is nothing which makes this case different from a case between Bevir and Cresswell. *Horlock v. Smith* (2 Myl. & Craig, 495), *Waters v. Taylor* (*Ibid.* 526), *Detillin v. Gale* (7 Ves. 583), *Down v. Halling* (4 Barn. & Cres. 330).

[259] Mr. Jacob and Mr. Wilbraham, for the Defendant Wiltshire. There is no case against Wiltshire, unless it be the law that a party who takes from a solicitor a security given by the client stands in the same situation with respect to it as a person who takes a bill of exchange that is overdue. There is no analogy between a bond and an overdue bill. There is no evidence that Wiltshire, when he took the bond, knew that the costs due from Cresswell to Bevir had not been taxed. Suppose that Bevir had prevailed on Cresswell to pay him the £3000 in bank notes, and had handed them over to Wiltshire; could Cresswell or his representatives have followed the money in the hands of Wiltshire and have compelled him to pay it into Court to await the taxation of Bevir's bills of costs?

Mr. Parry appeared for the Defendant Bevir.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is a very simple case.

With respect to the Defendant Wiltshire, it is plain that the bill must be dismissed with costs. There is nothing whatever to impeach his right to hold the bond and to insist on being paid the whole of what is due on it out of Cresswell's estate. A previous assignment had been made to him by Bevir of debts due from Cresswell and Harris; and then a bond was given by Cresswell, which Bevir put into the possession of Wiltshire, as a security, *pro tanto*, of the debt due to him. There was nothing whatever to raise a suspicion in the mind of Wiltshire that the bond was

given for a demand, the amount of which had not been ascertained; but, on the contrary, the amount of the demand was, to all appearance, settled. There is nothing, therefore, to affect the validity of the bond as far as Wiltshire is concerned; and, as to him, the bill must be dismissed with costs.

[260] PIGGOTT v. GARRAWAY. May 28, 1838.

Payment of Money out of Court. Construction of Lord Brougham's 28th Order.

Lord Brougham's 28th Order, which directs that orders for paying out sums of money shall specify the amount to be paid out, applies to those cases only in which the amount to be paid out can be ascertained at the time when the order for payment is made.

By an order in this cause, it was directed that so much of the fund in Court as should be sufficient to answer 10s. in the pound on certain ascertained legacies should be raised and paid to the legatees: the amount to be verified by affidavit. The Accountant-General's clerk objected to this order on the ground that it did not specify the amount to be paid; as he contended it ought to have done according to Lord Brougham's 28th Order, which directs that in all cases where any sums of money or any securities or other effects belonging to the suitors of the Court of Chancery, shall be directed to be paid into or deposited in the Bank of England in the name and with the privity of the Accountant-General of the said Court, and in all cases where any such sum of money or any securities or other effects be directed to be paid out or invested in the purchase of securities, transferred or carried over or delivered out, *the exact sum of money and amount of securities so to be paid out, invested, transferred or carried over, be ascertained by the registrar and specified and expressed in the order of Court in words written at length, except in the case of residues of money or securities remaining after a portion directed to be applied for particular purposes, the amount of which cannot be ascertained at the time of making the said order, in which cases the order shall direct that the amount of such residues and shares of residues shall be ascertained and specified by affidavit.*

On the objection being mentioned by Mr. K. Bruce,

THE VICE-CHANCELLOR said that Lord Brougham's Order could not be taken to be applicable unless the sum [261] directed to be paid could be ascertained at the time when the order for payment was made: and that the sum mentioned in the affidavit, in this case, was the sum which the Accountant-General ought to pay.

[261] DRIVER v. WRIGHT. May 31, 1838.

Practice. Discovery. Production of Documents.

Where a Defendant to a bill of discovery in aid of an action brought against him by the Plaintiff has been ordered to deposit, in the hands of his Clerk in Court, documents admitted in his answer to be in his custody, the Plaintiff is entitled to have such of those documents as by reference in the body of the answer are made part of the answer, produced and read at the trial as part of the answer.

The bill was filed for a discovery in aid of an action which had been brought by the Plaintiff against the Defendant; and, in obedience to an order made in the cause, the Defendant had deposited, in the hands of his Clerk in Court, certain documents which his answer admitted to be in his custody or power.

The Plaintiff now moved that the Defendant's Clerk in Court might attend at the trial of the action, with the documents that had been deposited in his hands, in order that the same might be read as part of the answer.

Mr. James Russell appeared for the Plaintiff, in support of the motion.

Mr. Willcock, for the Defendant, cited *Brown v. Thornton* (1 Myl. & Craig, 243).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that *Brown v. Thornton* did not apply; for it did not appear, in that case, that the documents to which the motion related were, by re-[262]-ference, made part of the answer: that the Plaintiff was entitled to have the whole of the answer produced at the trial of the action; and, therefore, if the officer of the Court had in his possession documents which were made part of the answer, he ought to attend at the trial with those documents, as otherwise the Court of law would not have the whole of the answer before it.

Ordered. That the Defendant's Clerk in Court should attend at the trial, with such of the documents as were referred to in the body of the answer, in order that the same might be read as part of the answer.

[262] BOYS v. MORGAN. May 31, 1838.

Demurrer. Practice.

In computing the 12 days allowed by Lord Brougham's 10th Order, for filing demurrers, an intervening Vacation is not to be excepted.

The Defendant appeared on the 11th of May, and filed a demurrer in the forenoon of the 24th, being the thirteenth day after his appearance.

Mr. K. Bruce, for the Plaintiff, moved that the demurrer might be taken off the file for irregularity, on the ground that it had not been filed within the time prescribed by Lord Brougham's Tenth Order, namely, 12 days after appearance.

Mr. J. Russell, *contrà*, said that, if a demurrer was filed before eleven o'clock on any day, it was the practice of the officer to consider it as filed on the day preceding: that, in this case, the office had been closed for the Easter recess during the preceding week; and, in *Bullock v. Edington* (*ante* vol. 1, p. 481), Sir A. Hart, V.-C., held [263] that the eight days allowed by the orders of the Court for entering a demurrer with the registrar were eight office days; and, consequently, the demurrer in this case had been filed in due time.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case cited does not affect the present question. In that case the demurrer had been filed, and the question was whether it had been entered with the registrar, which was an act subsequent to the filing, had been done in due time; and Sir A. Hart thought that the eight days mentioned in the order there alluded to were days on which the office was open.

Here the question is not whether the demurrer was properly dealt with in the offices after it had been filed, but whether it was filed in due time. By Lord Brougham's Tenth Order, the time within which a demurrer must be filed is 12 days after appearance; and everyone knows that a demurrer, as well as a bill, may be filed in Vacation.

Motion granted.

[264] STANLEY v. THE CHESTER AND BIRKENHEAD RAILWAY COMPANY.
May 29, 1838.

[Affirmed, 3 My. & Cr. 773; 40 E. R. 1124 (with note).]

Agreement. Railway Company. Corporation.

Certain persons intended to form a railway from A. to B., which was to pass over the Plaintiff's estate. The Plaintiff opposed the project: but, on the agent for the projectors agreeing, in writing, to pay him £20,000 for the portion of his estate over which the railway was to pass, he consented to withdraw his opposition. At the same time certain other persons intended to form a railway between the same *termini*, but by a different line, which also passed through the Plaintiff's estate, but not through the same part of it as the former line: 14 acres of the Plaintiff's land were required for the former railway, and 16 acres for the latter. The Plaintiff

opposed the latter railway also. The agents for the rival projectors then entered into and signed an agreement (which was approved of and signed by the Plaintiff's agent) by which they agreed that the first line should be abandoned and the second adopted, and that the adopted line should take the engagements entered into, with the landowners, by the abandoned line: and, thereupon, the Plaintiff withdrew his opposition to the adopted line; and the Act of Parliament for making the second railway and for incorporating the projectors of it was passed. Held, the incorporated company were bound to perform the agreement made with the Plaintiff by the projectors of the first railway.

In the year 1836 certain persons were proposing to form a company to make a railroad from Chester to Birkenhead, and were intending to apply for an Act of Parliament to enable them so to do; and they proposed to call themselves, "The Chester Junction Railway Company;" but they afterwards changed that name for "The Birkenhead and Chester Railway Company." The line of railway proposed to be formed by the intended company was, according to the plans deposited by them with the Clerk of the Peace for the county of Chester, to pass through and over certain parts of the estates of the Plaintiff, and would have been injurious to and destructive of the Plaintiff's property; and he was, therefore, in the first instance, much opposed to the formation of the railway. William Spurstow [265] Miller was the solicitor employed by the promoters of the intended railway; and, in that character, he made overtures to the Plaintiff for his consent to the execution of the plan; and, after some negotiation, the Plaintiff undertook to give his consent to the company for the proposed line of railway, and to permit them to form the same through and over his estates, on terms to be fixed by the agents of the Plaintiff and the intended company. The promoters of the railway appointed Miller to act for them in settling the terms between them and the Plaintiff, for the purchase of so much of his land as was required for the purposes of the proposed railway, and for the damage to the Plaintiff consequential on the formation of it; and Miller was duly authorized to act therein for the promoters of the company; and the Plaintiff appointed and authorized Richard Blundell to act for him. Miller and Blundell accordingly met; and, on the 17th of January 1837, a memorandum bearing that date was signed by them, which was as follows:—"Memorandum of terms of arrangement, this 17th day of January 1837, agreed upon between the undersigned Richard Blundell, on behalf of Sir Thomas Stanley, Bart., on the one part, and William Spurstow Miller, on behalf of the proposed Chester Junction Railway Company, on the other part. Whereas the said company propose applying to Parliament in the ensuing session, for an Act of Parliament to form a railway from the ferries opposite to a certain place on the proposed Grand Junction Railway now forming, called Crewe, or some portion thereof, and have deposited plans with the Clerk of the Peace for the county of Chester of such proposed measure: and whereas the line of railway as delineated in the said plans will run a considerable distance through the lands and property of Sir Thomas Stanley, and will, as he [266] alleges, seriously injure his property, and cause considerable damage to himself and his tenants: and whereas Sir Thomas Stanley hath been applied to for the sale of his land so to be taken by the said railway, and the same, including compensation for all damages both present and consequential, both to himself and his tenants, of every description whatsoever, whether arising from severance or otherwise, have been agreed and fixed at the sum of £20,000: now it is hereby agreed and fixed that, in case the said Act shall pass into a law, the said company shall pay to Sir Thomas Stanley the said sum of £20,000 at the following times and in the following manner, that is to say, the sum of £5000 previous to the company entering on to the land for the purpose of commencing the formation of the said railway, and within three months from the day the Act of Parliament shall receive the Royal assent, and the sum of £10,000 within twelve months from the day of the first-mentioned payment, and the sum of £5000 within twelve months from the day of payment of the last-mentioned payment; and that, on payment of the last-mentioned sum of £5000, and not before, Sir Thomas Stanley shall execute, with all proper parties, a conveyance of such part of his property as shall be required for the railway, as delineated and marked out in the plan so deposited; and that, in the formation of the railway, such conveniences as

Sir Thomas Stanley shall require for communication with the land on each side and for hunting purposes shall be made, and, in case of any difference on this point, the same shall be left to his surveyor and one to be appointed by the company, and of such third person as the two so named shall appoint, and the decision of any two of them shall be conclusive."

About the same time as the scheme for forming [267] the Birkenhead and Chester Railway Company was on foot, another proposal was made by other parties for forming a railway between the same points, Chester and Birkenhead, but by a different line; and it was proposed by them that application should be made to Parliament for forming them into a company, with powers to make such railway, and which should be called "The Chester and Birkenhead Railway Company."

The proposed line of the proposed Chester and Birkenhead Railway also passed through and over the Plaintiff's estates, and to such line the Plaintiff dissented.

Joseph Mallaby was the solicitor for the company intended to be called "The Chester and Birkenhead Railway Company," and was authorized to act for them; and in the session of 1837 two bills were introduced into the House of Commons by the respective promoters of them, one for forming the line of railway to be called "The Birkenhead and Chester Railway," and the other for forming the line of railway to be called "The Chester and Birkenhead Railway." Both the bills were referred to the same Committee of the House, by whom the respective merits of the two rival lines were examined; and, in the progress of such examination, a proposal was made by one of the members of the Committee, that it should be referred to Lord Sandon and Mr. Wilson Patten, two members of the Committee, to determine which of the two proposed lines should be adopted. This proposal was assented to by the promoters of the two bills; and an entry of the fact of such agreement for reference was made in the minutes of the proceedings of the Committee. Before the Committee adjourned for the day on which such proposal was [268] made and agreed to, an agreement was made and signed by the respective solicitors for the two bills, which was as follows:—"It is agreed by the undersigned solicitors of the Chester and Birkenhead and Birkenhead and Chester Railways, for and on behalf of their respective clients, that the merits of the two lines shall be submitted to Lord Sandon and Mr. Wilson Patten, who are to decide which line shall be adopted, and what ought to be done for the accommodation of the different ferries by the line selected. It is the basis of the agreement that the shareholders of the rejected line are to be at liberty, if they think proper, to take shares in the other line: and further, *that the adopted line is to take the engagements entered into with the landowners by the rejected line.*—18th April 1837.—Joseph Mallaby, solicitor for the Chester and Birkenhead Railway.—W. S. Miller, Samuel Brittain, jun., solicitors to the Birkenhead and Chester Railway." This agreement was approved of and adopted by the promoters of the two bills, and by the agent of the Plaintiff; and such approval was testified by the agreement being signed as follows: "Approved, R. Bryan, chairman, Christopher Bentham: Approved, George John Chamberlayne, Samuel Brittain: Approved, Richard Blundell." Bryan and Bentham were two of the members of the committee acting for the promoters of the Chester and Birkenhead Railway Company's bill, and Chamberlayne and Brittain were two of the committee acting for the promoters of the Birkenhead and Chester Railway Company's bill; and Blundell was the agent authorized to act for the Plaintiff.

The referees made their award, which was filed amongst the minutes and proceedings of the Committee of the House of Commons. The award, after deciding [269] in favour of the Chester and Birkenhead line, concluded as follows:—"Having no authority from the landowners we have not felt ourselves at liberty to go into detail into the question of injuries apprehended by them from the respective lines. They will, of course, remain in full possession of the right of being heard before the Committee, and stating their objections to either line.—Sandon. T. Wilson Patten."}

Upon this award being made, the Birkenhead and Chester bill was withdrawn; and the bill for making a railway from Chester to Birkenhead was passed by the House of Commons.

The Plaintiff, relying on the agreement so made between Miller on behalf of the Birkenhead and Chester Railway Company, and Blundell on the Plaintiff's behalf, and

so as aforesaid agreed to be adopted by the Chester and Birkenhead Railway Company, assented to the proposed bill for forming the Chester and Birkenhead Railway, and took no part in the further opposition that was made thereto in the House of Commons and in the House of Lords. The Chester and Birkenhead Railway bill passed the House of Lords, and the Royal assent was given to it on the 12th of July 1837: and, by the Act of Parliament so passed, it was enacted that certain persons therein named, of whom Bryan and Bentham were two, should be united into a company for making and maintaining that railway, and should be a body corporate by the name of "The Chester and Birkenhead Railway Company."

The bill, after stating as above, and that the Defendants pretended that no contract or agreement was ever made by them with the Plaintiff or any one on his [270] behalf, for the purchase of any part of his estates, charged that, by the terms of the agreement under which the reference to Lord Sandon and Mr. Wilson Patten was made, the Defendants adopted the agreement of the 17th of January 1837, which had been entered into between Miller and Blundell as aforesaid; and took upon themselves all the liabilities under it of the promoters of the other line of railway, who, under it, would have been bound to pay to the Plaintiff, and therefore the Defendants became bound to pay him, at the times and in the manner in that agreement specified, the sum of £20,000: that the Defendants pretended that, although they undertook, in general terms, to adopt all the engagements entered into by the promoters of the other line of railway with the landowners, yet that they did not know of the existence of the contract or agreement with the Plaintiff, and were, therefore, not bound by it; but the bill charged that, at the time when the proposal for reference to Lord Sandon and Mr. Wilson Patten was under consideration between the several parties, Miller acting as solicitor and agent of the promoters of the line which was afterwards rejected, distinctly informed Mallaby, who was acting as solicitor and agent of the promoters of the line which had been adopted, and in the presence and hearing of Blundell, the agent of the Plaintiff, of the existence of a contract or agreement with the Plaintiff; and, although Miller declined to name the exact sum which, under such contract or agreement, was to be paid to the Plaintiff, yet he informed Mallaby, and also two of the persons acting as a committee for the Chester and Birkenhead Railway Company, that the sum was more than £15,000, but would not exceed £20,000; and that it was after they had distinct knowledge, to that extent, of the contract or agreement with the Plaintiff, that the [271] agreement for reference to Lord Sandon and Mr. Wilson Patten was made and signed: that the Defendants pretended that the contract or agreement so made between Miller and Blundell was binding upon them only in the event of their taking the same line of road that was the subject of that agreement; and that the line that they were authorized by the Act of Parliament to take would not require so much of the Plaintiff's land as would have been required or taken by the other line, and would not do so much injury to the Plaintiff's estate as would have been done by the other line; and that, therefore, they ought not to be bound to pay so large a price as had been agreed upon; whereas the Plaintiff charged that, by the line of road proposed to be formed by the Birkenhead and Chester Railway, only $14\frac{1}{2}$ statute acres would have been taken of the Plaintiff's land; whereas, by the line to be formed by the Defendants, $16\frac{3}{4}$ statute acres were to be taken; and the rejected line was purposely laid down so as to avoid certain fox coverts and preserves on the Plaintiff's estate; whereas the line of the Defendants went through and destroyed two fox coverts and preserves, and, in other respects, did much greater injury to the Plaintiff and his estate than would have been done by the line of railway, the formation of which was the subject of the agreement.

The bill prayed that it might be declared that the agreement of the 17th of January 1837 was binding upon the Defendants, and ought to be performed by them; and that, under it, they were bound to pay to the Plaintiff, at the time and in the manner therein mentioned, the sum of £20,000; and that they might be decreed specifically to perform the said agreement, and, forthwith, to pay to the Plaintiff the sum of £5000, [272] and to pay to him the sum of £10,000 on the 13th of October then next, being twelve months from the day when the first £5000 ought to have been paid, and to pay to the Plaintiff the further sum of £5000 on the 13th day of October 1839; the Plaintiff offering to perform and execute the agreement, in all respects, on his part.

The Defendants demurred to the bill for want of equity.

Mr. Jacob, Mr. Wigram, and Mr. Walker, in support of the demurrer. In *Edwards v. The Grand Junction Railway Company* (1 Myl. & Cr. 650, and *ante*, vol. 7, p. 337) a body corporate was held to be bound by an agreement entered into, not by the body corporate, but by an agent for the projectors of the company, before they were incorporated. It is not very easy to collect, from the judgment on the appeal in that case, on what principle the company were held to be bound. In this case, however, the object is to transfer an agreement entered into with one company and relating to one set of lands to another company and another set of lands, or, in other words, a contract with A. respecting Black Acre, is to be considered as a contract with B. respecting White Acre.

This bill treats of two intended railway companies; one proposed to be called the Chester Junction Railway Company, which name was afterwards changed for that of the Birkenhead and Chester Railway Company, but which never came into existence; and the other, the Chester and Birkenhead Railway Company, [273] which was brought into existence by an Act of Parliament passed in 1837. Miller is described in the bill as the solicitor for the *promoters* of the intended railway; and the bill states that, in that character, he made overtures to the Plaintiff for his consent to the execution of the plan; and that, after some negotiation, the Plaintiff undertook to give his consent to the company for the proposed line, and to permit them to form the same through his estates, on terms to be fixed by the agents of the Plaintiff and the said *intended company*. In the next allegation, a different phraseology is used, namely, that the *promoters* of the railway appointed Miller to act for them in settling the terms between them and the Plaintiff. The bill then sets forth the agreement which was entered into between the agent for the Plaintiff, and the agent for the *promoters* of the company. It related to the compensation to be made to the Plaintiff for land to be taken and damage to be done in making the Birkenhead and Chester Railway; and it was to be binding only in case "the said Act," that is, the Act which Miller's clients were applying for, should pass into a law.

Now we come to the other company, to which the liability under this agreement is sought to be transferred: the company with which the agreement was made proved to be an abortion. This other railway was to be formed between the same points, but *by a different line*; and it was intended to be called the Chester and Birkenhead Railway. The bill then alleges that Mallaby was the solicitor for the Chester and Birkenhead Railway Company, and was authorized to act for them; and that two bills were introduced into the House of Commons by the respective *promoters* of the two railways. Then an agreement entered into by [274] the solicitors of the railways is set forth; and, in that agreement, we find a different term used, namely, *shareholders*. This latter agreement was a contract of indemnity between the two rival companies. The Plaintiff cannot be entitled to the benefit of it; for he was no party to it; and, moreover, his agreement with the rejected company was to be binding on them in the event only of their bill passing into a law, which it did not.

In order to bind a company by a contract entered into previous to their incorporation, the contract must be one which was binding on all the individuals of the company. But here the object is to transfer a contract, entered into with the promoters of one railway to the promoters of another railway, and from them to the company: and it does not appear that the individuals who were incorporated were the promoters of the second railway.

Lastly, if a party seeks to enforce an agreement, he must shew mutuality, that is, that there is an agreement binding on both sides. But, if the Defendants were to seek to enforce this agreement against the Plaintiff, he would say, "*Non hæc in federa veni*. I contracted to sell a smaller quantity of land and in another line." The Plaintiff does not offer by his bill to give up the land over which the Chester and Birkenhead Railway is to pass; but he asks for a specific performance of the agreement entered into by him with the promoters of the Birkenhead and Chester Railway. That agreement was to take effect on the happening of an event which has not occurred, and is never likely to occur; and if the Defendants were compelled to take the land which forms the subject of that agreement, it would be utterly useless to them.

[275] Mr. Knight Bruce, Mr. Temple and Mr. Lowndes appeared for the Plaintiff; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: This case is a very simple one.

Certain persons entered into an agreement to form a railway, to be called the Birkenhead and Chester Railway, and a Mr. Miller was appointed their agent and solicitor. As the proposed line was to pass through the estates of the Plaintiff, he objected to the project. An agreement was then made between Miller, as the agent for the projectors of the railway, and Blundell, as the agent for Sir T. Stanley, the immediate effect of which was that, on certain terms specified therein, Sir T. Stanley should withdraw his opposition to the intended railway and allow it to pass through his estates: so that, by making this agreement, the promoters of the railway obtained the advantage which they stipulated for. The agreement provided that the company should pay to Sir T. Stanley £20,000 by instalments; and that the company should not enter on his lands until the first instalment was paid.

About the same time other persons projected a railway, which was to be called the Chester and Birkenhead Railway, and which was to be formed between the same *termini* as the first-mentioned railway, but by another line; and it was designated by their plan that their line also would pass through Sir Thomas's estates. An agreement was subsequently entered into between the solicitors for the two bills for making the rival railways, which were then pending before a Committee of the House of Commons, by which it was agreed that the merits of the two lines should be submitted to Lord [276] Sandon and Mr. Wilson Patten, two of the members of the Committee, who were to decide which line should be adopted. Then Lord Sandon and Mr. Patten made their award, by which they determined that the line projected by the Chester and Birkenhead Company should be adopted: and, at the close of their award, they say: "Having no authority from the landowners, we have not felt ourselves at liberty to go into detail into the question of injuries apprehended by them from the respective lines. They will, of course, remain in full possession of the right of being heard before the Committee and stating their objections to either line."

That award having been made, the bill represents that the Birkenhead and Chester bill was withdrawn, and the bill for making a railway from Chester to Birkenhead was passed by the House of Commons.

While this arrangement between the Chester and Birkenhead Railway Company and the Birkenhead and Chester Railway Company was under discussion, an agreement, dated the 18th of April 1837, was entered into by the solicitors of the promoters of the two bills, by which agreement they first of all determined that the merits of the two lines should be decided as I have mentioned, and also that it was the basis of the agreement that the shareholders of the rejected line should be at liberty, if they thought proper, to take shares in the other line; and that the adopted line should take the engagements entered into with the landowners by the rejected line: and there is no difficulty in understanding what the parties meant, namely, that everything agreed to be done, which bound the Birkenhead and Chester Railway Company, should bind the Chester and Birkenhead Company, as between the two companies [277] themselves. But as that alone would not be sufficient, the agreement between Miller and Mallaby was approved and adopted by the promoters of the two bills; and such approval was testified by the signatures of two of the committee acting for the promoters of the Chester and Birkenhead Railway, and by two of the committee acting for the promoters of the Birkenhead and Chester Railway; and it was signed by Blundell, the Plaintiff's agent, as follows:—

"Approved, R. BLUNDELL."

The bill then states that the Plaintiff, relying on the agreement made between Miller on behalf of the Birkenhead and Chester Railway Company, and Blundell on the Plaintiff's behalf, and so agreed to be adopted by the Chester and Birkenhead Railway Company, and not doubting that the same would be faithfully adhered to and executed by the latter company, assented to the proposed bill for forming that company, and took no part in the further opposition that was made thereto in the

House of Commons or in the House of Lords. And so it appears that a consideration was actually given by the Plaintiff to the persons who afterwards formed the Chester and Birkenhead Company, namely, by his making no opposition to the further progress of their bill. It was quite plain, when the matter was in discussion, that the Plaintiff's estates would be affected by the Chester and Birkenhead Bill, and what parts of his estates would be affected by it : and it is immaterial that there is a slight difference in the quantities required for forming the two lines that is to say, fourteen acres and a half for the rejected line, and sixteen acres and three quarters for the adopted line, except that it shews fairness on the part of Sir T. Stanley.

[278] The agreement of the 18th of April 1837 was signed by the agents of all parties ; and the stipulation thereby made that the adopted line should take the engagements entered into with the landholders by the rejected line was the same in effect as saying that, instead of a new agreement being entered into between the Plaintiff and the Chester and Birkenhead Railway Company, the agreement between the Plaintiff and the Birkenhead and Chester Company should be the agreement between the Plaintiff and the Chester and Birkenhead Company. The Chester and Birkenhead Company are, therefore, as much bound to pay the £20,000 for taking the lands of the Plaintiff over which their line passes as the Birkenhead and Chester Company would have been for taking the lands over which their line was intended to pass.

The Plaintiff asks, by his bill, that the agreement of the 17th of January 1837 may be specifically performed ; and that the Defendants may be decreed to pay the £20,000 to him in the specified instalments ; and there is not the least doubt in my mind that he is entitled to the relief which he asks ; and, therefore, the demurrer must be overruled.(1)

[279] MARRIOTT v. TARPLEY. May 29, June 1, 4, 1838.

[S. C. 7 L. J. Ch. 245 ; 2 Jur. 464. Explained, *Batten v. Gedye*, 1889, 41 Ch. D. 507.]

Churchwardens. Jurisdiction. Pleading. Misjoinder.

A suit in this Court by the churchwardens of a parish to restrain a person from pulling down the churchyard wall is maintainable : and the churchwardens, notwithstanding their office has ceased, may file a supplemental bill for the purpose of stating facts occurred since the filing of the original bill, and may join their successors as Co-plaintiffs with them in the supplemental suit.

The Rev. K. M. Tarpley, who was the vicar of the parish of Floore, in Northamptonshire, claimed a right-of-way, from the vicarage house to the parish church, over land belonging to Richard Packe, Esq., upon which the wall of the churchyard abutted : and, in assertion of that right, he, in 1833, began to pull down part of the wall of the churchyard, in which he alleged that a gateway had formerly existed.

The Plaintiff was William Marriott, who was one of the churchwardens of the parish. The Defendants were Tarpley, the Dean and Chapter of Christ's Church, Oxford, who were the patrons of the vicarage and rectors of the parish, and Thomas Marriott, who was the other churchwarden of the parish. The bill prayed for an injunction to restrain Tarpley from pulling down the wall : and an injunction for that purpose was obtained on an *ex parte* application. An action of trespass was afterwards brought against Tarpley by Jakeman, the tenant of the land over which the right-of-way was claimed. Tarpley, in justification of his trespass, pleaded, first, a right-of-way for the vicar for the time being from the vicarage house to the parish church ; and, secondly, a common public highway over the land. Issue was joined on both pleas ; and the action was tried at the Spring Assizes for Northamptonshire in 1834, when a verdict was found for the Plaintiff in the action on both issues. In the following term, an application was made to the Court of Common Pleas for a [280] new trial, on the ground that the verdict was against evidence. But Mr. Justice Little-
dale, before whom the action was tried, having been referred to, and having certified

(1) Affirmed by the Lord Chancellor ; see 3 Myl. & Cr. 773.

that the verdict was satisfactory, the new trial was refused. Tarpley then put in his answer; and thereby set up a new claim to the right-of-way, namely, as a church-way. He afterwards moved to dissolve the injunction; but the motion was refused. A supplemental bill was then filed by William Marriott, who had ceased to be churchwarden, and James Phillips, who had succeeded him, against Tarpley, the Dean and Chapter of Christ's Church and Thomas Marriott, who had been re-elected churchwarden, for the purpose of stating the proceedings that had taken place at law.

The cause now came on to be heard. In the course of the argument three questions were raised:—

First, whether the churchwardens were entitled to institute the suit:

Second, whether William Marriott, who had ceased to be a churchwarden, ought to have been made a Co-plaintiff with his successor, Phillips, in the supplemental suit: and,

Third, whether the Ecclesiastical Court had not exclusive jurisdiction over the subject-matter of the suit.

Mr. Wakefield, Mr. Jacob and Mr. Turner, for the Plaintiffs, said that the guardianship of the fabric of the church and of the walls and fences belonging to it was vested, by law, in the churchwardens; and that they might maintain an action for a trespass committed on [281] the property of which they were guardians; and, consequently, they could maintain a suit in equity to restrain the trespass.(1)

Mr. Knight Bruce, for the Defendant Tarpley, said that churchwardens might maintain an action for chattels, but not for things real belonging to the church, as appeared from the passage in Viner's Abridgment, which had been cited by the Plaintiff's counsel: that the proper course of proceeding, in a case like the present, was either by indictment or by information in the name of the Attorney-General, or by a bill filed by one parishioner on behalf of himself and the other parishioners (3 Com. Dig. tit. Eglise, F. 3, p. 656): that, as the suit was instituted by an annual officer, it did not enable the Court to adjudicate finally on any right: that it was not the habit of the Court, in any case, to decide a right after a single trial only; and, therefore, the Court would not make the injunction perpetual without allowing Tarpley to try over again the issues in Jakeman's action: that, at all events, he ought to be allowed to try the right to a church-way which he insisted on, for the first time, in his answer, and which never had been tried: that William Marriott, being no longer a churchwarden, had ceased to have any interest in the subject-matter in dispute, and, therefore, the original suit, the object of which was to decide a right between two parties, one of whom had ceased to have any interest, must fail; that, at all events, the supplemental suit could not be maintained; because a person who had no interest was joined as Co-plaintiff, [282] with a party who had an interest, and such a misjoinder of parties was a fatal objection to the suit.

Mr. Koe and Mr. Waddington, with Mr. K. Bruce, said that churchwardens might be the owners of the goods, but that they had no interest in the freehold of the church,(2) and, therefore, they could not maintain an action with respect to the realty; and, moreover, the will expressly alleged that the Dean and Chapter of Christ's Church were the owners of the boundary fence of the churchyard. [THE VICE-CHANCELLOR. Suppose that the churchwardens are liable at law to keep the walls of the churchyard in repair, would it not follow that they might bring an action on the case against any person who injured the walls?] The churchwardens are not personally liable to repair any of the buildings or erections belonging to the church: they are liable to repair them only as representing the parishioners, and if they have, in their hands, funds produced by the church rates for that purpose, and it is doubtful whether they can maintain an action in respect of such a liability. *Philips v. Pearce* (5 Barn. & Cress. 433). By the 59 Geo. 3, c. 12, churchwardens were created corporations for certain purposes; but, until that Act was passed, they were incapable

(1) 1 Burn. E. L. 346, 413; 2 Roll's Ab. 287; Vin. Ab. tit. Churchwardens, A. 2, *placita* 4 and 5, and see same tit. *placitum* 10; *Anon.*, 1 Vent. 127; Watson's Clergyman's Law, 382; Gibson's Codex, 218.

(2) Bac. Ab. tit. Churchwardens (B.); Year Book, 12 H. 7, p. 27; 11 H. 4, p. 12; Bro. Ab. tit. Corporations, folio 185.

of holding land for any purpose whatever. *Doe v. Terry* (4 Adol. & Ell. 274; see p. 281).

This case is peculiarly within the jurisdiction of the Ecclesiastical Court. *Bennett v. Bonaker* (2 Haggard, Eccl. Rep. 25), *Walter* [283] *v. Montagu* (Curtis's Rep. 253). [THE VICE-CHANCELLOR. The bill in this case is filed for an injunction; and, if the Ecclesiastical Court will interfere as against a person who has pulled down the wall of the churchyard, it follows that this Court will grant an injunction. The cases cited are therefore in favour of the jurisdiction of this Court.]

It is impossible to maintain the suit in the manner contended for by the Plaintiffs; for, as Phillips does not derive his title under the prior churchwarden, he ought to have been brought before the Court, not by a supplemental bill, but by an original bill in the nature of a supplemental bill. *Lloyd v. Johnes* (10 Ves. 37).

Mr. Wakefield, in reply. Churchwardens are bound by law to keep the church fence in repair: and it is no answer to the censures of the Ecclesiastical Court for a neglect of that duty for them to say that they have no funds in their hands; for they are bound to provide the funds in the manner which the law directs. (Watson's Clergyman's Law, 382; see also Vin. Ab. tit. Churchwardens, A. 2, *placitum* 8.)

The Ecclesiastical Court cannot issue an injunction; and therefore, although it may punish an injury to the freehold of the church after it has been done, it has no power to prevent its being done.

In *Dent v. Prudence and Bond* (2 Strange, 852) it is laid down that, if churchwardens institute a suit whilst they are in office, they may continue it after their office has [284] determined; but they cannot commence a suit after they have gone out of office. The Plaintiff, therefore, had a right to proceed with the original suit after his office had determined. The supplemental suit was not an original suit instituted by the Plaintiff after he had gone out of office; but it was a continuation of the original suit which was instituted by him whilst he was in office. Supposing that the Plaintiff was wrong in joining Phillips as a Co-plaintiff with himself in the supplemental suit, the only consequence is that that suit must be dismissed, and the Plaintiff will be deprived of the benefit which he would otherwise have had from the evidence as to the proceedings in Jakeman's action. We submit, however, that the objection of misjoinder of Plaintiffs must be taken either by plea or by demurrer, and that, if it is delayed until the hearing of the cause, it comes too late. *Raffety v. King* (1 Keen. 601).

THE VICE-CHANCELLOR. There are several points in this case which are not matters of frequent consideration; and therefore I should like to look into them before I pronounce my judgment.

June 4. THE VICE-CHANCELLOR [Sir L. Shadwell]. I desired that this case might stand over for a few days, in order that I might satisfy my own mind about the jurisdiction of the Court to entertain such a suit: and I must say that it appears to me to be beyond all question that the Court can entertain such a suit as this.

[285] The suit is of this form. The bill was filed on the 18th of August 1833 by a person of the name of William Marriott, who described himself as being one of the churchwardens of the parish of Floor; and a gentleman of the name of Tarpley, who was alleged to have pulled down part of the wall of the churchyard, was one of the Defendants, and the other churchwarden, a gentleman of the name of Thomas Marriott, was also made a Defendant. The Court granted an *ex parte* injunction to restrain the act complained of. Afterwards, in the month of April 1834, another gentleman of the name of Phillips was chosen a churchwarden in the place of William Marriott, the Plaintiff in the original bill; and a supplemental bill was filed in 1835 by William Marriott, the original Plaintiff, and Mr. Phillips, who had been chosen the churchwarden in his room; and that supplemental bill was also against Mr. Thomas Marriott, who still continued to be a churchwarden, and against Mr. Tarpley.

In the course of the argument at the Bar a case was quoted from Ventris, which was to this effect:—A prohibition was prayed on the behalf of a churchwarden to the Ecclesiastical Court, for that they tendered him an oath upon these articles following:—1st. Whether any person within this parish hath encroached upon the churchyard. It was said that it concerned matter of freehold, but this was overruled by the Court of King's Bench; and it was held that the churchwardens may take notice, in the

Ecclesiastical Court, of encroachments on the churchyard.⁽¹⁾ There is another case (which [286] occurred in the 2d year of William & Mary) of *Quilter v. Newton* (Carthew, 151). In a prohibition, the case was that Newton, one of the churchwardens, libelled against Quilter for stopping the church door and windows by sheds, &c., built, as he supposed, upon part of the churchyard. It was moved for a prohibition upon a suggestion that the sheds were not built upon any part of the churchyard, but were built upon a lay fee, and that cognizance of lay fees appertains to the Temporal Courts. *Sed per Curiam*: A prohibition shall not be granted to any suit in the Spiritual Court for any nuisance or other matter done in the churchyard, upon a suggestion that the churchyard is a lay fee: for a nuisance there is properly of ecclesiastical cognizance.

It was said, in the course of the argument in this case, that this Court could not entertain the suit, because the churchwardens could not bring an action: but if the churchwardens could institute a suit in the Ecclesiastical Court for the nuisance, there seems to be no reason whatever why this Court should not interfere to prevent the very commission of the nuisance in respect of which they might have a suit.

Then, with regard to the circumstance which I have stated, namely, that the character which William Marriott originally held as churchwarden had ceased. It was said that, as he had ceased to be churchwarden, he ought not to have been a party to the supplemental bill, and that no relief could be given on the original bill with respect to him: and that, inasmuch as Mr. Phillips had become a churchwarden in W. Marriott's place, Marriott had no interest in the original suit. [287] Now, with respect to that, it appears that, in the case of *Dent v. Prudence and Bond*, it was held that churchwardens, after their term of office had expired, could not bring a suit for a rate which accrued during their time: but it was agreed that, if the suit had been begun within their year of office, they might have proceeded in it after their year was out. Besides that authority there is also the case of *Bodenham v. Ricketts* (not reported), which came before the Lords Commissioners in the year 1835, and which was brought before me in the spring of this year. The proceedings in that case shew both the points, namely, that a churchwarden cannot institute a suit in respect of a matter which happened before he became churchwarden; but that if, in the year in which he is churchwarden, he does institute a suit in respect of something which then occurred, he may, notwithstanding his churchwardenship has expired, prosecute the suit. The facts of the case were as follows:—The suit was commenced in the Ecclesiastical Court for several church rates which accrued in the years 1828 and 1829, in which the libellers were not churchwardens; and also for rates which accrued in 1830, in which they were churchwardens. They abandoned the suit for the rates accrued in the years in which they were not churchwardens, and gained a decree in the suit for the rate which became due in the year in which they were churchwardens. In 1837, which was long after they had ceased to be churchwardens, they took out a *significavit* to enforce payment under the decree; and in March 1838 Ricketts moved before me to quash the writ; but I refused the motion.

[288] It is clear, therefore, from the cases to which I have referred, that a churchwarden may libel, in the Ecclesiastical Court, for an injury done to the wall of the churchyard whilst he was churchwarden; and, if he commences the suit whilst he is churchwarden, he may continue it when his churchwardenship has ceased. And in my opinion this Court ought, in such a case, to be ancillary to the Ecclesiastical Court, and to grant an injunction as in other cases where any act in the nature of waste is either threatened or committed. I must, therefore, hold not only that the original suit was properly instituted by Mr. William Marriott, but that he had a right to continue it by filing the supplemental bill, notwithstanding his year of office had expired. And, inasmuch as Mr. Phillips was a churchwarden at the time when the supplemental bill was filed, it is perfectly manifest that he had an interest, as churchwarden, in the continuance of that injunction which had been pronounced in

(1) In the report it stands thus:—"It was said, to the first of these, that it concerned matter of freehold. But this was overruled: for they may take notice of encroachments on the churchyard."

1833; for it applied to the very subject-matter of which he was the guardian, and in respect of which he might have instituted a new suit in the Ecclesiastical Court.

My opinion, therefore, is, on the objections with respect to the maintaining of the suit, that they are unavailing, and that the suit may be maintained. I should, therefore, as a matter of course, have now made a decree for a perpetual injunction, but for this circumstance, namely, that those proceedings which were taken in the action which was brought by Mr. Jakeman, who was the tenant of Mr. Packe, have determined, merely, that there is not the vicar's right, nor is there the general right which was asserted by the two special pleas. In respect of them, a motion was made for a new trial, and that motion was refused by the Judges of the Court of [289] Common Pleas, who had received a certificate from the learned Judge who tried the cause (Mr. Justice Littledale) that he was satisfied with the verdict of the jury; and I think it right, therefore, that those points shall not be tried again. But I think that, if Mr. Tarpley is desirous that there shall be further proceedings had for the purpose of determining whether there is that which has been called the church-way, I certainly will give him liberty to try that question. The injunction, however, must be continued in the meantime.

[289] BOYS v. MORGAN. June 11, 13, 19, 1838.

[Affirmed, 3 My. & Cr. 661; 40 E. R. 1081.]

Construction. Will. Residuary Gift.

A testator concluded his will as follows:—"I guess there will be found sufficient in my banker's hands to discharge all my debts, which I desire Mrs. E. M. to do, and keep *the residue* for her own use." Held (the whole of the will being taken together), that E. M. was entitled not only to the residue of the money in the banker's hands, but to the residue of the testator's general personal estate.

The Plaintiff was one of the next of kin of John Boys, who died in August 1835. The Defendants were the other next of kin, and Eliza Morgan, to whom probate of the deceased's will had been granted.

The bill alleged that, in 1825, Eliza Morgan went to reside with John Boys, and continued to live under his protection until his death; that, having acquired great influence over him, she, in the years 1831 and 1834, prevailed upon him to transfer into her name four sums of stock, namely, two of £6000 each, one of £6317, and another of £5200; that she alleged that John Boys had left a will, which was in the following words:—

"London, No. 11 Gower Street, North, 28th June 1835.—To my friends and relations who may be curious [290] to inquire, be it known that, a few years back, of my own free will, I gave to Eliza Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, watches and trinkets of any kind then in my possession, a pianoforte, all my library, manuscripts, papers, &c., whatever have been added and may hereafter be added previous to my decease, without any exception whatever, to her sole use and disposal, under promise from her that she will take care that I shall never be in want of any articles as long as I live. Having attained to the 82d year of my existence, and finding the infirmities of age increasing, I choose to give her this voucher of the truth, that none may question or trouble her to make declaration of it. She knows that, 30 years ago, I agreed with Dr. Hector Campbell that he should have my carcase for chemical and anatomical experiments to be by him performed upon it, if he could prevail on her to give it to him; doubting her compliance, I will trouble my head no more about it. The world may think this to be from a spirit of singularity or whim in me. Be that as it may, I have always had a mortal aversion to funeral pomp and expense; and therefore trust she will avoid it; and had rather be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments. I guess there will be found sufficient

in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep *the residue* for her own use and pleasure.

"JOHN BOYS."

The bill charged that the before-mentioned transfers were made without consideration, and that Eliza Morgan held the stock as a trustee for John Boys; and that, at the date of his will, he had money at his bankers [291] more than sufficient to pay all the debts that he *then* owed. The bill prayed that it might be declared that *the general residue* of the deceased's personal estate did not pass by the will, and that Eliza Morgan was a trustee of the several sums of stock for the testator's next of kin.

Eliza Morgan demurred, generally, to the bill.

On the argument of the demurrer the question was, what was the meaning of the word *residue* in the will; whether it meant the residue of the testator's money in his banker's hands, or the residue of his general personal estate.

Mr. Jacob and Mr. James Russell, in support of the demurrer, contended that the word *residue* meant the residue of the testator's general personal estate. They said that Eliza Morgan was the only person for whom any provision was made by the will; that, in the introductory part of it, there was such a large expression of bounty to her as to be nearly sufficient to carry the whole of the testator's property; that the testator had, in effect, appointed Eliza Morgan his executrix, and so placed the whole of his property in her custody; that he had directed her to pay his debts; but it was clear that he did not mean her to pay them out of the money in his banker's hands only; that there was no source from which the funeral expenses could come, unless Eliza Morgan took the testator's property generally, and, consequently, that the residue which she was to keep was not merely the residue in the banker's [292] hands, but the general residue of the testator's estate. *Legge v. Asgill* (Turn. & Russ. 265, note), *Crooke v. De Vandes* (9 Ves. 197, and 11 Ves. 330).

Mr. Knight Bruce and Mr. G. Richards, in support of the bill. The question is whether the word *residue*, in this will, means a special or a general residue.

The instrument begins thus:—"To my friends and relations who may be curious to inquire, be it known that, a few years back, of my own free will, I gave to E. Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, watches and trinkets of any kind then in my possession, a pianoforte, all my library, manuscripts, papers, *et cetera*." If that introductory passage is to be considered as a gift, the expression *et cetera* must be confined to things *ejusdem generis* as those before mentioned. But it is not to be taken as a gift; but as a recognition of a prior gift.

The word *residue* is a relative term; and where, as in this will, a testator speaks of a particular fund, and then, in the same sentence, uses the term *residue*, he must be taken to mean the residue of that particular fund which he had just before spoken of, and not the residue of his property generally. In this Court we are apt to put a technical signification upon the word *residue*; but, in common parlance, it is synonymous with *remainder*; and, if the testator had used that word, there would have been no doubt as to his intention.

[293] Can it be contended that if the testator had intended that Eliza Morgan should take the large sums of stock which are mentioned in the bill, he would have been so cautious as to mention that he had given her his furniture, table and bed linen, &c.? Why did he mention that he had given her those articles, if he meant to give her all his property by his will? Why did he mention the money in his banker's hands, if she was to take everything under the will? [THE VICE-CHANCELLOR.] The bill states that the testator, at the date of his will, had, in his banker's hands, money more than sufficient to pay all the debts that he *then* owed; but there is no allegation that he had in his banker's hands money more than sufficient to pay the debts which he owed at his death. When he speaks of the money in his banker's hands, he speaks conjecturally. He says: "I guess there will be found sufficient in my banker's hands to defray and discharge my debts." But the direction which he gives to E. Morgan, to pay his debts, is positive. He meant that she should pay his debts at all events, that is, whether there was or was not sufficient, in the banker's hands, to pay them. May he not, therefore, have meant by the word *residue* the

residue of that property out of which his debts were to be paid at all events?] If a party is directed to pay a testator's debts generally, it does not follow that that party is to take the residue of the testator's property. The only property that is dealt with in this will is the money in the banker's hands. [THE VICE-CHANCELLOR. The testator alludes to the money which his funeral would cost; and, therefore, he adverts, impliedly at least, to some fund in contradistinction to the money in his banker's hands, that is, his general personal estate.]

[294] The cases that have been cited are clearly distinguishable from the present case. In *Crooke v. De Vandes* the testator, after having mentioned the whole of his property, concluded his will as follows: "What remains to go to my grandsons:" and, as the testator had before enumerated the whole of his property, there was nothing to which those words could refer, except his general estate. (See 11 Ves. 331.) In *Legge v. Asgill* the expression in the codicil, "if there is money left unemployed," meant money left unemployed after the general administration of the testator's estate.

The case of *Onmaney v. Butcher* (Turn. & Russ. 260) is decisive of the present; it is a conclusive authority if ever there was one. *The Attorney-General v. Johnstone* (Ambler, Blunt's edit. 577), *Hastings v. Hane* (ante, vol. 6, p. 67).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case of *Boys v. Morgan*, I wished the matter to stand over after the argument, that I might read through the pleadings, to see whether there was anything stated on the bill (the whole statement of which is admitted by the demurrer) which would vary the case, that is, which would make the case which is made by the bill depend upon anything else than merely the construction of the will; and it appears to me, on reading it all over very deliberately, that the right of the Plaintiff does solely and exclusively depend on the construction of the will. The will is in a very singular form; and I must say, with reference to the cases that have been cited, that they are no otherwise applicable to this case [295] than to shew that, where wills are made in such a singular form as the wills in *Legge v. Asgill*, *Crooke v. De Vandes* and *The Attorney-General v. Johnstone*, you must construe the expressions that are used in them, as well as you can, by looking at the whole of the context.

In this case the testator sets out, first of all, with giving the world notice, and shewing, therefore, that he was clearly aware that he had friends and relations, that is, persons to whom, if he made no disposition, his property would devolve. "To my friends and relations who may be curious to inquire, be it known that, a few years back, of my own free will, I gave to Eliza Morgan, commonly called Eliza Castillo, all my furniture, table and bed linen and apparel, plate, &c., whatever have been added and may hereafter be added previous to my death, without any exception whatever, to her sole use and disposal, under promise from her that she will take care that I shall never be in want of any article as long as I live. Having attained to the 82d year of my existence, and finding the infirmities of age increasing, I choose to give her this voucher of the truth, that none may question or trouble her to make declaration of it." What was the precise quantity of that gift does not appear; but I cannot but think that the testator meant that, whatever it was, it should at least receive confirmation by his will, to the extent of acknowledging the fact to be such. Then he says: "She knows that, 30 years ago, I agreed with Dr. Hector Campbell that he should have my carcase for chemical and anatomical experiments to be by him performed upon it, if he could prevail on her to give it to him. Doubting her compliance, I will trouble my head no more about it. The world may think this to be [296] from a spirit of singularity or whim in me; be that as it may, I have always had a mortal aversion to funeral pomp and expense, and therefore trust she will avoid it; and had rather be given away, with the sum a funeral would cost, for the purpose of dissection and chemical experiments."

Now it is plain, I think, on that part of the will, that the testator considered that there was so much kindness and confidence reposed by him in Eliza Castillo, that he countermands his own personal wish in favour of her wish; and, rather than oppose her wish, he submits to have his body buried in the usual way, and, in effect, authorizes her to bury the body; because, he says: "I, therefore, trust she will avoid it," that is, avoid funeral pomp and expense: "and I had rather be given away, with

the sum a funeral would cost, for the purpose of dissection and chemical experiments." I mention this, because it struck me at the hearing as a strong circumstance to shew that here he does evidently refer to his general personal estate; because he does, in effect, direct that Eliza Castillo shall bury him, and she could not bury him except at the expense of his general personal estate. Then he says: "I guess there will be found sufficient in my banker's hands to defray and discharge my debts, which I hereby desire Mrs. Eliza Morgan to do, and keep the residue for her own use and pleasure."

It is quite obvious, I think, that there is no direction here that the debts shall be paid out of that fund only which happened to be in the banker's hands. I observe it is stated in the bill, and, of course, it is admitted by the demurrer, that, at the date of his will, the testator had at his banker's more than sufficient to pay the [297] debts which were then owing from him; but, as the testator could not foresee what would be the amount of money in the hands of his banker at the time of his death, it is plain that he alludes to the contingent sum, whatever it might be, when he says: "I guess there will be found sufficient in my banker's hands;" and, therefore, he was not referring to the amount that was then in his banker's hands, any further than as the amount which was then in his banker's hands might furnish him with more or less reason for guessing that there would be found sufficient in the banker's hands to defray and discharge his debts; and it is quite obvious that the amount of his debts might vary as well as the fund itself.

Then he takes a contingent view of the sufficiency of the sum in his banker's hands, and says, "to defray and discharge my debts:" and immediately afterwards he adds these words, "which I hereby desire Mrs. Eliza Morgan to do:" and he does not there direct that she shall apply that fund only which is in the banker's hands to the payment of his debts; but gives a positive and absolute direction that she shall pay and discharge his debts. Then follow these words, on which the discussion principally turned, "and keep the residue for her own use and pleasure." Now it was said that the term, *the residue*, plainly, from the context, referred only to that which might remain of the fund in the banker's hands after satisfaction of the debts. But it seems to me, in the first place, that there is nothing which stints the words, "the residue," to the residue of that fund: and, as the testator, in that part of his will in which he directs the expenses of his funeral to be paid, has plainly referred, although not in express terms yet by implication, to all his personal property, it is quite [298] obvious that this expression, "the residue," may as well apply to the residue of the general personal estate as to the residue of the fund in the banker's hands: and as, in case the debts might happen to exhaust the money in the banker's hands, still they were to be paid, the true construction, in my opinion, is that the residue which E. Castillo is to keep is the residue of the property liable to pay the debts which will remain after the payment of them, including of course the funeral expenses which, by law as well as by plain implication, were to be paid out of the general personal estate. And I think that this construction is aided by the circumstance that, from the beginning to the end of his will, though he does notice friends and relations, yet the sole object of bounty, the sole depository of confidence and trust, is Eliza Castillo: and, therefore, it appears to me that, on the true construction of this will, she is entitled to the residue: and consequently the demurrer must be allowed.(1)

[299] COWLEY v. COWLEY. June 6, 18, 23, 1838.(2)

Practice. Plaintiff. Dismissal.

A. and B., Co-plaintiffs, claimed under a will, and B. claimed also under a deed executed by the testator. The claims under the will failed; but B.'s claim under the deed succeeded. The bill was dismissed as against both Plaintiffs, but without prejudice to B.'s filing a new bill.

(1) Affirmed by the Lord Chancellor. See 3 Myl. & Craig, 661.

(2) *Ex relatione.*

The Plaintiff, Mary Cowley, claimed to be entitled to an annuity of £40, charged upon the estates of her deceased husband by a deed executed by him, and also to an annuity of £50 and a sum of £100, charged upon the same estates by the will of the deceased. Lovell Cowley, the other Plaintiff, claimed to be entitled to a sum of £200 charged upon the estates by the will; but he made no claim under the deed.

At the hearing of the cause, the Court decided against the claims of both the Plaintiffs under *the will*; but held that Mary Cowley's claim under *the deed* was valid.

Mr. Knight Bruce and Mr. Blunt, for the Defendant the heir of the deceased, contended that it was the practice of the Court not to make any decree where the claim made by one of the Plaintiffs wholly failed, although another Plaintiff might be entitled to relief in respect of a distinct separate claim; and, therefore, that the bill ought to be dismissed as against both the Plaintiffs. *Denton v. Dary* (1 Moore's Priv. Council Cases, 15).

Mr. Jacob and Mr. Koe, for the Plaintiffs, said that where, as in the present case, all the Plaintiffs sued jointly in respect of part of the whole relief prayed, and one of them prayed distinct separate relief, the proper course was to dismiss the bill, as against all the Plaintiffs, with respect to the joint demand, but to grant [300] relief to the Plaintiff who had succeeded in establishing his separate demand. *Gemmel v. Block* (2 Dick. 513), *Mattison v. Mattison* (cited in *Gemmel v. Block*).

Mr. K. Bruce, in reply, said that the cases reported by Dickens were not much to be relied upon: and that he had an extract from Reg. Lib. of the case of *Mattison v. Mattison*, which shewed that it was a legatee's suit, and such suits, like creditor's suits, were excepted out of the usual practice, and did not furnish any authority as to other suits.

THE VICE-CHANCELLOR [Sir L. Shadwell], having been furnished by Mr. Walker, the registrar, with an extract from Reg. Lib., of the case of *Gemmel v. Block*, was at first disposed to adopt the course contended for by the Plaintiff's counsel: but, on the 23d of June, His Honor said that he had conferred with the Lord Chancellor, and that his Lordship was of opinion that the bill ought to be dismissed, as against both the Plaintiffs, but without prejudice to Mary Cowley's right to file a new bill; and also without costs, as the objection had not been raised by the answer. (See *Raffety v. King*, 1 Keen. 601.)

[301] WOODWARD v. TWINAINE. Nov. 27, 30, Dec. 5, 1839.

Practice. Contempt. Waiver.

A Defendant, being in contempt for want of answer, filed his answer, and the Plaintiff took an office copy of it. Held, that the Plaintiff did not thereby waive the contempt.

The Defendant, being in contempt for want of answer, filed his answer, and the Plaintiff took an office copy of it. The Defendant now moved to dismiss the bill for want of prosecution.

Mr. E. Montagu, for the Defendant, contended that the Plaintiff by taking an office copy of the answer had waived the contempt, and therefore the Defendant was entitled to make the motion. He referred to *Landars v. Allen* (*ante*, vol. 6, p. 619), *Green v. Thomson* (1 Sim. & Stu. 121), *Sidgier v. Tyte* (11 Ves. 202), *Smith v. Blofield* (2 Ves. & Beam. 100), *Const v. Ebers* (1 Mad. 530), *Hoskins v. Lloyd* (1 Sim. & Stu. 393), *Anon.* (15 Ves. 174), and *Watson v. Fairlie* (Reg. Lib. B. 1824, fol. 1581, and see next page).

Mr. K. Bruce, for the Plaintiff, said that the question was raised in *Landars v. Allen*, but that, in fact, it was not decided; that the motion stood over in order that the point might be looked into, and in the meantime the order was *drawn up* as if the question had been decided: that in *Green v. Thomson* it was to be inferred, although the fact was not stated in the report, that the Plaintiff had taken an office copy of the answer: that in *Hoskins v. Lloyd* the Defendant had acted on the answer, as well as taken an office copy of it; for he had moved for a production of deeds admitted

by the answer to be in the Defendant's custody; and [302] that *Watson v. Fairlie* shewed that the Defendant was not entitled to make his motion.

Nov. 30. On this day, the orders in *Green v. Thomson* and *Landars v. Allen* were produced from the office of Messrs. Lowe, Garey & Sweeting, of Chancery Lane. The Vice-Chancellor, after observing that the order in the former case appeared to tally with the printed report of it, directed the motion to stand over, in order that the registrar's book might be searched for the case of *Watson v. Fairlie*.

Dec. 5. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case I have been supplied by Mr. Walker (the registrar) with a short note of what took place in *Green v. Thomson*, and I find that it corresponds with what is stated in the printed report; and I have read over the case of *Watson v. Fairlie*, as it appears in the registrar's book. The facts appear to be these:—The Defendant's time for answering being out, the Plaintiff sued out an attachment, which was sent to the Sheriff of Hertfordshire; and then the Defendant put in an answer, which was excepted to. The exceptions were referred to the Master, who allowed nine of them. The Plaintiff then served the Defendant with a *subpoena* for a further answer, and that further answer not being put in in time, another attachment was issued; and then an answer was put in. It is not stated whether the Plaintiff took an office copy of it or not, but I think it is fairly to be inferred, from the fact of there being no further proceedings on the exceptions, that he had taken an office copy and was satisfied with the answer. Then it [303] appears that the Defendant obtained an order to dismiss the bill for want of prosecution; and the Court afterwards discharged that order; and I cannot but think that the fair inference is that the mere taking of an office copy is no discharge of the contempt.

I am inclined to think that there must have been some misrepresentation, made inadvertently, of what took place in the case of *Landars v. Allen*.⁽¹⁾

I am of opinion that the mere taking of the office copy by the Plaintiff of the Defendant's answer is no such waiver of the contempt as will justify the Defendant, without more, in moving to dismiss for want of prosecution; and I have the satisfaction of knowing that the Lord Chancellor is of the same opinion; and, therefore, the motion to dismiss for want of prosecution in this case must be refused.

Motion refused, without costs.

[304] JONES v. CRESWICKE. BOOTH v. CRESWICKE. Dec. 3, 1839.

Mortgagor and Mortgagee. Foreclosure.

Under a decree in a foreclosure suit, the time fixed for payment of principal, interest and costs was the 31st of July. On the 25th the Defendant obtained an order, referring it to the Master to fix a further time on his paying the interest and costs on the first-mentioned day. The Defendant, however, failed to make that payment, and, on the 3d of August following, the Plaintiff obtained the usual order for foreclosure absolute; but, owing to the press of business in the registrar's office, it was not drawn up. On the 16th of August the Defendant moved for a further extension of time, on the ground that a person who had agreed to lend him the amount of the principal, interest and costs was prevented, by illness, from coming to London on the 31st of July, and his wife, whom he had deputed to bring the money, was prevented from doing so by the coach being full on the 30th. Motion granted.

(1) In consequence of the observation in the text, the reporter referred to Reg. Lib., where he found the following entry, under the date mentioned in the report, of the 29th of May 1834:—

"*Landars v. Allen*. } Whereas Mr. Spence, of counsel for the Defendant, this day moved this Court that the Plaintiff's bill might stand dismissed out of this Court for want of prosecution, in the presence of Sir E. Sugden, of counsel for the Plaintiff, who alleged that the Plaintiff is willing to proceed in this cause with effect. Whereupon," &c. Then follows an order in the terms stated, *ante*, vol. 6, p. 620. Reg. Lib. B. 1833, fol. 1392.

On the 8th of March 1837 the Plaintiff, Booth, obtained a decree of foreclosure against the Defendant, Humphrey Creswicke.

On the 8th of May 1839 the Master, by his report made in pursuance of the decree, found £1229, 8s. 7d. to be due for principal, interest and costs from Creswicke to Booth, and directed the former to pay that sum to the latter at the Rolls Chapel on the 31st of July following. On the 25th of that month Creswicke applied to the Vice-Chancellor to enlarge the time for making the payment; and His Honor ordered that on Creswicke paying to Booth the interest and costs then reported due, amounting to £549, 4s. 2d., on the 31st of the same month, and on the terms that Booth's costs in *Jones v. Creswicke* should be added to the principal due to him, it should be referred to the Master to compute the subsequent interest and costs, and enlarge the time for redemption on payment of the principal, interest and costs to be reported due, at a new time and place to be appointed by the Master. Booth attended at the Rolls Chapel on the 31st of July 1839, at the time appointed, but neither Creswicke nor any person on his behalf came to pay either the £1229, 9s. 7d., or the £549, 4s. 2d. [305] On the 3d of August 1839 the Plaintiff obtained the usual order for foreclosure absolute; but, owing to the press of business in the registrar's office, that order was not drawn up. On the 16th of that month Creswicke moved that it might be referred back to the Master to compute subsequent interest on the mortgage, from the foot of the report of the 8th of May, and to tax Booth his subsequent costs, and to appoint a new time and place for Creswicke to pay what should be reported due. The motion was supported by two affidavits, one made by G. M. Daubeney, and the other by H. Creswicke. Daubeney's affidavit was to the following effect: that he was ready and willing to advance the £1229, 9s. 7d., and any further sum that might be necessary for the purpose of paying Booth the principal, interest and costs due to him; that he had the money ready to advance forthwith, on having a transfer of the mortgage made to him; that he had the money ready to advance on the 31st of July last, *but was prevented by illness from coming to London for that purpose*; that, not being able to come to London himself, he deputed his wife to come up with the money; but, in consequence of the only London coach which passed near his residence being full on the 30th of July last, his wife could not reach town with the money until after the 31st, or it would have been ready to be advanced on that day. Creswicke deposed that he was in treaty for the loan of the £1229, 9s. 7d. from Daubeney, who would have lent him that sum on or before the 31st of July last, but was prevented by illness from coming to London in time to advance it; that the deponent used every exertion to raise the money by the 31st of July; and had now obtained a promise of the loan of that sum, and any other sum that might be necessary to pay the principal, interest and costs due to the Plaintiff.

[306] In opposition to the motion, Booth's solicitor deposed that Creswicke's solicitor had not proceeded to draw up the order of the 25th of July, and, as the deponent believed, had abandoned the drawing up thereof; that, on the 3d of August then instant, Booth obtained the usual order for absolute foreclosure, upon the customary affidavit of his attendance to receive the amount reported due and of the Defendant's default: that the deponent had bespoken that order, but owing to the press of business in the registrar's office *it had not been drawn up*.

The motion was made on the 16th of August, but was directed to stand over in order that search might be made for precedents.

The motion was renewed on the 3d of December, Mr. Colville, the registrar, having in the interval furnished the Vice-Chancellor with the following extracts from Reg. Lib. :—

Between John Lee and Anne, his wife, John Hervey and George Nicholls,
Esquires, Plaintiffs; Gilbert Heath, Defendant. Monday, Jan. 12, 1747.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, &c., by Mr. Hervey, of counsel with the Plaintiffs, it was alleged that, by the decree made on the hearing of this cause, on the 14th day of May last it was, amongst other things, ordered that it should be referred to Mr. Spicer, one of the Masters, &c., to take an account of what was [307] due to the Plaintiffs

for principal and interest on their mortgage therein mentioned, and to tax them their costs of this suit; and the said Defendant was to pay unto the Plaintiffs what should be reported due to them for such principal, interest and costs, within six months after the said Master should have made his report, at such time and place as the said Master should appoint, or in default thereof, he was to stand absolutely foreclosed; that pursuant thereto the said Master made his report, dated the 3d day of July last, and thereby certified that there was due to the Plaintiffs on their said mortgage the sum of £946, 1s. 4d., which he appointed the Defendant to pay to the Plaintiffs at the time and place in the said report particularly mentioned; that the Plaintiff, John Lee, did accordingly attend at the time and place in the said report mentioned in order to receive of the Defendant the said money, but the said Defendant did not then attend to pay the said money, nor hath the same or any part thereof been since paid; and, therefore, it was prayed that the said Defendant may stand absolutely foreclosed. Whereupon, and upon hearing of Mr. Sewell, of counsel with the Defendant, who alleged that the said mortgaged premises are considerably worth more than the money due thereon, and prayed that the said Defendant may have six months' further time to redeem the said mortgaged premises; and upon hearing of an affidavit of the Defendant, an affidavit of Benjamin Glanville and Leonard Dix, read, and what was alleged by the counsel on both sides, and upon the Defendants agreeing to deliver possession of the said mortgaged premises at the end of the said six months to the Plaintiffs if he shall not redeem by that time, his Lordship doth order that the time for the said Defendant's redeeming the said mortgaged premises be enlarged for [308] six months, and that it be referred back to the said Master to compute subsequent interest on the said mortgage, and tax the Plaintiffs their subsequent costs, and appoint a new time and place for payment of what shall be found due.—Lib. B. 1746, fol. 83.

Between John Nanfan, Esquire, Plaintiff; James Perkins and Edmund Perkins, Esquires, and Others, Defendants. Monday, July 7, 1766.

Whereas, by an order made the 5th day of June last, for the reasons therein contained, it was ordered that the Defendants James Perkins and Edmund Perkins should stand absolutely foreclosed of all right, title, interest, and equity of redemption of, in, and to the mortgaged premises therein mentioned: now upon motion this day made unto the Right Honourable the Lord High Chancellor of Great Britain by Mr. Wedderburn, of counsel with the Defendants James and Edmund Perkins, it was alleged that Mr. Browning, one of the Masters of this Court, to whom this cause is referred by his report of the 10th of December last, certified that there would be due to the Plaintiff for principal, interest and costs in this cause, on the 3d of February then next, the sum of £3218, 4s. 2d., which he appointed the Defendants James Perkins and Edmund Perkins to pay unto the Plaintiff on that day, at the Chapel of the Rolls: that the said Defendants, being desirous to pay the Plaintiff what was reported due to him, came to London from Hampshire, in order to raise money for that and other purposes, and a person had promised to lend the same, but such person re-[309]-quiring a particular of the estates, the Defendant, James Perkins, went into the country again, in April last, to get it made out, and to get the several title-deeds and leases belonging to the estates: that the said Defendants, under these circumstances, being in expectation of raising money to pay the same, omitted to move to enlarge the time to redeem, and not attending to pay the money reported due, the Plaintiff obtained the said order of the 5th of June last to foreclose the Defendants: that the said Defendants will be able to raise money to pay the Plaintiff as soon as proper conveyances of the estate can be made to the person who is to advance the same; and therefore it was prayed that the said order, made the 5th day of June last, may be discharged, and that it may be referred to the said Master to compute the Plaintiff's subsequent interest, and to tax him his subsequent costs, and to appoint a new time and place for payment of what shall be found due to the said Plaintiff for principal, interest and costs; and that, on payment thereof, the Plaintiff may convey the said mortgaged premises to the Defendants, or such person

or persons as they shall appoint: whereupon, and upon hearing of Mr. Hett, of counsel with the Plaintiff, and the affidavit of James Perkins read, and what was alleged by the counsel on both sides, it is ordered that the said Defendants James Perkins and Edmund Perkins paying to the Plaintiff, in a fortnight from this time, the sum of £1000, in part of what is reported due to him for principal, interest and costs, that the said order of the 5th day of June last be discharged, and that it be referred back to the said Master to compute subsequent interest on what shall remain due to the Plaintiff, and likewise to tax the Plaintiffs' subsequent costs, and to appoint a new time and place for payment of what shall be found due to the Plaintiffs for principal, interest and costs, not exceeding six months from this [310] time; and, in default of the said Defendants James Perkins and Edmund Perkins their paying to the Plaintiff the said sum of £1000 by the time aforesaid, it is ordered that the said order of the 5th day of June last do stand.—Lib. B. 1765, fol. 307.(1)

[311] Between Samuel Crompton, Esquire, and Thomas Stamford, Esquire, Plaintiffs; and The Right Honourable Thomas Earl of Effingham, Defendant. Thursday, Nov. 21, 1782.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor of Great Britain by Mr. Attorney-General and Mr. Madocks, being of counsel for the Defendant, it was alleged that by the decree made on the hearing of the original cause, wherein Samuel Crompton and Thomas Stamford were Plaintiffs, and the Defendant the Earl of Effingham was Defendant, on the 16th day of February 1781, it was ordered and decreed that it should be referred to Mr. Leeds, one of the Masters of this Court, to take an account of what was due to the late Plaintiff Samuel Crompton, deceased, for principal and interest on the mortgage in question, and to tax the Plaintiffs their costs of this suit, for the better taking of which account the usual directions were given; and, upon the Defendant's paying to the Plaintiffs Samuel Crompton and Thomas Stamford what should be found due for principal, interest and costs as aforesaid within six months after the said Master should have made his report, at such time and place as the said Master should appoint,

(1) An affidavit, sworn by James Perkins, on the 21st of June 1766, and filed on the 3d of July following (and which, it is presumed, was the affidavit mentioned in the above order to have been made by him), was set out in the briefs of the Defendant's counsel in the case above reported. It was to the following effect:—That the lands comprised in the several mortgages in the pleadings named were of the yearly value of £600 and upwards, and, in the deponent's judgment, were worth, to be sold, the sum of £13,000 and upwards: that the deponent, intending to borrow a sum of money in order to pay off the moneys due to the Plaintiff and for other purposes, did, in or about the month of February last, come to town for that purpose, and the deponent having a promise of the money wanted by him, caused the Plaintiff to be informed thereof: that, in or about the beginning of the month of April, he returned to the country in order to prepare a rental and particular of the said lands and of other lands proposed by him to be conveyed as a further security for the money proposed to be borrowed by him: that, soon after his return to the country, *he was taken extremely ill with a bilious disorder, and continued so for some weeks, and the said disorder had continued on him ever since; by which means he was rendered incapable, for some weeks, of coming to London to complete his agreement for borrowing the money;* that he did not come to town till the 12th of June then instant, when he found that the Plaintiff had, on the 5th of that month, obtained an order in the cause, whereby he and the other Defendant Edmund Perkins, stood absolutely foreclosed: that, on the deponent coming to town, he caused application to be made to the Plaintiff's solicitor, to see if he would waive the said order, but he refused so to do: that, upon the title to the lands proposed to be mortgaged by the deponent being approved of, and on the execution of the proper securities, the money due to the Plaintiff for principal, interest and costs, was ready to be paid to him.

it was ordered and decreed that the Plaintiff should reconvey the said mortgaged premises, free and clear of and from all incumbrances done by them or those under whom they claimed, and deliver up all deeds and writings in their custody or power relating thereto, upon oath to the Defendant, or to whom he should appoint; but, in default of the said Defendant paying unto the Plaintiffs what should be reported due to them for principal, interest, and costs as aforesaid, by the time aforesaid, the [312] Defendant was from thenceforth to stand absolutely debarred and foreclosed of and from all right, title, interest, and equity of redemption of, in, and to the said mortgaged premises: and any of the parties were to be at liberty to apply to the Court as there should be occasion: that, pursuant to the said decree, the said Master made his report, dated the 29th day of June 1781, and thereby certified that there would be due to the late Plaintiff Samuel Crompton, as surviving administrator of Henry Coape, Esq., deceased, for principal, interest, and costs on the mortgage, on the 29th day of December 1781, the sum of £6229, 12s. 5d., which he appointed the said Defendant to pay to the Plaintiff Samuel Crompton, on the 29th day of December 1781, at the Chapel of the Rolls in Chancery Lane, London, between the hours of 11 and 12 of the clock in the forenoon of the same day: that, afterwards, the said Samuel Crompton died, having made his will, and appointed the now Plaintiff Samuel Crompton, his executor, and he has proved the will; and, thereupon, the Plaintiffs exhibitd their bill of revivor in this Court, and the said suit and proceedings were, by an order dated the 11th day of April last, ordered to stand revived, and which order was obtained on an allegation that the Defendant had appeared, and his time for answering was out; and, the Defendant not having paid the principal, interest, and costs at the time appointed for payment thereof, the Plaintiff obtained an order, dated the 3d day of July last, that the Defendant should stand absolutely foreclosed, which order has been since signed and enrolled: that the Defendant is advised that the said mortgaged premises are now worth £12,000 and upwards to be sold, and he never was informed of the order for confirming the Master's report, otherwise he should have applied for an order to enlarge the time to [313] redeem; and he was at the time of obtaining the said order for an absolute foreclosure in treaty with some persons to raise the money reported due, and redeem the mortgaged premises, and he is advised that the said order to revive was obtained on false allegations, viz., that he had appeared, and that his time for answering was out, whereas, in truth, he never did appear until the 20th day of April last, many days after the obtaining the said order to revive, and the cause not being duly revived was, at the time of obtaining the said order to foreclose, out of Court: and therefore it was prayed that the enrolment of the proceedings in this cause, and the order, bearing date the 3d day of July last, for making the foreclosure in this cause absolute, may be discharged, and that it may be referred back to the said Master to compute subsequent interest on the Plaintiff's mortgage, and tax the Plaintiff his subsequent costs, and that upon payment of what shall be reported due to the Plaintiff within a month after the Master shall have made his report, the mortgaged premises may be reconveyed, and the title-deeds delivered up to the Defendant, or to whom he should appoint: whereupon, and upon hearing Mr. Price and Mr. Mitford, of counsel for the Defendant, an affidavit of the Defendant the Earl of Effingham, an affidavit of John Foljambe, an affidavit of Isaac Milbourn, and an affidavit of Darcy Tancred, read, and what was alleged by the counsel on both sides, his Lordship doth order that it be referred back to the said Master to compute the Plaintiffs their subsequent interest, and tax them their subsequent costs; and it being admitted that the Plaintiff, Samuel Crompton, is now in the possession of the mortgaged premises, it is ordered that the said Master do take an account of such rents and profits which have been received by the Plaintiff, Samuel Crompton, or by any other person or [314] persons by his order, or for his use, or which he without his wilful default might have received thereout; and it is ordered that what should be found due on the said account of rents and profits be deducted out of what shall be reported due to the Plaintiff, Samuel Crompton, for principal, interest and costs as aforesaid; and it is further ordered that the said Master do also inquire what ought to be allowed for the expense of preparing the conveyance to the Plaintiff Stamford; and upon payment by the Defendant to the Plaintiffs of what is already reported due for principal, interest, and costs, and

what shall be reported due for subsequent interest and subsequent costs, and of what ought to be allowed for the expense of the Plaintiff, Thomas Stamford's conveyance, on the 23d day of January next, at such time and place as the Master shall appoint, it is ordered that the said order of the 3d day of July last, and the enrolment thereof, be discharged. Lib. A. 1782, fol. 26.

Between William Joachim, Plaintiff; James M'Douall, Deceased, and William Ward, Defendants. Friday, Nov. 2, 1798.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor of Great Britain, by Mr. Attorney-General, of counsel for the Defendant William Ward, it was alleged that by an order, dated the 27th day of June 1798, suggesting that by the decree in this cause, bearing date the 18th day of June 1796, it was ordered and decreed that it should be referred to Mr. Simeon, one of the Masters of this Court, to take an account of what was due to the Plaintiff for principal and interest on his mortgage [315] in the pleadings mentioned, and to tax him his costs of this suit; and upon the Defendants, or either of them, paying unto the Plaintiff what should be reported due to him for principal, interest and costs as aforesaid, within six months after the said Master should have made his report, at such time and place as the said Master should appoint, it was ordered that the Plaintiff should reassign the said mortgaged premises, free from incumbrances, to the Defendants, or either of them, who should so redeem the Plaintiff as aforesaid, or as they or either of them so redeeming the Plaintiff as aforesaid should appoint: but in default of the Defendants, or either of them, paying to the Plaintiff what should be reported due to him for principal, interest and costs as aforesaid, by the time aforesaid, the Defendants were from thenceforth to stand absolutely foreclosed: and the Defendant, William Ward, making default at the hearing, the said decree was to be binding on him, unless cause shewn to the contrary: and the said decree was, by an order dated the 17th day of May 1797, made absolute against him: that in pursuance of the said decree the said Master made his report, dated the 12th day of December 1797, and thereby certified that there would be due to the Plaintiff for principal, interest and costs, on his mortgage, on the 12th day of June 1798, the sum of £1377, 14s. 3½d., which he appointed the said Defendant William Ward to pay to the Plaintiff on the said 12th day of June, between the hours of 11 and 12 in the forenoon, at the Rolls Chapel in Chancery Lane: that the Defendant William Ward not having paid the said sum of £1377, 14s. 3½d. to the Plaintiff at the time and place fixed by the said Master's said report, it was ordered that the said Defendant, William Ward, should stand absolutely debarred and foreclosed of and from all right, title, interest and equity of re-[316]-demption of, in, and to the said mortgaged premises: that the Defendant William Ward, from a variety of unfortunate circumstances and by being misinformed by the Plaintiff's solicitor as to the day fixed by the said Master for payment of the said principal, interest and costs, he, the said Defendant, was prevented from attending to pay the same on the said 12th day of June: that the Plaintiff, between the said 12th day of December 1797 and the 12th day of June 1798, received some further sums of money on account of the rents and profits of the said mortgaged premises: that the said mortgaged premises are a very ample security for the money due to the Plaintiff in respect of his mortgage thereon: it was therefore prayed that the said order, dated the 27th day of June 1798, might be discharged with costs, and that the time for payment of the money reported to be due to the Plaintiff for principal, interest and costs may be enlarged for six months. Whereupon, and upon hearing of Mr. Romilly, of counsel for the Plaintiff, and the said order dated the 27th day of June 1798 read, and what was alleged by the counsel on both sides, his Lordship doth order that the said order, dated the 27th day of June 1798, be discharged, and that the time for the Defendant William Ward, his redeeming the mortgaged premises in question, be enlarged for three months. And it is further ordered that it be referred back to the said Master to carry on the subsequent account of receipts and payments, and to compute the Plaintiff his subsequent interest, and tax him his subsequent costs, and appoint a new

time and place for payment of what shall be found due to the Plaintiff. And it is ordered that the said Master do proceed *de die in diem*. A. 1797, fol. 894.(1)

[317] Mr. Knight Bruce and Mr. Parry, for the Defendant H. Creswicke, in support of the motion.

Mr. James Russell and Mr. Beales, for the Plaintiff, said that the present case was distinguishable from every one of the precedents that had been produced; for, on the 25th of July, H. Creswicke applied for and obtained an order enlarging, on certain terms, the time [318] fixed by the Master for payment of the sum reported due from him, but that he had complied with none of those terms; that when the order for foreclosure was made absolute, the discretionary power of the Court to enlarge the time of payment was gone; that none of the precedents except those in which the order absolute had been obtained had any application; that in *Crompton v. The Earl of Effingham* Crompton sued as administrator of Coape, and on Crompton's death the suit was revived by his executor, which was irregular; and, consequently, the order absolute and all the other proceedings subsequent to the revivor were irregular: that in *Nanfan v. Perkins* the time fixed for payment of the principal, interest and costs, was the 3d of February, but no step was taken to obtain the order absolute until the 5th of June, and the Defendant was prevented by illness from completing his agreement for borrowing the money; and under those circumstances he abstained from applying to the Court to enlarge the time of payment: that in *Joachim v. M'Douall* the Defendant had been misinformed by the Plaintiff's solicitor as to the day appointed by the Master for the payment of the principal, interest and costs; and, moreover, in the interval between that day and the date of the Master's report, the Plaintiff had received some further sums on account of the rents and profits of the mortgaged premises; so that, when the day of payment arrived, the whole sum found by the Master remained no longer due.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that *Nanfan v. Perkins* was a sufficient authority for granting the present application; that in that case the Court, having regard to the circumstances under which the Defendant was prevented from

(1) In addition to the above extracts, the reporter is indebted to Mr. Colville for the following notes:—

Lord Keeper Sir Nathan Wright. Hilary Term 1701.

Abney v. Wordsworth.

Dobyns, for Plaintiff. We come to shew cause why Wordsworth should not have further time to redeem; the decree is signed and enrolled, and the father was foreclosed by his own consent by signing the registrar's book, and now the son (the heir of the mortgagor) wants a year longer time to redeem.

Mr. Cowper, for same side. The estate is not worth our money. [Affidavit read.]

Mr. Serjeant Bretland, for the son. The estate has been computed at more than £9000.

Lord Keeper. Let the son have six months' longer time, from this day, to redeem. Take till Michaelmas term to redeem: if money not then paid, let the order to foreclose stand—and this to be peremptory.

Ismoord v. Claypool. 18 Charles 2.

Notwithstanding signing and inrolling of the decree of foreclosure, let Defendant have six months' longer time to redeem. [On motion, 1666.]

This case is reported in 1 Ch. Rep. 139.

Clay v. ———. Lord Chancellor, 21st Nov. 1745.

Stanley prays *absolute* foreclosure.

Capper prays time.

Cur. Enlarge time to redeem for six months.

raising the money found due from him, did enlarge [319] the time of payment, notwithstanding the order for foreclosure had been previously made absolute : and that it was sworn in this case that, but for certain adverse circumstances, the money would have been obtained and paid on the 31st of July last.

Motion granted.

[319] BARDSWELL v. BARDSWELL. July 2, 1838.

[S. C. 7 L. J. Ch. 268.]

Will. Construction. Trust.

Testator bequeathed all his property, both real and personal, to his son Charles, his heirs, executors, &c., to and for his and their own use and benefit, well knowing he would discharge the trust the testator reposed in him by remembering his (the testator's) sons and daughters, William, Edmund, Martha, &c. Held, that no trust was created for the sons and daughters ; but that Charles took the property for his own benefit absolutely.

Charles Bardswell, by his will, gave all his estate and effects, both real and personal, unto his son Charles Bardswell, his heirs, executors, administrators and assigns, to and for his and their own use and benefit, *well knowing* he would discharge *the trust* the testator reposed in him, *by remembering* his (the testator's) sons and daughters, William, Edmund, Martha, Eliza, and Maria ; and the testator appointed Charles Bardswell, who was his eldest son, the executor of his will.

The bill was filed by Edmund Bardswell against his brothers and sisters, praying for the usual accounts of the testator's property, and that the rights and interests of the parties therein might be ascertained and declared. Charles Bardswell put in a general demurrer.

Mr. Jacob and Mr. James Russell, in support of the demurrer. There is no statement in the bill that the will was made by the father on the faith of a promise given by C. Bardswell, the son, that he would give any part of the property to his brothers and sisters.

[320] This is an attempt to carry the doctrine of implied trust further than it was ever carried before. In order to raise a trust by implication, there must be certainty both as to the objects and the subject ; and it must be ascertained what proportion each child is to have. But there is nothing in this case from which the Court can adjudicate that the testator intended that his younger children should have part of his property. If C. Bardswell had taken the Plaintiff into partnership, or had bought the Plaintiff a place under Government, he would have fulfilled his father's intention. The Plaintiff appears from his bill to labour under considerable uncertainty as to how much, if anything, Charles Bardswell himself is to have.

The words, "to and for his and their own use and benefit," clearly shew that no trust was intended. In *Sale v. Moore* (*ante*, vol. 1, p. 534), *Meredith v. Heneage* (*Ibid.* 542), and *Benson v. Whittam* (*ante*, vol. 5, p. 22), no such words were used, and yet the Court held that no trust was created. The principle upon which *Hoy v. Master* (*ante*, vol. 6, p. 568) was decided is precisely applicable to the present case. There the testator gave the whole of his property to his wife for her life, and directed that upon her death one-third of it should devolve upon his daughter, and that the other two-thirds should be at the sole and entire disposal of his wife, trusting that, should she not marry again and have other children, her affection for their daughter would induce her to make the daughter her principal heir. It was uncertain, therefore, how much the daughter was to have ; and, moreover, the daughter was to be heir to the property which the wife might leave at her death ; and, [321] consequently, the testator's property was not pointed at as the property which was to furnish the provision. *Lechmere v. Larie* (2 Myl. & Keen, 197), *Wood v. Cor* (2 Myl. & Craig, 684). In the latter of those two cases the words, "for his and their own use and benefit," were used : and the Lord Chancellor founded his judgment on those words,

and held that the devisee took beneficially. [THE VICE-CHANCELLOR. I do not see in any part of the bill that the Plaintiff gives a hint as to the share which he considers himself entitled to.]

Mr. Knight Bruce and Mr. Wakefield, in support of the bill. The testator has devised the whole of his property to his son Charles, well knowing that he would discharge the trust he reposed in him. It is impossible, if we stop there, not to see that the testator intended his son Charles to take the property subject to *some* trust; and, if there is a plain trust fixed upon the property, the words, "to and for his and their own use and benefit," will not destroy it. Those words mean no more than that the devisee is to take the property absolutely. The testator then proceeds to describe the trust. [THE VICE-CHANCELLOR. Was the devisee himself to be a participator in the property?] No: he was not to take any share, but was to be a trustee of the whole for his brothers and sisters.

In none of the cases cited was the word *trust* used. In *Sale v. Moore* the persons intended to be benefited were uncertain, and it was impossible for the Court to ascertain what provision was intended to be made for them. In *Meredith v. Heneage* the words, "unfettered and unlimited," were used; and there was great un-[322]-certainty as to the objects of the testator's bounty. In *Benson v. Whittam* no direction was given to Arthur Benson to apply the dividends for the benefit of the children of Francis Benson; but the words were, "*to enable him* to assist such of the children of . . . deceased brother, Francis Benson, as he may find deserving of encouragement." In *Hoy v. Master* it is clear that no trust was imposed; for the daughter was to be principal heir, not of the testator's property, but of his widow's.

It is clear that Charles Bardswell takes the whole of the property subject to *some* trust; and that is sufficient to sustain this bill. The children are the next of kin of the testator; and, if Charles Bardswell takes the property subject to a trust, but that trust is too vague for the Court to execute, he is a trustee of the property for the testator's next of kin. *Ellis v. Selby* (*ante*, vol. 7, p. 352, and 1 Myl. & Craig, 286), *Morice v. The Bishop of London* (9 Ves. 399, and 10 Ves. 522).

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case has been ingeniously argued: but the result is that one part of the argument destroys the other. It was first said that a clear trust was created, and then that there was no trust.

The words on which the question arises are: "I give, devise and bequeath all my estate and effects, both real and personal, of what nature or kind soever and where-soever the same may be, unto my son, Charles Bardswell, his heirs, executors, administrators and assigns, to and for his and their own use and benefit, well knowing [323] he will discharge the trust I have reposed in him by remembering my sons and daughters."

It is clear from the first part of the sentence that the whole of the property is given to the son absolutely for his own use and benefit. The words of gift point to heirs, executors, &c.; but the words by which the trust is said to be created relate solely to the son; so that it is a gift to the son, his heirs, executors, administrators and assigns, without imposing any trust on the heirs, executors, administrators or assigns. Now a case might easily be put in which the trust could be performed only by the heirs, executors, administrators or assigns; as, for instance, if the son had died the day after his father. But there is a plain expressed intention to give the property to the son for his own use and benefit, well knowing, &c., &c., so that the testator has left it to the son to execute the trust of remembrance in what manner he thinks proper. If we take the words in their common and ordinary sense, the testator has given the property to his son absolutely, and has given a recommendation merely of his other children to the kindness of his son.

There is no doubt that the expression "well knowing" would have created a trust if it were pointed out who were the parties to take, and what they were to take.

The objection that no trust is declared does not apply; as the testator has himself declared what the trust is. The demurrer, must, therefore, be allowed.

[325] GROOM v. THE ATTORNEY-GENERAL AND OTHERS.(1) Nov. 4, 1837.

Practice. Attorney-General.

The Attorney-General not having answered the bill within a reasonable time, the Court ordered that he should put in his answer within a week after service of the order, or that the bill should be taken *pro confesso* against him.

The Attorney-General not having put in his answer to the bill within a reasonable time,

THE VICE-CHANCELLOR, on the application of Mr. G. Richards, ordered that the Attorney-General should, within a week after service of the order, put in his answer to the bill, or, in default thereof, that the bill should be taken *pro confesso* against him; and that service of the order on the Attorney-General's Clerk in Court should be good service. (See 1 Fowl. Ex. Prac. 452, and *Barclay v. Russell*, 2 Dick. 729.)

[326] NICHOLSON v. KNAPP. June 7, 1838.

Injunction. Bishop.

In a suit for the specific performance of an agreement for the sale of the next presentation to a living, the Court will restrain the bishop of the diocese from taking advantage of a lapse pending the suit.

The Defendant Knapp had agreed to sell to the Plaintiff the next presentation to a living. After the agreement was entered into the incumbent died; and Knapp having refused to complete the contract, the bill was filed against him and the bishop of the diocese, praying for a specific performance, and for an injunction to restrain Knapp from presenting and the bishop from instituting, or, in the case of a lapse taking place pending the suit, from collating to the living any clerk not nominated by the Plaintiff.

Mr. K. Bruce and Mr. Beavan now moved for the injunction.

Mr. Jacob and Mr. James Parker, for the Defendant Knapp.

Mr. Flather, for the bishop of the diocese, contended that the Court had no right to interfere with the legal rights of the bishop. But

THE VICE-CHANCELLOR [Sir L. Shadwell] granted an injunction in the terms of the motion.

[327] HAMMOND v. MESSENGER. July 5, 14, 1838.

[See *Sandes v. Dublin United Tramways Company*, 1883, 12 L. R. Ir. 206, 424.]

Assignee of Debt. Debtor and Creditor. Demurrer. Costs. Construction of Lord Lyndhurst's 31st Order.

The assignee of a debt cannot sue for it in a Court of Equity, unless the assignor refuses to allow the assignee to sue for it at law in his name, or has done or intends to do some act which will prevent the assignee from recovering it at law in the assignor's name.

Where a demurrer to the whole bill is allowed, but the Plaintiff has leave to amend, the costs which he is to pay to the Defendant are not the whole costs of the suit, but of the demurrer only.

The Plaintiff was the assignee, for valuable consideration, of a debt of £80 due

(1) *Ex relatione.*

from the Defendant, Charles Messenger, to the Defendants, William Wilks and Henry Thomas Wooler, who had been co-partners as coal merchants.

The bill alleged, amongst other things, that on the 2d of October 1837 the Plaintiff applied to Messenger to pay him the £80, and fully apprised Messenger of his right and title to be paid the debt; and that Messenger for the first time pretended that the Plaintiff was not entitled to receive the debt, but that he was bound to pay it to Wilks & Wooler; that the Plaintiff had since renewed his applications, but Messenger had refused to comply therewith, pretending that no debt was due from him to Wilks & Wooler, or to the Plaintiff as the assignee thereof, but that the alleged debt was due to Wilks, solely, on his own private account: but the Plaintiff charged that the £80 was a debt due to the late firm of Wilks & Wooler at the time of the dissolution of their partnership, and that after such dissolution the £80 became and still was due by Messenger to the Plaintiff, and that Messenger had had express notice from the Plaintiff of the Plaintiff's right to receive the same from him; and, on receiving such notice, Messenger became and still was a trustee in equity for the Plaintiff of the £80: that Wilks and Messenger (although at other times they did not dispute the Plaintiff's right to receive the debt) acting in collusion together, pretended that there was some private and sepa-[328]-rate debt due from Wilks to Messenger, equal to or greater in amount than the £80 due from Messenger to the firm, and that Messenger was entitled to set off his private debt against the debt so due from him to the firm; but the Plaintiff charged that if any private debt was due from Wilks to Messenger, Messenger was not entitled to set off the same against the £80: that if any agreement had been entered into between Wilks and Messenger for the purpose of enabling Messenger to set off such alleged private debt against the £80, the same was entered into collusively with Wilks solely, without the privity or concurrence of Wooler, and such agreement was fraudulent and void as against the Plaintiff and Wooler; and as evidence that such agreement (if any such had been entered into) was collusive and fraudulent as against the Plaintiff and Wooler, the Plaintiff charged that Messenger, having in October then last applied to Wilks for a debt claimed to be due to him from Wilks, and proposed to set off the same against the debt of £80, was informed by Wilks or by his agent or attorney that he, Messenger, had no right to do so, and that he could not consent thereto, and that the debt due from Wilks to Messenger should be paid if Messenger would grant to Wilks a little time for that purpose, and that Messenger had admitted the facts so to be to the Plaintiff and other persons: and that Messenger at other times alleged that he had paid the £80 to Wilks & Wooler; but the Plaintiff charged the contrary to be true: that Messenger, further colluding with Wilks, at other times alleged that he had obtained and had then in his possession a release or other instrument in writing, signed by Wilks & Wooler; whereby they acknowledged to have received the £80, and released and discharged Messenger therefrom; but the Plaintiff charged that, if in fact such release or instrument of discharge [329] had been given to Messenger, or he had any such in his possession, the same was, in fact, signed and given by Wilks alone to Messenger, without the privity or knowledge, and against the will and consent, of Wooler; and that the same was so given to Messenger collusively and fraudulently, and that no money passed between Wilks and Messenger upon the occasion of Wilks giving the same: that if, in fact, any payment or any such release or receipt as was pretended had been made, signed or given by Messenger to Wilks, such payment and such release or receipt had been made and signed or given in consequence or in consideration of some bond of indemnity of Wilks, or of his agent or attorney, or of some other person or persons on his behalf, whereby Wilks or such agent or attorney or other person or persons as aforesaid had agreed to indemnify Messenger from all losses, damages and expenses to which he might thereafter be subject in consequence of such payment to Wilks, or of such release or receipt so alleged to have been given by Wilks to Messenger: that Wilks, Wooler and Messenger had had various conversations with each other, and with other persons, in which they had admitted the matters before stated, or some of them, as true; and that they and other persons had written, sent, received and seen divers letters, notes, &c., relating to the matters aforesaid, and that they then had or theretofore had in their possession or power divers deeds, &c., relating to the co-partnership affairs and accounts of Wilks & Wooler, and the assets thereof, and to the agreement

for payment, and to the payment of the debt of £80, and to the other matters aforesaid or some of them, and whereby the truth of such matters would appear.

The bill prayed that Messenger might be decreed to [330] pay to the Plaintiff the £80, or, if necessary, that an account might be taken of all sums due by Messenger to the firm, and that he might be decreed to pay to the Plaintiff what, upon taking such account, might be found due; or that the Plaintiff might be at liberty to use the names of Wilks & Wooler in an action at law, to be brought by him against Messenger; and that Messenger might be restrained from pleading to such action any plea or pleas of payment or satisfaction of the debt of £80, or in any manner availing himself thereof, in such action, and that Wilks & Wooler might be restrained from releasing the debt or discontinuing the action, or in any way interfering with the Plaintiff in the proceedings thereunder.

Messenger put in a general demurrer.

Mr. Wigram and Mr. Girdlestone, in support of the demurrer. The Plaintiff is the assignee of a debt due from Messenger to Wilks & Wooler; therefore his remedy is naturally at law. In order to give jurisdiction in such a case to a Court of Equity, the Plaintiff must shew that there is some legal bar existing which prevents his suing at law. This bill does not allege that Messenger has, in fact, obtained a release of the debt from Wilks & Wooler; but it states, merely, that Messenger *says* that he has obtained such a release. Nor does the bill contain any allegation that Wilks & Wooler have threatened or intend to release the debt, or that they have refused to permit the Plaintiff to sue at law in their names for the recovery of the debt. On the argument of a demurrer it is not sufficient for the Plaintiff to shew that he may possibly be entitled to relief at the hearing. Unless such [331] a case appears on the face of the bill, that relief must be necessarily given at the hearing if all the statements are proved or admitted, the bill is demurrable. *Mitf. Treat.* 3d edition, 100. *Attorney-General v. Mayor of Norwich* (2 Myl. & Craig, 406); *Jones v. Jones* (3 Mer. 161); *Barber v. Hunter* (cited in 3 Mer. 173); *Stansbury v. Arkwright* (*ante*, vol. 6, p. 481); *Kemp v. Pryor* (7 Ves. 237).

Mr. Knight Bruce, Mr. Jacob and Mr. Tripp, in support of the bill, contended that the assignee of a debt might sue for it in a Court of Equity; and though, according to the modern practice at law, a Judge at Chambers might order the assignor to allow his name to be used in an action to be brought by the assignee against the debtor, yet a Court of Equity was not to be ousted of its jurisdiction by modern innovations. *Aston v. Lord Exeter* (6 Ves. 288), *Hylton v. Morgan* (*Ibid.* 293), *Cathcart v. Lewis* (1 Ves. 463): that according to the averments in the bill, which were admitted by the demurrer, Messenger had notice of the assignment; therefore, he could not pay the assignors, and he would not pay the assignee, and, consequently, if the bill was not maintainable, he must retain the debt subject to the risk of his insolvency: that the bill contained distinct charges of collusion between the debtor and one of the joint legal creditors, for, if a Defendant admitted that he averred a fact, he could not dispute the truth of it; and, as Messenger admitted by his demurrer that he alleged that he had obtained a fraudulent release of the debt, he must be taken to have admitted the fact alleged: that *Jones v. Jones* was decided on the ground that, in that case, there was no allegation of any legal bar [332] existing; but where, as in the present case, a legal impediment was averred, there was an end to the objection against the assignee of the debt suing for it in a Court of Equity.

THE VICE-CHANCELLOR [Sir L. Shadwell]. If this case were stripped of all special circumstances it would be simply a bill filed by a Plaintiff who had obtained from certain persons, to whom a debt was due, a right to sue in their names for the debt. It is quite new to me that, in such a simple case as that, this Court allows, in the first instance, a bill to be filed against the debtor, by the person who has become the assignee of the debt. I admit that, if special circumstances are stated, and it is represented that, notwithstanding the right which the party has obtained to sue in the name of the creditor the creditor will interfere and prevent the exercise of that right, this Court will interpose for the purpose of preventing that species of wrong being done; and, if the creditor will not allow the matter to be tried at law in his name, this Court has a jurisdiction, in the first instance, to compel the debtor to

pay the debt to the Plaintiff; especially in a case where the act done by the creditor is done in collusion with the debtor.

If bills of this kind were allowable, it is obvious that they would be pretty frequent: but I never remember any instance of such a bill as this being filed, unaccompanied by special circumstances.

The only question then is whether, on this record, there are any special circumstances which create a ground for a Court of Equity to entertain the bill against the debtor.

[333] The bill sets out with a statement that a partnership was carried on between Wilks & Wooler; and a variety of instruments and transactions are stated, the result of which was that the partnership was to be dissolved, that the Plaintiff was to pay the debts due from the partnership, and to be entitled to the partnership assets. Then it represents that Messenger, the demurring party, at the time of the agreement for the dissolution of the partnership, was justly indebted to the firm in the sum of £80 for coal and coke sold and delivered to him by the firm, and that Messenger is now indebted to the Plaintiff in the said sum of £80 as the assignee of such debt. Therefore the debt in question was purely a debt recoverable at law. Then the bill states a notice given to Messenger by the Plaintiff to pay the debt to him. It then states that on the 2d of October the Plaintiff called on Messenger and applied to him for payment of the sum of £80, and fully apprised him of the Plaintiff's right and title to demand and receive payment of it from him: that Messenger, for the first time, pretended that the Plaintiff was not entitled to receive the debt, but that he was bound to pay it to Wilks & Wooler. That, of itself, creates no equitable ground.

The bill then alleges, in the usual manner, that the Plaintiff had applied to Messenger for the payment of the debt, and that Messenger, combining and confederating with Wilks, had refused so to do, and pretended that there was no such debt: that, however, gives no equity. Then it charges that Messenger, on receiving notice of the Plaintiff's right and title to the debt, became and still was a trustee of it for the Plaintiff. That again does not make him a trustee, that is to say, such a trustee as the Plaintiff has a right [334] to sue in equity, unless the whole circumstances of the case taken together do shew that the Plaintiff has a right to sue in equity. Then the bill charges that Wilks and Messenger, colluding together, allege that there was a large sum due from the Plaintiff to Wilks & Wooler; but that is denied. It then charges that Wilks and Wooler, acting in collusion together, pretend that there was or is some private and separate debt of Wilks due and owing from him to Messenger, equal to or greater in amount than the said debt of £80, and that Messenger was entitled to set off his private debt against the debt of £80. *Prima facie* one would imagine that could not be so: but if it were so, it appears to me that, if there was any transaction or any circumstance of such a nature as that, it will be available to Messenger, at law, for the purpose of reducing or annihilating the debt of £80, Messenger has a right, at law, to avail himself of that circumstance. Then the bill charges that Messenger, having in the month of October last applied to Wilks for a debt claimed to be due from him to Messenger, and proposed to deduct and set off the debt owing to Messenger by Wilks from and against the £80 owing by Messenger to the Plaintiff, was informed by Wilks, or his agent or attorney, that he, Messenger, had no right to do so. I do not see how that affects the case at all.

Then comes the charge which was mainly relied upon as creating the equity in this case. It is as follows:—"That Messenger, further colluding with Wilks, at other times alleges that he has obtained and now has in his possession a release or other instrument in writing signed with the names of Wilks & Wooler, whereby Wilks & Wooler acknowledge to have received the said sum of £80, and do release and discharge [335] Messenger therefrom." Then the bill charges: "That if, in fact, such release or instrument of discharge has been at any time given to Messenger, or he has any such in his possession, the same was, in fact, signed and given by Wilks alone to Messenger, without the privity or knowledge and against the will and consent of Wooler, and the same was so given to Messenger collusively and fraudulently, and that no money passed between Wilks and Messenger on the occasion of

Wilks giving the same." Now if we take the former of these charges by itself, and, more especially, if we couple it with the latter, it is plain that it cannot be considered as amounting to a positive charge that Messenger has obtained and has in his possession a release of the debt from Wilks & Wooller; but it is merely a charge that Messenger *alleges* that he has obtained and has in his possession such a release. A statement that a party *alleges* a certain thing to be so and so cannot be considered as a positive statement that the thing is so and so.

A similar point was brought under my notice in the case of *Stansbury v. Arkwright* (*ante*, vol. 6, p. 481), where there was an allegation in the bill that the Defendant threatened to set up some outstanding term of years or other legal estate, and I expressly stated, as the ground of my judgment in that case, that the bill did not allege that there *was* any outstanding term or estate, but merely that the Defendant threatened to set up some outstanding term or other legal estate: and I looked upon it therefore and treated it as a statement that the Defendant alleged a fact, and that it was not to be taken as a statement that what he alleged was the fact; and it [336] seems to me that that is the fair inference in this case: moreover, in the next charge, there is a sort of hypothetical account given of the circumstances under which the release was signed and given if it existed, without there being anything on the face of the bill which at all tends to shew that that which the Defendant has alleged as a fact is true in fact.

Then there is another charge: "That Wilks, Wooller and Messenger have had various conversations with each other, and with other persons, in which they have admitted the matters hereinbefore stated and mentioned." That would have been strong if it stood alone; but then the bill goes on to say, "or some of them, or referred to such matters, or some of them, as true." And, as I am not informed by this bill which of those matters were admitted or referred to as true, but only that such matters or some of them were so referred to or admitted, that allegation does not affect the case. If it had been stated that there had been such a release given, or that it was the intention of Wilks & Wooller to give it, or if it had been stated there was any intention on the part of Wilks & Wooller to give, and on the part of Messenger to receive from, them anything which would be destructive of the action, that statement would be a ground for interfering; but there is no such statement in the bill.

When I come to the prayer, I find that it first of all prays, "that Messenger may be decreed to pay to the Plaintiff the sum of £80 so due to the firm of Wilks & Wooller as aforesaid, or, if necessary, that an account may be taken." Now no case whatever is stated to shew the necessity for an account, and, therefore, it [337] must, of necessity, stand as a mere prayer that Messenger may be decreed to pay the debt. It then proceeds as follows: "or that the Plaintiff may be at liberty to use the name of the Defendants, Wilks & Wooller, in an action at law to be brought by him against Messenger." There is, however, no case stated which shews that Wilks & Wooller have at all interfered to prevent, or that they intend to prevent, the Plaintiff from using their names at law. Then it goes on thus, "and that Messenger may be restrained from pleading to such action, any plea or pleas of payment or satisfaction of such debt of £80 to Wilks & Wooller, or in any manner availing himself thereof." I do not understand what is meant by this part of the prayer; because the bill nowhere states that there has been a fictitious payment or satisfaction of which Messenger intends to avail himself at law. Why then does it ask that Messenger may be restrained from pleading any plea or pleas of payment or satisfaction of the debt to Wilks & Wooller, or in any manner availing himself thereof.

It seems to me that this case is altogether denuded of those special circumstances, the existence of which is the only ground for this Court to lend its aid to a party who, like the Plaintiff, has taken an assignment of a debt: and, consequently, the demurrer must be allowed.

Demurrer allowed, with liberty to the Plaintiff to amend his bill.

[338] A question arose, on drawing up the order in the above case, whether the Plaintiff ought to pay the costs of the demurrer only, or those costs and the costs of the suit also; as Lord Lyndhurst's 31st Order directs that, upon the allowance of any plea or demurrer, the Plaintiff shall pay to the Defendant the taxed costs thereof;

and, when such plea or demurrer is to the whole bill, then the further taxed costs of the suit also.

THE VICE-CHANCELLOR decided that the Plaintiff ought to pay the costs of the demurrer only.

[339] MUNCH v. COCKERELL. July 16, 17, 19, 21, 23, Dec. 22, 1838.

[See S. C. on appeal, 5 My. & Cr. 178 ; 41 E. R. 338.]

Trustees. Breach of Trust. Acquiescence.

By a settlement made in India, in 1778, the trustees were directed to invest a certain sum of rupees in good public or private securities, at the highest rate of interest that could be obtained, upon certain trusts under which one of the daughters of the marriage became entitled to a moiety of the fund after the death of her father and mother. The fund was accordingly invested in notes of the Indian Government ; and those notes were deposited with Palmer & Co., of Calcutta. On the daughter's marriage in 1791 her moiety of the fund was assigned to other trustees, in trust, after the deaths of her father and mother, to receive and lay out the same in such of the public stocks or Parliamentary funds or other securities (private personal security only excepted) as the daughter and her husband should appoint. After the father's death the mother filed a bill against the trustees of the two settlements and her daughter and her husband, to have the trusts of 1778 carried into execution. By the decree in that suit, made in 1809, at which time the mother was dead, certain arrears of interest on the fund were ordered to be paid to the mother's representative, and the daughter's moiety of the fund was declared to have vested in the trustees of the settlement of 1791 upon the trusts thereof, and was ordered to be paid to them accordingly. The trustees of 1778 did not comply with that decree, but allowed the notes to remain in the hands of Palmer & Co., who failed in 1830, having previously received the amount of the notes. Held, that the trustees of 1778 were responsible for the loss. Held, also, that although the *cestui que trust* knew and acquiesced in the mode in which the fund had been invested and dealt with, and approved of its remaining under the management of Palmer & Co., yet, as the trustees were aware that Palmer & Co. were in pecuniary difficulties some time before they failed, but did not inform the *cestui que trust* thereof, the acquiescence did not exempt the trustees from their liability.

This cause came on to be heard in November 1836, when an objection was taken for want of parties, and in part allowed. (See *ante*, vol. 8, p. 219.)

The necessary parties having been brought before the Court, the cause again came on to be heard.

[340] In addition to the facts contained in the former report, it is necessary to state that it appeared from the proceedings in a suit relating to the fund in question, which was instituted in 1820 by Mr. Silberschildt, in the name of himself and his daughters, Mrs. Munch and Mary Elizabeth Silberschildt, against Sir W. Paxton, Sir C. Cockerell and Mr. Trail (see *post*, p. 345), and also from the correspondence which subsequently took place between Mrs. Munch and Cockerell & Co., and their respective solicitors, that Mrs. Munch knew of and acquiesced in the manner in which the fund in question in the suit had been invested and dealt with, and expressed a wish that it should continue under the management of Palmer & Co. It did not, however, appear that Mrs. Munch was aware that in 1823 Palmer & Co. received the sum of 164,000 rupees, being the amount of the India Company's note, on which the fund was then invested, and afterwards took a new note for 114,000 rupees, but kept the balance of 50,000 rupees in their hands.

Mr. Knight Bruce and Mr. G. Richards appeared for the Plaintiffs.

Mr. Walker, for the parties entitled to Mrs. Le Gros's moiety of the fund.

Mr. Jacob and Mr. Cockerell, for the representatives of Sir C. Cockerell, who had recently died, and also for the representatives of Logan.

Mr. Wigram and Mr. Sharpe, for Trail's representatives.

[341] THE SOLICITOR-GENERAL [Sir R. M. Rolfe] and Mr. J. F. Hall, for Sir W. Paxton's representatives.

Sir. W. Horne and Mr. Shadwell, for Evelyn's representatives.

The counsel for the representatives of Cockerell and Trail relied principally upon the acquiescency, on the part of the Plaintiffs, in the mode in which the fund had been dealt with. They contended also that the trustees of the settlement of 1791, and not their clients, were responsible to the Plaintiffs.

The cases cited in the course of the argument were *Langston v. Olivant* (Coop. C. C. 33); *Massey v. Banner* (1 Jac. & Walk. 241); *Macdonnell v. Harding* (ante, vol. 7, p. 178); *Heathcote v. Hulme* (1 Jac. & Walk. 122); and *Twyford v. Trail* (ante, vol. 7, p. 92).

THE VICE-CHANCELLOR [Sir L. Shadwell]. After the marriage of William Barton with Harriett, his wife, a settlement was made, in the year 1774,(1) which directed that a sum of 40,320 rupees should be invested either in the East India Company's interest notes, if the same could be procured, or, otherwise, in such good and sufficient security or securities as the trustees should think proper. In December 1778 another deed was executed, by which a slight variation was made in the mode of investment directed by the deed of 1774; and there the direction was that the fund should be invested in some good or sufficient public or private [342] security or securities at the best and highest rate of interest that could be obtained, and that those securities should be held on certain trusts for the benefit of Mrs. Barton and her children. There was issue of the marriage two children, Harriet, who married J. F. Silberschildt, and Elizabeth, who married William le Gros; and they became the parties entitled to the fund after the death of their father and mother.

In April 1791, upon the marriage of Harriet with Mr. Silberschildt, a settlement was made by which her moiety of the fund was assigned to Archibald Paxton, Sir W. Paxton and John le Gros, in trust to receive and lay out and invest the same in or upon such of the public stocks or Parliamentary funds or other securities (private personal security only excepted) as the husband and wife should appoint.

There was a power to change trustees in the deed of 1778; and a deed was executed in the month of September 1792, under which Sir Charles Cockerell, Henry Trail and William Logan became trustees of the deed of 1778, in conjunction with John Evelyn, one of the original trustees. William Barton died in 1799; and, shortly after his death, his widow married Mr. Eyles; and, in February 1802, Mr. and Mrs. Eyles filed a bill, to which John Evelyn, Sir Charles Cockerell, Henry Trail, William Logan, William le Gros and his wife, and their son, William Beaufoy le Gros, and Mr. and Mrs. Silberschildt and their children, were Defendants; and it seems that one of the objects of that suit was to settle a question as to what was due in respect of interest that had accrued on the fund comprised in the deed of 1778. There were various proceedings in that cause, and the ultimate result of it was that, in the [343] year 1809, there was a final decree made, which directed the arrears of interest on the fund accrued between the death of William Barton and the death of Mrs. Eyles (who died pending the suit) to be paid to Mr. Eyles; and it was declared that Mrs. le Gros was entitled to one moiety of the capital of the fund; and the remaining moiety was directed to be paid to the Defendants A. Paxton and Sir W. Paxton, upon the trusts of the settlement of 1791. It appears, by the proceedings in the cause, that there had been a reference to the Master to see whether the deed of 1791 was a proper settlement of Mrs. Silberschildt's share; and the Master made a report in which he sets forth the settlement at length, and finds that it was a proper settlement; and that report was confirmed. I mention this, because, in my opinion, *this ordering part of the decree in 1809 has made it quite unnecessary to enter into the question, that was very much discussed, namely, what was the sort of investment in India which the trustees were at liberty to make under the directions which were contained in the deeds of 1774 and 1778.*

At the time when the final decree was made in the cause of *Eyles v. Evelyn*,

(1) It did not appear to be necessary to notice this deed in the former report of the case.

William le Gros was dead; and, though Mrs. Eyles was alive when the suit was instituted, yet she died pending the suit in the year 1805; and her husband, Mr. Eyles, administered to her; and then a bill of revivor was filed; so that it appeared, by the proceedings in the cause, that the Silberschildt moiety had come into possession in the course of the cause; therefore the Court was justified in decreeing, in 1809, that that moiety should be transferred to Sir William Paxton and A. Paxton, who were the surviving trustees of the settlement of 1791. Now, by the trusts of that settlement, that moiety was to be [344] invested in public stocks, or Parliamentary funds, or other securities (private personal security only excepted); and, in my opinion, *the very least obligation which was imposed, by the settlement of 1791, on the trustees of the deeds of 1774 and 1778, was that they should transfer a moiety of the fund, which is the moiety in question, to Archibald Paxton and Sir W. Paxton.* If they did not choose to do so, they might have been perfectly safe if they had invested that moiety in those securities which were pointed out, by the settlement of 1791, as the securities in which Mrs. Silberschildt's moiety was to be invested when it came into possession. Instead of which the trust fund was allowed to remain in India in the state which I am about to mention.

There was a firm formed of certain gentlemen at Calcutta, for the purpose of carrying on mercantile business there, which at first consisted of Sir C. Cockerell, Mr. Trail and Sir William Paxton. Then, in 1795, Sir W. Paxton retired, and Mr. Palmer became a partner. Afterwards Sir Charles Cockerell and Mr. Trail withdrew themselves; and ultimately the partnership firm became the firm of Palmer & Co.

Before the year 1800 A. Paxton, Sir W. Paxton, Sir C. Cockerell and Mr. Trail became partners in London, in an East India house, and that firm was, from time to time, carried on under various names. The London house had a great many transactions with the house at Calcutta; and, up to the year 1823, the trust fund was allowed to remain invested on securities of the Indian Government; and a great deal of the evidence in the cause relates to the nature of the securities and to the circumstance that the trustees, if they had taken certain precautions, might have prevented anyone from re-[345]-ceiving the money due on those securities, without their concurrence. In 1823, when the whole amount of the trust fund was 164,000 rupees or thereabouts, the Government paid off the notes, and Messrs. Palmer, who acted in the transaction, took a new note for 114,000 sicca rupees, and kept the balance, the difference between the amount of that note and the 164,000 rupees, that is, 50,000 rupees, in their hands; and, from time to time, accounts were transmitted from Palmer & Co. to Cockerell and Co., which shewed what was the state of the trust fund.

For a considerable time the payment of the interest on the moiety in which Mr. Silberschildt was interested was made to him, and without complaint; but Silberschildt afterwards found some occasion to quarrel with what had been done; and, in the year 1820, he filed a bill in the name of himself and Mr. Munch, who had then married his daughter Harriet Elizabeth Munch, and of his other daughter Mary Elizabeth Silberschildt, against Sir W. Paxton, Sir C. Cockerell and H. Trail, praying for an account of all sums of money received by Sir C. Cockerell and his agents, in respect of his late wife's moiety of the yearly interests of the trust fund, which then amounted to 164,000 sicca rupees, and of what had been paid in respect thereof; and it also prayed that the Defendants might be decreed to pay the balance of the interest to Mr. Silberschildt. To this bill answers were put in by Sir W. Paxton, Sir C. Cockerell and Mr. Trail, which represented that the Defendants had been, for many years last past, resident in this country, and had carried on business, in co-partnership together and with other persons, as merchants in London, and that the management of the trust fund had been entrusted by them to Palmer & Co., their correspondents [346] at Calcutta, who had, from time to time, received the proceeds thereof, and had annually remitted the same to the house of the Defendants, Sir C. Cockerell, Henry Trail, and their co-partners for the time being, to be by them applied for the benefit of the parties interested therein; and that it appeared, by the accounts transmitted by Palmer & Co., their correspondents, which they believed to be correct and true, that, in the month of June 1811, the trust funds amounted in the whole to the sum of 164,000 sicca rupees, which was then invested at interest upon the security of a

note of the Bengal Government, bearing date the 30th of June 1811, and carrying interest at the rate of 6 per cent., and which interest the Defendants believed was payable half-yearly. Then they say that they believed that that note and security was then in the custody of Palmer & Co., but subject to the order and disposition of the trustees. This was the representation which was made at the time those gentlemen put in their answer in this suit. Mr. Silberschildt died in the month of August 1827, and the suit so instituted by him was not prosecuted after his death. At the time of, and after the death of Mr. Silberschildt, Mrs. Munch and her sister Miss Silberschildt were resident at Copenhagen; and they always resided there, with the exception that Mrs. Munch, for a short time, paid a visit to England, which does not affect the case at all. After the death of Mr. Silberschildt a further application was made to Messrs. Cockerell and Trail, on behalf of Mrs. Munch and her sister, for the purpose of obtaining a settlement of their rights with respect to the fund; and a great deal of correspondence was carried on between the parties and their respective solicitors, upon which nothing turns, at least, nothing in favour of the Defendants. It appears, however, that the matter took this course; namely, that Mrs. Munch [347] and her sister gave a power of attorney to Reid, Irving & Co., to receive their moiety of the fund, and, upon receiving it, to give a release and discharge to the trustees.

The correspondence evidently shews that there was a desire, on the part of Mrs. Munch and her sister, to continue, as they expressed themselves, the management of the fund in the same respectable hands, meaning the hands of Palmer & Co.

It appears, too, that a release was actually executed, to the trustees, by the parties having the power of attorney, but that release can produce no effect whatever on the question, because the power of attorney was not to be acted upon by the attorney, except upon receipt of what was due to the principals, and that receipt was never had. Moreover, throughout the correspondence, no representation was made either to Mrs. Munch or her sister, or to the agents acting for them, of the real position of the affairs of Palmer & Co., as far as they actually were within the knowledge of Sir C. Cockerell and Mr. Trail; and it distinctly appears, from their answer, that they must have been aware that the position in which Messrs. Palmer stood in 1827 was such as to make it rather an unsafe thing to let money remain in their hands; because it is represented, in their answer, that they had originally agreed to give credit to Palmer & Co. for £150,000; and that, nevertheless, Palmer & Co. had been continually increasing their drafts upon them until the debt amounted to £400,000. It appears also that they had remonstrated with Messrs. Palmer, and had taken some steps for the purpose of procuring a diminution of the debt; notwithstanding which the correspondence was carried on without any mention being [348] made of those facts; and, at last, a release was executed; and certain instruments were sent out to India, which, had they been duly acted upon, and had Messrs. Palmer & Co. been solvent, would have had the effect of releasing Messrs. Cockerell and Trail from all their liability as trustees. But the release was executed on the 8th of January 1830, and the failure of Messrs. Palmer's house took place a few days before. *The answers which Sir C. Cockerell and Mr. Trail have put into the original bill in this suit would almost have afforded a case for a decree without any evidence at all; because it does most distinctly appear that, during all the time in which the correspondence to which I have alluded was going on, no statement was ever made of the position in which (as their answer shews) Messrs. Cockerell and Trail must have known that Messrs. Palmer & Co. really stood.* In my opinion, therefore, there is nothing like acquiescence which can bind Mrs. Munch or those who represent her.

It was said by the counsel for Sir C. Cockerell and Mrs. Trail that, after the death of Mr. Silberschildt, the ladies consented that the suit of *Silberschildt v. Cockerell* should be dismissed with costs; and so they did; but that suit was not a suit which at all raised the question which is raised in this suit. The principal question in it was respecting the interest of the Plaintiff's moiety of the trust fund; and it appears from the admissions in this cause that the bill was filed without any privy or knowledge on the part either of Mr. and Mrs. Munch or Miss Silberschildt. The bill was certainly dismissed; but I do not think that much advantage could arise to Messrs. Cockerell and Trail, from that suit, considering that there was, in the answer

they put in to it in 1820 and 1821, a representation that the [349] 164,000 sicca rupees were under their order and disposition, though they might have been managed by Palmer & Co.

Messrs. Cockerell and Trail originally acted wrongly in not making the transfer which was ordered by the decree of 1809 in the cause of *Eyles v. Evelyn*; and though they might, with the concurrence of the tenants for life, have dealt with the fund in the way in which it was actually dealt with, yet no concurrence of the tenants for life could at all bind or affect the interest of those entitled in remainder: and, in my opinion, it was the duty of Messrs. Cockerell & Trail, if they were willing to take a release at all, to state exactly those circumstances which were within their knowledge in regard to the house of Palmer & Co. They did not, however, do so. They took a release which, in fact, was no release at all; for no transfer was made according to the power of attorney which was sent out for that purpose; and, therefore, I do not see how it is possible to abstain from making a decree, which will have the effect of making Messrs. Cockerell and Trail liable to Mrs. Munch for the amount of one moiety of the trust fund.

When this case was first brought before me it was contended that the representatives of Evelyn and of Logan, and those persons also who represent, in point of interest, the Le Gros moiety of the fund, ought to have been parties to the suit; and I was of opinion that the objection was well founded; and the consequence is that all those parties have been brought before the Court. Now, it is contended that Evelyn's estate is not liable: and I was very desirous, before I decided the point, to read over all the papers in *Eyles v. Evelyn*, for the sake of seeing how, at the time when that cause [350] was in progress, the Court had treated Evelyn. When Evelyn put in his answer in that cause, he represented that he had never acted in the trust since 1792; and it seems to me that in the whole progress of that cause, including the proceedings before the Master, and adverting to the sort of answer put into the bill by Messrs. Cockerell, Trail and Logan, Evelyn was virtually considered not as a trustee *de facto*, though he had been a trustee, in a sense perhaps, by allowing the funds to stand to a certain extent in his own name. Virtually, he was not considered as a trustee; he did not attend before the Master in taking the accounts. Those accounts were taken solely as against Cockerell, Trail and Logan; and, therefore, it would be the height of injustice, after the lapse of so many years since the final decree was made in *Eyles v. Evelyn*, to hold that Evelyn should be liable as a trustee; and, therefore, as against his representative, the bill must be dismissed, with costs to be paid by the Plaintiffs; but those costs must be paid over again by the representatives of Sir C. Cockerell and Mr. Trail, for they it was who made the objection which had the effect of producing Evelyn's representative as a party to the record.

Next, with respect to Mr. Logan. Mr. Logan was a party to the cause of *Eyles v. Evelyn* at the time when the decree of 1809 was pronounced; but I collect from a passage in the answer either of Sir C. Cockerell or Mr. Trail, that he was drowned in his homeward passage in that very year; and though he might be a party *de facto* to the cause, and so, in that sense, be bound by the decree of 1809; yet it would be extremely unjust to say that he should be made responsible for all that was consequent on that decree. The only liability he could come under would have arisen from non-com-[351]-pliance with that decree: but, in point of fact, he could not have executed it, for he was dead at the time.

My opinion on the whole of this case is that, as to the relief which is substantially asked by the bill, the Plaintiffs are entitled to an account of what is due in respect of the whole of the fund which was in the hands of Messrs. Palmer & Co at the time of their failure, and also of what is due in respect of interest on that fund, after the rate of £5 per cent. (See *Heathcote v. Hulme*, 1 Jac. & Walk. 122.) And, if the representatives of Sir C. Cockerell and Mr. Trail admit assets, they will be liable to pay what may be found due; otherwise an account must be taken of the assets possessed by them.(1)

(1) In Hil. term 1840 the Lord Chancellor affirmed the above decision, so far as it related to the cash balance of 50,000 rupees; but reversed it, so far as it related to the proceeds of the note for 114,000 rupees. [5 My. & Cr. 178.]

[352] MATHER v. PRIESTMAN. July 27, 1838.

Insolvent Debtor. Construction of Insolvent Debtors Act, 7 Geo. 4, c. 57, s. 20.

Although the Insolvent Debtors Act (7 Geo. 4, c. 57, s. 20) directs the assignees to sell the insolvent's real estates by auction, yet, if they have tried to sell them by auction and failed, a sale by private contract will be good.

The Plaintiffs were the assignees of an insolvent debtor; and, having made an ineffectual attempt, within the time prescribed by the Insolvent Debtors Act (7 Geo. 4, c. 57, sect. 20) to sell the insolvent's real estates by auction, they, after that time had expired, sold part of the estates to the Defendant by private contract, having previously obtained the consent of the major part in value of the creditors present at a meeting duly convened for that purpose.

The bill was filed for a specific performance of the contract; and the question was whether, under the section of the Act above referred to, the assignees were authorized to sell the estates otherwise than by public auction.

That section enacts that the assignee or assignees of the estate and effects of any such prisoner shall, with all convenient speed after his or their accepting the conveyance and assignment of the prisoner's estate and effects from the provisional assignee, use his or their best endeavours to receive and get in the estate and effects of such prisoner, and shall, with all convenient speed, make sale of all such estate and effects; and if such prisoner shall be interested in or entitled to any real estate, either in possession, reversion or expectancy, such real estate, within the space of six months after the conveyance and assignment made to such assignee or assignees in that behalf, or within such other time as the Insolvent Debtors Court shall direct, *shall be sold* [353] *by public auction* in such manner and at such place or places as shall, thirty days before any such sale, be approved, in writing under their hands, by the major part in value of the creditors of such prisoner entitled to the benefit thereof, who shall meet together on notice of such meeting published fourteen days previous thereto in the *London Gazette*, and also in some daily newspaper printed and published in London, or within the bills of mortality, if the prisoner, before his or her going to prison, resided in London or within the bills of mortality, and if such prisoner resided elsewhere within the United Kingdom, then in some printed newspaper which shall be generally circulated in or near the place where such prisoner resided at the time aforesaid.

Mr. Knight Bruce and Mr. Bethell, for the Plaintiffs, contended that the language of that part of the section which related to the sale of the insolvent's real estate was affirmative and directory merely, and that it was nowhere enacted that, if the estates were not sold by auction, the sale should be void. *The King v. The Justices of the Borough of Leicester* (7 Barn. & Cress. 6); *The King v. The Inhabitants of Birmingham* (8 Barn. & Cress. 29). That the language of the 24th section of the Act was much stronger than the language of the 20th, for it enacted that no suit in equity should be commenced by the assignees without the consent in writing of the major part in value of the creditors; and yet it had been decided that a suit might be commenced by the assignees without such consent. *Piercy v. Roberts* (1 Myl. & Keen. 4); *Casborne v. Barsham* (ante, vol. 6, p. 317).

Mr. G. Richards, for the Defendant, said that, under the 20th section of the Act, the assignees could not sell [354] the insolvent's real estates otherwise than by auction; and, if they could not sell them within the time mentioned in that section, they must apply to the Insolvent Debtors Court to appoint a further time. *Walrond v. Howell* (3 Russ. 376).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The objection raised by the Defendant is unfounded.

The first part of the 20th section of the Act contains a *general* direction that the assignees shall make sale of *all* the insolvent's estate and effects. The section then proceeds to enact that, within a certain time, the assignees shall sell the insolvent's real estates by public auction; but the Act nowhere enacts that they shall not be

sold in any other manner than by public auction; therefore the general direction for sale in the previous part of the section still remains in force; consequently, if the scheme of selling by auction has been tried and failed, the assignees were justified in selling by private contract.

[355] *HAWKES v. BALDWIN.* July 30, 1838.

[S. C. 7 L. J. Ch. 297; 2 Jur. 698.]

Will. Construction. Legacy.

Testatrix gave legacies to A., B. and C., and declared that if any of them should be dead at her decease, or should not then be heard of to be then living, or should not respectively claim their respective legacies within twelve months after her death, then the legacies given to such of them as should be dead at her decease, or as should neglect to claim the same within the time aforesaid, should sink into her residuary estate. Three years after the testatrix's death C., who had not been heard of for upwards of 20 years, claimed her legacy. Held, that she was not entitled to it, although she had been ignorant until a short time before that her sister was dead.

Mary Hawkes made her will, dated the 15th of January 1834, as follows:—

"I direct that all my just debts, funeral and testamentary expenses be paid as soon as conveniently may be after my decease. I give and bequeath unto each of my servants, Charles Pratt, gardener, Susannah Gosling, Sarah Tilley and Job Parker, one year's wages each, over and above what may be due to them respectively at the time of my decease, and also the sum of £3 each in addition thereto, which I direct shall be paid within three months after my decease. I give and bequeath unto John Lovell Yeats, G. David Yeats, Eliza Julian Yeats, Charlotte Yeats and Ellen Jane Patterson (late Yeats), now the wife of Admiral Patterson, great-nephews and nieces of John Lovell, deceased, all of whom are mentioned in his will, the sum of £100 each absolutely. I give and bequeath unto my three nephews, John Musselwhite, William Musselwhite and James Musselwhite, sons of my late sister Ann Musselwhite, the sum of £500 each absolutely. I give and bequeath unto James Gannaway, and to his brother, whose name, I believe, is Thomas, sons of my late father's sister, the sum of £200 each, provided they, or either of them, shall be living at the time of my decease. I give and bequeath unto my sister Betsey, if living at the time of my decease, the sum of £1000 absolutely. I give and [356] bequeath all my wearing apparel and linen unto the said Eliza Julian Yeats, Charlotte Yeats, Ellen Jane Patterson and my said sister Betsey, to be equally divided between them, share and share alike, as tenants in common. I give and bequeath unto William Baldwin, of Ringwood, in the county of Southampton, gentleman, my executor hereinafter named, the sum of £300 absolutely. And I do hereby declare that the several legacies by me hereinbefore given, or such of them as shall become payable, shall be paid to the said several legatees within 12 calendar months after my decease, free of legacy duty, and without any deduction whatsoever, and that the said several legacies given to my said nephews and sister Betsey, and to the said James Gannaway and his brother, shall carry interest at the rate of £3 per cent. per annum from the time of my decease until such legacies shall be paid respectively. Provided always, and it is my will that, in case the said James Gannaway, his said brother, or my said sister Betsey, or any or either of them, shall be dead at the time of my decease, or shall not then be heard of to be then living, or shall not respectively claim their respective legacies within twelve calendar months next after my decease, then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease, or as shall neglect to claim the same within the time aforesaid, shall sink into and form a part of my residuary personal estate for the benefit of my residuary legatees. I give and bequeath all the rest, residue and remainder of my monies, securities for money, whether in the public funds or stocks or otherwise, and all other my personal and

testamentary effects over which I have a disposing power, including in this bequest the legacies hereinbefore given to the said James Gannaway and to his said brother, and my said sister Betsey, in case such legacies respec-[357]-tively, or any or either of them, shall become void in the events aforesaid, unto the said John Lovell Yeats and Ellen Jane Patterson, share and share alike, as tenants in common absolutely. But, in case the said Ellen Jane Patterson shall die in my lifetime, then I give and bequeath the share hereby intended for her unto the daughter of the said Ellen Jane Patterson absolutely."

The testatrix died on the 17th of January 1834. At the time of her death her sister, Betsey Hawkes, as the answer stated, had not been heard of by any of her relations or friends for upwards of twenty years. After the testatrix's death Mr. Baldwin made many inquiries in order to ascertain whether Betsey Hawkes was living or dead, and, if living, where she was to be found. He also published advertisements in several newspapers, offering a reward to any person who would give information respecting her; but all that he learnt was that, in 1814, she was seen on the quay at Southampton in company with a soldier about to embark for either Guernsey or Jersey. However, in August 1837, she presented herself to Mr. Baldwin; and the account that she then gave of herself was that, at the testatrix's death, she was, and had been for many years before, resident in the City of Norwich in very humble circumstances; that, being in great distress, she had recently left Norwich for Christchurch, her late sister's place of residence, in order to throw herself on the bounty of her sister; and that, on her journey, she heard, for the first time, that her sister was dead, and had left her a legacy of £1000. Mr. Baldwin having refused to pay the legacy on the ground that Betsey Hawkes had not claimed it within the time prescribed by the will, the bill was filed by her, in Novem-[358]-ber 1837, for payment of that legacy and one-fourth of the proceeds of the testatrix's wearing apparel and linen, which Mr. Baldwin had sold.

Mr. Wigram and Mr. Romilly, for the Plaintiff, said that, on the testatrix's death, the legacy of £1000 vested in the Plaintiff, subject to a conditional limitation over, depending on her being dead at the testatrix's death or neglecting to claim the legacy within a given time; that such conditions ought to be most strictly construed, and therefore it was material to see whether the Plaintiff's case came within the strict meaning of the words in the will: that, in the first branch of the proviso, three events were mentioned; first, being dead at the time of the testatrix's decease; second, not being heard of to be then living; and third, not claiming the legacies within twelve months afterwards; but in the second branch of the proviso, by which the legacies were given over to the residuary legatees, two events only were specified; namely, the being dead at the time of the testatrix's decease, and the *neglecting* to claim the legacies within twelve months afterwards, and, consequently, there was no gift over in the event of the legatees being alive, but not being then heard of to be then living; and, moreover, the testatrix, when she described the events on which the gift over was to take place, did not say, as she had done in the former member of the sentence, "shall not claim their respective legacies;" but used a different expression, namely, "shall *neglect* to claim," &c.: that the two members of the sentence did not correspond with each other, three events being mentioned in the former, and only two in the latter, and one of those two differing materially from every one of the events mentioned in the former; for neglect pre-supposed knowledge of the act to be neglected, and a person could [359] not be said to have neglected to do an act which he never knew he was required to do; and therefore it was an impossible condition that a party should claim a legacy which he never knew was given to him; that the executor ought to have given the Plaintiff notice of the legacy and of the condition annexed to it, in which case it would have been the legatee's own fault if the gift over took effect: that the Plaintiff, as one of the testatrix's next of kin, ought to have had notice given to her by the executor before he disposed of the assets; *David v. Frowd* (1 Myl. & Keene, 200; see 208, 209): that the present case was distinguishable from *Burgess v. Robinson* (3 Mer. 7), and *Tulk v. Houlditch* (1 Ves. & Beam. 248), for, in both those cases, the legacies were given on conditions precedent.

Mr. Knight Bruce, Mr. Jacob and Mr. Anderdon, for the Defendant. The word *or*, which precedes the words "shall not respectively claim their respective legacies"

must be read as *and*. The expression "shall neglect to claim" means "shall omit or fail to claim." It is a short description of, or a compendious reference to, what the testatrix had before said, namely, "shall not be heard of to be then living, or shall not respectively claim their respective legacies:" and, in this respect, this case is analogous to *Mackinnon v. Sewell* (*ante*, vol. 5, p. 78), and *Murray v. Jones* (2 Ves. & Beam. 313). The residuary legatees were as much objects of the testatrix's bounty as the particular legatee was.

The cases of *Burgess v. Robinson* and *Tulk v. Houlitch* shew that it was not necessary for the executor to [360] advertise for the legatee or to take any other step in order to give her notice of the legacy.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It seems to me, from the whole scope of the will, that the object which the testatrix had in view was the speedy putting an end to her temporal affairs by the distribution of her property. She begins her will by directing her funeral and testamentary expenses and debts to be paid as soon as conveniently might be after her decease. She next gives legacies to her servants, and directs those legacies to be paid within three months after her decease. Then follow legacies to her nephews and several other persons, and amongst them to James Gannoway and his brother, provided they, or either of them, should be living at the time of her decease. She next bequeaths to her sister Betsey, if living at the time of her decease, the sum of £1000 and a share of her wearing apparel and linen. Then, after giving a legacy of £300 to Mr. Baldwin, her executor, she says: "And I do hereby declare that the said several legacies by me hereinbefore given, or such of them as shall become payable, shall be paid to the said several legatees within twelve calendar months after my decease, free of legacy duty, and without any deduction whatsoever; and that the said several legacies given to my said nephews and sister Betsey, and to the said James Gannoway and his brother, shall carry interest at the rate of three pounds per cent. per annum, from the time of my decease, until such legacies shall be paid respectively. Provided always, and it is my will that, in case the said James Gannoway, his said brother, or my said sister Betsey, or any or either of them, shall be dead at the time of my decease, or shall not be heard of to be then living, OR shall not respectively claim their respective [361] legacies within twelve calendar months next after my decease."

I think that Mr. Jacob's construction of this part of the sentence is correct; namely, that, in that member of it in which the testatrix says, "shall not be heard of to be then living, or shall not respectively claim their respective legacies," the word *or* must be read as *and*: for it is plain that the expression "shall not be heard of to be then living" does include the not claiming the legacies; for the legatees must have been heard of if they claimed their legacies; and therefore the testatrix must have meant "shall not be heard of to be then living, *and* shall not respectively claim their respective legacies." In the next part of the sentence she says: "Then the legacies hereinbefore given to such of my respective legatees as shall be dead at the time of my decease, or as shall neglect to claim the same within the time aforesaid, shall sink into and form a part of my residuary personal estate for the benefit of my residuary legatees." My opinion upon this part of the will is that the testatrix intended that the legacies given to her sister, and to James Gannoway and his brother, should sink into her residuary personal estate on failure of any one of the three events which she had before specified; for, although she has not repeated one of those events, namely, the not being heard of to be living at the time of her decease, yet she has, in substance, described all the events in which the legacies were to fail. What Mr. K. Bruce said is correct, namely, that the residuary legatees were as much objects of the testatrix's bounty as her sister and James Gannoway and his brother were. If they were living at the time of her decease, and made a claim within twelve months after, they were to be entitled to their legacies; but, if not, their legacies [362] were to go to the residuary legatees. Therefore, it is clear that, in the event that has happened, of one of those legatees having survived the testatrix, but not having made a claim within the proper time, the legacy given to that legatee has lapsed; because, adverting to the language of this will, I must take it that the testatrix, when she used the expression "shall neglect to claim" meant "shall not claim." The result is that the residuary legatees are entitled to the legacy of £1000.

I do not see how I can separate the one-fourth of the wearing apparel and linen from the legacy of £1000. I admit that the expression "to be paid" is not correctly applicable to those subjects: but the language of the will is general, "shall not respectively claim their respective legacies." Now what were their respective legacies? Why, the money-legacy and the share of the wearing apparel and linen. Therefore, the word *legacies*, according to its natural meaning, must carry over the share of the wearing apparel and linen, as well as the legacy of £1000.

Bill dismissed without costs.

[363] INGHAM v. INGHAM. July 28, 1838.

Practice. Debt.

A Defendant may put in a further answer pending exceptions to his first answer, although he thereby deprives the Plaintiff of the benefit of obtaining the common injunction on the Master's reporting the first answer to be insufficient. The case of *Russell v. Dight*, *ante*, vol. 6, p. 430, explained.

The bill in this cause prayed (amongst other things) for the common injunction.

The Defendant had put in his answer, to which the Plaintiff excepted. Pending the exceptions the Defendant put in a further answer. The Plaintiff now moved to take that answer off the file, on the ground that it was irregular to file a further answer before the Master had reported on the exceptions.

Mr. Knight Bruce and Mr. Emsley, in support of the motion, relied on *Russell v. Dight* (*ante*, vol. 6, p. 430), and said that the Defendant, by filing his further answer before the Master had made his report, had deprived the Plaintiff of the advantage which he would otherwise have had of obtaining the common injunction. They distinguished this case from *Knox v. Symmonds* (1 Ves. jun. 87), and *Wynne v. Jackson* (2 Sim. & Stu. 226), on the following grounds: namely, that in *Knox v. Symmonds* the motion was to discharge the order which the Defendant had obtained for dissolving the common injunction, but no application was made to take the further answer off the file; and, in *Wynne v. Jackson*, the order for the common injunction for want of answer was clearly irregular, as there was an answer on the file, and no application was made to have that answer taken off the file.

Mr. Jacob and Mr. Rogers, for the Defendant, relied on *Knox v. Symmonds* and *Wynne v. Jackson*.

[364] THE VICE-CHANCELLOR [Sir L. Shadwell]. This motion seems to me to be founded on an erroneous view of what fell from me in *Russell v. Dight*: namely, that in a case where a Plaintiff may derive some benefit from the judgment of the Master, the Defendant is not at liberty to put in a further answer until the Master has made his report as to the sufficiency of the first answer. The language is general, but it ought to be taken with reference to the subject-matter. In that case two insufficient answers had been put in, and then a third answer was filed, which was referred back upon the original exceptions; and just as the Master was about to report that answer also to be insufficient, the Defendant filed a fourth answer. Now Lord Lyndhurst's Tenth Order directs that, upon a third answer being reported insufficient, the Defendant shall be examined, upon interrogatories, to the points reported insufficient, and shall stand committed until he shall have perfectly answered such interrogatories; and shall pay, in addition to the £4 costs before paid, such further costs as the Court shall think fit to award; so that the benefit which that order gives to the Plaintiff is absolute and unconditional, and does not depend on winning a race; and, consequently, the Defendants had no right to deprive the Plaintiff of the benefit of that order by putting in a fourth answer. In *Knox v. Symmonds* the Master of the Rolls seems to consider that where exceptions are taken to the first answer, and the injunction depends upon the report, it is competent to the parties to run the race. He says:—"If the practice be that he may put it in at any time before the order, he might have had it ready and have filed it as soon as he heard the Master's opinion was against him on the exceptions, even before the report; and then there is nothing supposing

that he waited till after the last seal [365] before Christmas to do it. It is a kind of race to be run between Plaintiff and Defendant." So that in a case like the present, where the obtaining of the common injunction is the only benefit which the Plaintiff is entitled to on the answer being reported insufficient, it is competent to the Defendant to deprive the Plaintiff of that benefit by putting in a further answer before the Master has made his report; and my opinion, therefore, is that this motion must be refused with costs.

[365] FRANKLAND v. OVEREND. July 31, 1838.

Defendant. Supplemental Answer.

Leave given to a Defendant to file a supplemental answer for the purpose of correcting a mistake in his former answer, as to the custom of a manor, which was one of the facts in issue in the cause.

The Defendant, in his answer, said that to the best of his belief the custom of a manor (which was one of the facts in issue in the cause) was as the bill alleged it to be.

After rules had been given to pass publication the Defendant moved for leave to file a supplemental answer for the purpose of correcting the statement in his answer, as to the custom of the manor. The motion was supported by an affidavit alleging that when the Defendant put in his answer he was not fully informed as to the custom of the manor, and that he had since learnt that the statement in his answer was incorrect, and that the custom was as thereafter mentioned.

Mr. Sidebottom, in support of the motion.

Mr. Ellis, *contrà*, said that the bill was filed in December 1836, and that the answer was put in in [366] March 1837, and, therefore, the Defendant had been a considerable time in discovering his mistake.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Defendant did not, in his answer, speak of the custom of the manor as a fact that was within his own knowledge; that since putting in his answer he had acquired further knowledge on the subject; that the allegation as to the custom contained in the affidavit was not contradicted by any affidavit on the part of the Plaintiff; and that, if the Plaintiff disputed that allegation, he might examine the steward of the manor as a witness in the cause.

Motion granted.

[366] LEWIS v. JOHN. August 1, 1838.

[S. C. 7 L. J. Ch. 242. See *National Provincial Bank of England v. Games*, 1885-86, 31 Ch. D. 582.]

Mortgagor and Mortgagee. Costs.

A mortgagee is not entitled, as against the devisees of the mortgaged estate, to be paid the costs of an action on the mortgagor's bond, brought by him against the executrix of the mortgagor.

David John, being indebted to the Plaintiff in £120, executed a bond, and subsequently made an equitable mortgage of a copyhold estate to the Plaintiff for securing that sum. He afterwards died, having devised the estate to his widow for life, with remainder to his children, and appointed the widow his executrix. After John's death the Plaintiff brought an action on the bond against the widow; but, upon her pleading *plene administravit*, he abandoned it. He then filed the bill in this cause against the widow and children, for the purpose of having the estate sold and the proceeds applied in paying his principal and interest and his costs of this suit and at law.

[367] At the hearing of the cause the question was whether the Plaintiff was entitled to be paid his costs of the action out of the proceeds of the estate.

Mr. K. Bruce and Mr. Spurrier, for the Plaintiff.

Mr. Cooper and Mr. Wilbraham, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Plaintiff was entitled to the same costs as a legal mortgagee was; and that if a legal mortgagee had brought an ejectment for the purpose of recovering the mortgaged estate he would have been entitled to have the costs of that action taxed and added to his debt; but that the mortgagee was not entitled, as against the devisees of the estate, to be paid the costs of an action brought by him against the executrix of the mortgagor, for the recovery of the money due to him out of the mortgagor's personal estate. (See C. P. Cooper's Rep. 8.)

[368] HUSTLER v. TILLBROOK. August 3, 1838.

Will. Construction.

Testator bequeathed a sum of stock to his wife for life, and, after her decease, to his three sons, equally to be divided amongst them, if they should be all living at the decease of his wife; but, if any or either of them should happen to die in the lifetime of his wife, and should leave any child or children, his will was that such child or children who should be living at the time of his wife's death, should be substituted in the place of such of his said sons who should so happen to die, and take his, her or their parent's share. All the sons died in the wife's lifetime. Two of them left children, who were living at the wife's death. The third son died a bachelor. Held, that one-third of the stock fell into the residue.

John Tillbrook, by his will, dated the 23d of January 1808, bequeathed as follows:—

"I give and bequeath the sum of £4475 stock, now standing in my own name in the books of the Governor and Company of the Bank of England, in the capital stock there, called the three per cent. Reduced Bank annuities, or so much and such part thereof as shall be remaining in said stock or fund at the time of my decease, and the dividends and interest thereof, unto my dear wife, Elizabeth Tillbrook, and her assigns, for and during the term of her natural life; and, from and immediately after her decease, my will and mind is, and I do give the before-mentioned three per cent. Reduced Bank annuities, and all the dividends and interest from thenceforth to grow and become due, unto my three sons, Robert Clee Tillbrook, Samuel Tillbrook and James Tillbrook, to be equally divided between or amongst them, *if they shall be all living at the time of the decease of my said wife*; but if any or either of them shall happen to depart this life in the lifetime of my said wife, and shall leave any child or children of his or their body or bodies lawfully belonging, then I will and desire that such child or children who shall or may be living at the time of my said wife's decease shall be substituted in the place and stead of such of my said sons who shall so happen to die, and take his, her or their parent or parents' share: [369] and I do, hereby, in such case, give and bequeath unto such child or children, his, her or their respective parent's share, equally to be divided between such children, if more than one, and, if but one, to that one only." The testator disposed of his residuary estate in the following words:—"And I give, devise and bequeath my book debts, and all and every the rest, residue and remainder of my estate and effects whatsoever and wheresoever, as well real as personal, and of every nature or kind, unto and between my said three sons, Robert Clee, Samuel, and James Tillbrook, their heirs, executors and administrators, equally to be divided between them, share and share alike:" and he appointed his wife and his three sons executors of his will.

The testator died in July 1810, leaving his wife and three sons surviving. The sons all died in the widow's lifetime. Robert Clee Tillbrook and Samuel Tillbrook left children, all of whom survived the widow: but James Tillbrook died a bachelor. The testator's widow died in July 1835.

The Plaintiffs were the personal representatives of Samuel and James Tillbrook. The Defendant, Sarah Tillbrook, was the personal representative of the testator, and also of R. C. Tillbrook.

The bill alleged that the £4475 stock having, upon the death of the widow, become divisible under the will, the Plaintiffs had been advised that, in the events which had happened, the same had become divisible into three equal parts, of which the children of R. C. Tillbrook became entitled to one-third, the children of Samuel Tillbrook to one other third, in substitution for their respective fathers who died in the widow's lifetime, and [370] that the remaining third *vested absolutely in James Tillbrook, notwithstanding his decease in the widow's lifetime*, and that the Plaintiffs, as his personal representatives, were entitled thereto: but that the Defendant alleged that she was advised that such third, by reason of the decease of James Tillbrook in the widow's lifetime and of his death without leaving issue, did not vest in him, but fell into the residue, and, consequently, that the Plaintiffs, as the personal representatives of James Tillbrook, were entitled only to one-third of such third part, and that one other third was payable to the Plaintiffs as the personal representatives of Samuel Tillbrook, and that the Defendant, as the personal representative of R. C. Tillbrook, was entitled to the remaining third.

THE SOLICITOR-GENERAL [Sir R. M. Rolfe], for the Plaintiffs, contended that the testator had given the stock to his three sons, equally to be divided amongst them; but, if they died in the widow's lifetime, their shares were to go over to their children, if they left any, but not otherwise; and, consequently, that James Tillbrook took a vested interest in one-third of the stock, and, notwithstanding he died in the widow's lifetime, yet as he left no issue, the Plaintiffs, as his personal representatives, were entitled to that third.

Mr. K. Bruce and Mr. Koe appeared for the Defendant; but

THE VICE-CHANCELLOR [Sir L. Shadwell], after hearing the Solicitor-General, said: I do not think that that is the true construction of the bequest. There is no gift, in the first instance, to any son unless he survives the wife.

[371] The words, "if they shall be all living at the time of the decease of my said wife," are to be taken disjunctively, not conjunctively. The testator meant to give the fund to such of his sons as should survive his wife; but if any son did not survive her, that son was not to take any share of the fund; but his children, if he left any, were to take by way of substitution for him. But, if he neither survived the testator's wife, nor left any child, there is no gift.

Declare that James Tillbrook, having died in the lifetime of the testator's widow, without leaving a child, one-third of the stock fell into the residue.

[372] PEEL v. CATLOW. August 3, 1838.

[S. C. 7 L. J. Ch. 273; 2 Jur. 759. See *In re Potter's Trust*, 1869, L. R. 8 Eq. 52.]

Will. Construction.

Testator bequeathed one-sixth part of his residuary estate amongst the children of his late sister J. T., and directed that their shares should be paid to them at 21; and that in case any of them should die under that age leaving issue, their shares should be paid to their issue, as soon as such issue could give a legal discharge for the same; but if any of the children should die without leaving issue, their shares should be paid to the surviving children and the issue of such of them as should be then dead, such issue taking no greater share than their deceased parents would have been entitled to, if living; and he bequeathed another sixth part to his sister, M. C., for life, and after her death, unto and amongst her issue, and to be payable at the like times and with the like benefit of survivorship, *and in like manner* as was thereinbefore expressed concerning the sixth part thereinbefore given to the children of J. T. M. C. had six children living at testator's death; and she had had another child, who died before the date of the will.

Held, that as the latter clause of the will referred to the former, the word *issue* in it must be taken to mean children. Held also, that under the former clause, no grandchild of J. T. could take except by way of substitution for its parent, and therefore, under the latter clause, no grandchild of M. C. would take, except by way of substitution for its parent.

Jonathan Peel, by his will, dated the 14th of May 1824, gave and devised his real and personal estate to trustees in trust to sell the same; and directed that the proceeds should be divided into six equal parts; and, after disposing of two of those parts, the testator expressed himself as follows:—"And, as to one other part thereof, I give and bequeath the same unto and amongst all and every the children of my late sister Jane Taylor, equally to be divided amongst them, share and share alike; and, if there shall be but one such child, then to such only child, to and for their, his or her own use respectively, the said sixth share, or the parts or shares thereof, to be paid to such children or child at their, his or her respective ages of 21 years; and, in case any such child or children shall die under the age of 21 years, leaving issue of his, her or their body or respective bodies living at the time or respective times of his, her or their decease, the part or share, [373] parts or shares of such of them as shall die under the age of 21 years, so leaving issue as aforesaid, shall be paid to the issue of such child or children respectively, as soon as such issue respectively can give a legal discharge for the same; and if any such child or children shall happen to depart this life under the age of 21 years, and shall leave no issue of his, her or their body or respective bodies living at the time or respective times of his, her or their decease, then the part or share of him, her or them so dying shall go and be paid to the survivors or survivor of them, and the issue of such of the deceased children as shall have died so leaving issue as aforesaid (such issue, nevertheless, to take no greater share than his, her or their parent or respective parents would have been entitled to in case such parent or parents respectively had been living) at such time or respective times as his, her or their original share or shares shall become payable, or as soon afterwards as circumstances will admit. And, as to one other sixth part or share of such trust monies, I direct that they, my said trustees, and the survivor of them, and the executors and administrators of such survivor, do and shall place out the same at interest on good real security, in the names or name of them, my said trustees, or the survivor of them, and do and shall pay, apply and dispose of the interest, dividends and proceeds thereof unto such person or persons, and for such uses, intents and purposes, and in such parts, shares and proportions, manner and form, as my sister, Mary Catlow, wife of George Catlow, shall, notwithstanding her present or any future coverture, by any note in writing, under her hand, direct or appoint, and, in default of appointment, then into the proper hands of my said sister; and, from and after the decease of my said sister, upon trust [374] that they, my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall call in the said last-mentioned part or share of the said trust monies, or make sale and dispose of the securities whereon the same shall be then invested, and do and shall pay and apply the same unto and amongst her issue, and to be payable at the like times, and with the like benefit of survivorship and accruer, *and in like manner, as is hereinbefore expressed and declared of and concerning the sixth part of the last-mentioned monies hereinbefore given by me to the children of my said late sister Jane Taylor.* And in case my said sister, Mary Catlow, shall depart this life without leaving issue of her body living at the time of my decease, or leaving any, they shall respectively depart this life under the age of 21 years, and shall leave no issue of his, her or their body or respective bodies living at the time or respective times of his, her or their decease, then upon trust that my said trustees, or the survivor of them, or the executors or administrators of such survivor, do and shall pay and apply and dispose of the share or shares of him, her or them so dying, to such person and persons, and in such manner, and at such time or times, and in such parts, shares and proportions as are hereinbefore directed concerning the surviving shares of the said trust monies, and the interest and proceeds thereof, or as near thereto as the deaths of parties and other circumstances will admit."

The testator died in May 1824. Mary Catlow died after him. At the date of

his will and at his death she had six children living, and she had had two other children, both of whom were dead at the date of the will. One of them left a daughter, the Defendant Mary Mac[375]-dougall. The question was whether Mary Macdougall was entitled to a share of the sixth part of the trust fund which was given in trust for Mrs. Catlow for life.

Mr. Lowndes appeared for the Plaintiffs, the trustees of the will.

Mr. Sharpe, for Mary Macdougall, said that, as one-sixth of the trust fund was directed to be paid after Mrs. Catlow's death unto and amongst her issue, her grandchild, Mary Macdougall, was clearly entitled to a share of that sixth part; that it would be contended by the counsel for the surviving children of Mrs. Catlow that the sixth part in question was to be held, after Mrs. Catlow's decease, upon the like trusts as the part in which Mrs. Taylor's children were interested; and, therefore, Miss Macdougall's claim could not be maintained, as her mother never became entitled to any share of that sixth part; and that the cases of *Christopherson v. Naylor* (1 Mer. 320), and *Waugh v. Waugh* (2 Myl. & Keen. 41), would be cited in support of that argument; that in those cases nothing was given to the issue of the original legatees, except by way of substitution for their parents; but, in the present case, the will declared that, on the death of Mrs. Catlow, her issue were to take, and, therefore, Miss Macdougall did not claim by way of substitution for her mother; that in *Waugh v. Waugh* Sir John Leach, Master of the Rolls, said: "It is plain that the words used in the first part of the bequest would comprise Eleanor Waugh; for she was the child of Alexander Waugh, a brother of John; but, by the subsequent part of the gift, it is expressed that the children of a deceased brother of John are to take only the share [376] their parent would have taken if living." So that His Honour decided that, if the words had been only such as are used in this case, Eleanor Waugh would have taken; that in *Humphreys v. Howes* (1 Russ. & Myl. 639) a decision was made conformable, in principle, to that now contended for; and that *Tytherleigh v. Harbin* (*ante*, vol. 6, p. 329) was a decision to the same effect; in that case, as in this, there was an original, substantive gift to the issue of deceased children.

Mr. Follett and Mr. Reynolds appeared for the surviving children of Mrs. Catlow: but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The question first to be decided is whether, in the clause under which alone the issue of Mrs. Catlow can take, the word *issue* must not be taken to mean *children*.

In that clause the testator refers to the trusts declared by the preceding clause. He says: "And, from and after the decease of my said sister, upon trust that they, my said trustees, do and shall call in the said last-mentioned part of the said trust monies, and do and shall pay and apply the same unto and amongst her issue, and to be payable at the like times, and with the like benefit of survivorship and accruer, and in like manner as is hereinbefore expressed and declared of and concerning the sixth part of the said last-mentioned monies hereinbefore given by me to the children of my said late sister Jane Taylor." My opinion, therefore, is that the word *issue* in this clause must, of necessity, [377] be taken to mean children; and as, under the trusts declared by the preceding clause, no grandchild of Mrs. Taylor could take except by way of substitution for its parent: so, under this clause of reference, no child of a deceased child of Mrs. Catlow can take except by way of substitution for its parent; and as Miss Macdougall's mother died in the testator's lifetime, and, therefore, never became entitled to take, Miss Macdougall herself does not sustain that character which will entitle her to take.

[377] COCHRANE v. ROBINSON. August 4, 1838.

Supplemental Suit.

An executor died insolvent after a sum had been reported due from him, to his testator's estate, in a suit instituted by the residuary legatees. A supplemental suit was then instituted against his personal representative. Held, that the decree in that suit ought not to be confined to the payment of the sum reported due, but ought to embrace the general administration of the executor's estate.

The bill in this cause was filed by the residuary legatees against the executors of a testator, praying the usual relief in like cases.

The Master, by his report made in pursuance of the decree, found the sum of £2600 to be due to the testator's estate from the Defendant Robinson. Robinson afterwards died *insolvent*: whereupon a bill of revivor and supplement was filed against his personal representatives, praying that they might admit assets sufficient to pay the £2600, or that an account might be taken of his estate; and, on the hearing of the supplemental suit, the registrar was of opinion that the decree ought to be drawn up in the same terms.

Mr. Purvis, however, contended that the decree ought not to be so limited, but ought to direct the Master to advertise for Robinson's creditors in general, and to order his estate to be applied in payment of what should [378] be found due to them as well as the £2600 found due to the testator's estate. And

THE VICE-CHANCELLOR [Sir L. Shadwell] so ruled.

Mr. Knight Bruce and Mr. Stuart also were counsel in the cause.

[378] ——— v. THE BRIDGEWATER CANAL COMPANY. August 4, 1838.

Practice. Demurrer.

Pending a notice of motion for a special injunction, the Defendant put in a demurrer. Held, that the demurrer must be set down and argued *instantly*.

After the Plaintiff had served the Defendants with notice of a motion for a special injunction, the Defendants filed a demurrer to the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that, under these circumstances, the demurrer must be set down and argued *instantly*.

[379] THE ATTORNEY-GENERAL v. COOPER. Nov. 2, 7, 1838.

Dismissal of Bill. Costs.

A Plaintiff, after being served with a notice of motion to dismiss, filed a replication and informed the Defendant that he had done so, but did not tender the costs of preparing and serving the notice of motion. Held, that the Defendant was entitled to the costs of the motion.

The Defendant served the relators with notice of a motion to dismiss the information for want of prosecution. On the day on which the notice was served, but after the service, the relators filed a replication; and shortly afterwards informed the Defendant that they had done so, but did not tender to him the costs of preparing and serving the notice of motion.

On the motion being made by Mr. K. Bruce, the question was whether the Defendant was entitled to the costs of it.

Mr. Blunt, for the relators, contended that, as the Defendant had persisted in making the motion after he had notice that a replication had been filed, he was not entitled to the costs. *Reynolds v. Nelson* (5 Madd. 60).

Mr. Knight Bruce said that he could not obtain the costs without bringing on the motion.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as the relators had not tendered to the Defendant the costs of preparing and serving the notice, they must pay the costs of the motion.

[380] BODDINGTON v. WOODLEY. Nov. 6, 1838.

Practice. Amendment.

Where a Plaintiff wishes to amend his bill but does not require a further answer, the order ought to contain a recital to that effect, otherwise it is irregular.

On the 5th of March the Plaintiff obtained, by petition at the Rolls, an order to amend his bill on payment of 20s. costs; and afterwards served the order on the Defendant's Clerk in Court and paid the 20s. costs. On the 8th of March the amended bill was filed. On the 19th the Plaintiff filed a replication. On the 21st of May the Defendant served the Plaintiff with notice of a motion that the replication might be taken off the file, and that he might be at liberty to answer the amended bill.

The motion was now made by Mr. Jacob and Mr. Hislop Clarke. They said that the Defendant had suffered the time allowed for answering the amended bill to elapse, (1) in consequence of the order to amend not having stated, as it ought to have done, that the Plaintiff did not require a further answer; whereby the Defendant was misled, and was induced to expect that he should be served with a *subpoena* to appear to and answer the amended bill: and they referred to the forms of orders to amend in Hand's Practice, 75, *et seq.*

Mr. Knight Bruce, for the Plaintiff, said that the petition at the Rolls, on which the order to amend was obtained, stated that no further answer was required; that the order was drawn up by the secretary at the Rolls in the usual form in like cases; that if there was any irregularity in the order, the Defendant had waived his right [381] to object to it by accepting the 20s. costs; and that, at all events, the indulgence sought for ought not to be granted, unless the Defendant made an affidavit shewing that justice would not be done to him, unless he was permitted to file a further answer.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the order to amend is informal.

It is plain that the orders in Hand's Practice, which have been referred to, shew, on the face of them, whether the Plaintiff does or does not require a further answer: but this order omits what it is most material for the Defendant to know, namely, that the Plaintiff does not require a further answer: and the objection is not got rid of by saying that the Defendant might have seen the petition on which the order was obtained.

The order, in my opinion, is one by which any practitioner might have been fairly misled: and, as the Defendant tells me that he wishes to put in a further answer, I think that I ought to give him liberty so to do; but it must be done with as little prejudice to the Plaintiff as possible.

This is not a case in which a Defendant seeks to vary or falsify a statement contained in his former answer; and, therefore, I do not think that I ought to require him to state the substance of the answer which he wishes to put in.

The order which I shall make is that the Defendant be at liberty to put in an answer to the amended bill, and that he be allowed six weeks' time for that purpose; the answer, when filed, to be without prejudice to the [382] replication and the other proceedings in the cause, which have been taken by consent; and, as the mistake was made by the officer who drew up the order and not by either of the parties in the cause, I shall make no order as to costs.

The practice with respect to amended bills was certified to the Vice-Chancellor by Mr. Collis, the registrar, to be as follows:—

The eight days (allowed by Lord Brougham's 14th Order) commence after the amended bill filed. If the Plaintiff requires an answer, a *subpoena* is to be served; otherwise not. The Plaintiff cannot reply until the eight days expire. If the Plaintiff requires a further answer, the order is on payment of 20s. costs. If no answer is required, without costs, amending Defendant's office copy, unless a new

(1) See Lord Brougham's 10th and 14th Orders.

engrossment is necessary, and then on payment of 20s. costs. If the Defendant is desirous of putting in an answer to the amended bill, he must take out a warrant within the eight days.

[383] THE CORPORATION OF DARTMOUTH v. HOLDSWORTH. Nov. 6, 1838.

Practice. Dismissal.

Where a Plaintiff files a replication after being served with notice of a motion to dismiss but before the motion is made, no order ought to be made on the motion, except for the Plaintiff to pay the costs of it.

After a notice of motion to dismiss the bill for want of prosecution had been served, but before the motion was made, the Plaintiff filed a replication; and, on the motion being made, the Plaintiff's counsel stated that that step had been taken; upon which it was understood that the usual order in like cases should be made. The order, however, as drawn up by the registrar, directed the Plaintiff to file a *subpoena* to rejoin and to take the other steps pointed out by the 16th Amended Order, and also to pay to the Defendant the costs of the motion.

Mr. Teed, for the Plaintiff, now moved to discharge that order for irregularity, except so far as it directed the Plaintiff to pay the costs of the motion.

Mr. Knight Bruce, for the Defendant, said that, although the Plaintiff had taken one of the proceedings required by the 16th Order before the motion to dismiss was made, he was bound to take the others also.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that where a Plaintiff, on being served with a notice of motion to dismiss, filed a replication before the motion was made, the uniform course of practice for the last seven years had been to order him merely to pay the costs of the motion; which was exactly consonant to what he had decided in *Williams v. Janaway* (*ante*, vol. 6, p. 77; see *The Attorney-General v. Cooper*, *ante*, p. 379), on the 17th Order.

Motion granted.

[384] EALES v. THE EARL OF CARDIGAN. Nov. 16, 1838.

[S. C. 8 L. J. Ch. 11. Observed upon, *Bryan v. Twigg*, 1867, L. R. 3 Ch. 186.]

Will. Construction.

Testatrix gave to her servants, Samuel Eales, and Charlotte, his wife, an annuity of £200 a year each, for their lives and the life of the survivor. Held, that each of the legatees was entitled to an annuity of £200 during their joint lives and the life of the survivor of them.

The testatrix in this cause, after giving legacies of sums in gross and annuities to several persons, proceeded thus:—

"I give unto my servants, Samuel Eales and Charlotte, his wife, an annuity of £200 each for their lives and the life of the survivor, to commence from the time of my decease and to be paid by equal quarterly payments." By a codicil, after reciting that she had, by her will, given annuities to S. Eales and Charlotte, his wife, she charged her real and personal estate with the payment of the annuities given to them and the other annuitants named in her will.

Samuel Eales died, leaving his wife surviving.

Mr. Spence and Mr. Wilbraham, for the Plaintiff, Charlotte Eales, contended that two annuities of £200 were given by the will, and that Mrs. Eales, having survived her husband, had become entitled to both the annuities, that is, to an annuity of £400.

Mr. Coleridge, for the personal representative of Samuel Eales, said that the

husband and wife took each an annuity of £200 for their joint lives and the life of the survivor. *Jones v. Randall* (1 Jac. & Walk. 100).

Mr. Knight Bruce, Mr. Barber, and Mr. Pole, for [385] the parties interested in the testatrix's estate, said that, considering that the annuitants had been servants to the testatrix, and that they were living together as man and wife, it was impossible to imagine that the testatrix meant to give them more than one annuity of £200; that she intended only a personal benefit to them, and could not have entertained a notion of an annuity going to the executors of an old servant: that, after having given to S. Eales and his wife an annuity of £200 each for their lives, it occurred to the testatrix that *that* might mean for their joint lives, and, by way of precaution, she added the words, "and for the life of the survivor," in order to prevent the annuity from ceasing on the death of one of them.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is the simplest case possible. The words of the bequest are perfectly plain, and the construction which they ought to receive is free from doubt.

The testatrix says: "I give unto my servants Samuel Eales and Charlotte, his wife, an annuity of £200 a year each." If the bequest had stopped there, each would have been entitled to an annuity of £200; for, if a testator gives to his sons, John and Richard, a horse each, the bequest would not be satisfied by the delivery of one horse to the two legatees; but each of them must have a horse: and that this testatrix knew that she had given two annuities appears to me to be manifest from the recital in the codicil: "Whereas I have, by my will, given annuities to Samuel Eales and Charlotte, his wife," &c.

The testatrix then proceeds to point out the time during which the annuities were to continue; and, for [386] that purpose, she uses the words, "for their lives and the life of the survivor." In my opinion, therefore, there can be no doubt that the husband was entitled to an annuity of £200 a year during the joint lives of himself and his wife and the life of the survivor of them, and that the wife was entitled to an annuity of the same amount during the joint lives of herself and her husband and the life of the survivor of them; and the consequence is that the representatives of the husband are entitled to an annuity of £200 a year during the life of the wife.

[386] SLADE *v.* FOOKS. Nov. 16, 1838.

[S. C. 8 L. J. Ch. 41; 2 Jur. 961. Followed, *In re Bonner*, 1881, 19 Ch. D 201.
See *Wilks v. Bannister*, 1885, 30 Ch. D. 512.]

Will. Construction. Second Cousins.

Testatrix bequeathed her residue to her second cousins of the name of S., and the issue of such of them as were dead. She had no second cousins, but she had three first cousins once removed of that name, two of whom were living at her death, and had children, but the third was then dead, leaving children. Held, that the two surviving first cousins once removed, and the children of the one who was dead, were entitled to the residue, to the exclusion of the children of the former, although they were in the same degree of relationship to the testatrix as her second cousins would have been had she had any.

The testatrix in the cause directed the residue of her property to be paid to and equally divided between all her *second* cousins of the name of Slade; and, if any of them should have died leaving issue, that their shares should go to their issue.

It appeared by the Master's report, made in pursuance of the decree, that the testatrix *had no second cousins*, but that she had three first cousins once removed of the name of Slade, two of whom were living and had children, and that the third had died leaving children.

Mr. Jacob and Mr. Thomas Turner, for the Plaintiffs, the surviving first cousins once removed and the children [387] of the one who had died, contended that, as the

testatrix had no second cousins, she must have meant to designate by that expression her first cousins once removed, and therefore, that the two who were living and the children of the one who had died were entitled to the residue.

Mr. Knight Bruce, for the children of the surviving first cousins once removed, said that the term second cousins was no more applicable to first cousins once removed than it was to first cousins twice removed; that the latter stood in the same degree of relationship to the testatrix as her second cousins would have done, if she had had any, and, consequently, the Court must hold the children of the two surviving first cousins once removed to be included in the bequest.

Mr. Hayter appeared for the executors of the testatrix.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, in disposing of her residuary estate, the testatrix had only two generations of persons in her contemplation, namely, those whom she called her second cousins and the issue of such of them as were dead: that it was very common for persons to call the children of their first cousins their second cousins; and, therefore, he must hold that the two surviving first cousins once removed and the children of the one who was dead were alone entitled to the residue: the two survivors taking one-third each, and the children of the deceased the remaining third.

[388] PARKES v. BOTT. Nov. 23, 1838.

[S. C. 8 L. J. Ch. 14.]

Deed. Construction. Policy of Insurance. Bonus.

A marriage settlement recited that it had been agreed, on the treaty for the marriage, that the intended husband should insure his life in the Rock Insurance Office, in the names of trustees, in the sum of £3000; that the dividends of certain canal shares should be applied in keeping the policy on foot; that *the said sum of £3000* under the policy should be settled in manner thereafter mentioned: and that, in pursuance of the agreement, the intended husband had made an insurance on his life in the Rock Office, in the sum of £3000, in the names of the trustees of the deed; and it was declared that the trustees should stand possessed *of the policy*, in trust for the intended husband until the marriage, and that, upon the solemnization thereof, they should stand possessed of *the said sum of £3000*, when received under the policy, upon certain trusts for the benefit of the intended wife and the children of the marriage. The husband became bankrupt and afterwards died. On his death, a considerable bonus was payable on the £3000. Held, that the husband's assignees were not entitled to the bonus, but that that sum, as well as the £3000, belonged to the trustees of the settlement.

By the settlement on the marriage of John Parkes the younger, son of John Parkes the elder, with Anna Maria Rees, bearing date the 28th of March 1817, after reciting that it was agreed on the treaty for the marriage that John Parkes the elder should settle in the manner therein mentioned 13 shares in the Warwick and Napton Canal Navigation, and that John Parkes the younger should insure his life in the Rock Insurance Office in Bridge Street, Blackfriars, London, in the names of trustees, in the sum of £3000; for keeping which policy on foot, if the interest and dividends of the canal shares should at any time be insufficient for that purpose, his father should join with him as security; and, further, that John Parkes the younger should by his bond secure to trustees the transfer by his heirs, executors or administrators, within three calendar months next after his decease of £4400 consols, into the names of such trustees, to the intent that the same, together with *the* [389] *said sum of £3000* under the policy, might become settled in the manner thereafter mentioned; and that, in part pursuance of the agreement, John Parkes the younger had made an insurance in the said assurance office, in the sum of £3000 for his life, in the names of the Plaintiffs, and that he had also executed a bond to the Plaintiffs for securing the transfer into their names, of the £4400 consols, upon the

trusts of the settlement: it was witnessed that John Parkes the elder assigned the canal shares to the Plaintiffs; and it was declared that they should stand possessed thereof, in trust for John Parkes the elder, his executors, &c., until the marriage should take effect, and of the policy of assurance in trust for John Parkes the younger, his executors, &c., until the marriage should take effect; and, upon the solemnization thereof, that they should stand possessed of the canal shares, and of the *said sum of £3000*, when received under the policy, and the £4400 consols, when transferred into their names, upon the trusts after expressed (that is to say), as to the canal shares, upon trust, out of the interest and dividends thereof, to pay the premiums, duty and other charges and expenses payable upon the policy, in order that the same might be kept on foot so long as the purposes of the settlement might require, and subject thereto, to pay such interest or dividends to John Parkes the younger, for his life; and upon his decease, upon trust, to invest *the said sum of £3000*, when received under the policy, in the purchase of Reduced 3 per cent. annuities in the names of the then trustees of the settlement, and to stand possessed as well of the Reduced 3 per cent. annuities so to be purchased as also of the £4400 consols and the canal shares, upon trust to pay to Anna Maria Rees the interest and dividends thereof, for the then remainder of her [390] life, and after the decease of the survivor of John Parkes the younger, and Anna Maria Rees, upon trust to transfer and assign the Bank annuities then standing in the names of the trustees, and the canal shares, to the children of the marriage; and in case there should be no such child, upon trust to transfer the Bank reduced 3 per cent. annuities, being the fund in which *the said sum of £3000* was to be so laid out as aforesaid, to the executors, administrators and assigns of John Parkes the younger; and to assign and transfer the canal shares and the £4400 consols to such person and persons, &c., as Anna Maria Rees should appoint, and in default of such appointment, to her, her executors and administrators; and John Parkes the elder, and John Parkes the younger, covenanted with the Plaintiffs, that if the interest and dividends of the canal shares should at any time be insufficient for that purpose, they would discharge the premiums, duty and other charges payable upon the policy, in order that the same might be kept on foot so long as the purposes of the settlement might require.

In 1828 John Parkes the younger became bankrupt, and the Defendant, Bott, was chosen his assignee. In 1836 he died, leaving his wife and three children surviving. On his death the Rock Assurance Company paid the trustees of the settlement £3885, being the amount of the sum insured by the policy and three bonuses thereon. Bott having claimed the £885 on the ground that it was a separate sum from the £3000 secured by the policy, and, therefore, was not subject to the trusts of the settlement, but belonged to the estate of J. Parkes the younger, the bill was filed by the trustees against Bott and Mrs. Parkes and her children, pray-[391]-ing that the rights and interests of all parties in the £885 might be declared by the Court.

Mr. Sharpe appeared for the Plaintiffs the trustees of the settlement.

Mr. Jacob and Mr. Neate, for the assignee of John Parkes the younger, contended that nothing passed to the trustees of the settlement, except the sum for which the policy was effected, as was evident from the expression used throughout the deed, of *the said sum of £3000*.

Mr. Knight Bruce and Mr. Loftus Wigram, for the *cestuis que trust* under the settlement, argued that the bonuses, as well as the sum originally insured, were subject to the trusts of the settlement; and they cited *Courtney v. Ferrers* (*ante*, vol. 1, p. 137).

THE VICE-CHANCELLOR [Sir L. Shadwell] having referred, during the argument, to the prospectus of the Rock Life Assurance Company, said:

If the parties to the settlement had meant that the husband should take the bonuses, as separate and distinct from the sum insured, they would have said so; but their meaning was that *the policy* should be settled.

The recital is that it was agreed that John Parkes the younger should insure his life in the Rock Insurance Office, in the names of trustees, for keeping *which policy* on foot, if the interest and dividends of the canal shares should, at any time, be insufficient for [392] that purpose, his father should join with him as security; and further,

that he should, by his bond, secure unto trustees, the transfer, by his heirs, executors or administrators, within three calendar months next after his decease, of £4400 consols, into the names of such trustees, to the intent that the same, together with the said sum of £3000 under the said policy, might become vested in manner therein-after mentioned; and that, in part pursuance of the said agreement, the said John Parkes the younger had, on the 13th day of the then instant month, made an insurance in the said assurance office, in the said sum of £3000 for his life, in the names of the trustees: and then it is declared that, until the marriage should take effect, the trustees should stand possessed of the canal shares in trust for John Parkes the elder, and of *the policy of assurance*, in trust for John Parkes the younger; and that, upon the solemnization of the marriage, the trustees should stand possessed of the canal shares upon trust, by and out of the interest or dividends thereof, from time to time, to pay and defray the premiums, duty and other charges and expenses (if any there should be), for the time being payable upon *the said policy* of assurance, in order that *such policy* might be kept on foot so long as the purposes of the settlement might require, and to pay over the residue or surplus of such interest or dividends, from time to time, to the said John Parkes the younger, so long as the expenses of keeping *the said policy* on foot should be borne out of the said trust fund. Then, in the subsequent part of the settlement, we find these words: "And upon the decease of the said John Parkes the younger, upon trust to lay out and invest the said sum of £3000, when received under the said policy of insurance, in the purchase of Bank Reduced 3 per cent. annuities."

[393] Therefore one of the subjects of the settlement was the policy of insurance. And it is to be observed that no trust is declared, in any part of the deed, as to any increase on the sum for which the policy was effected. My opinion, therefore, is that it was the intention of the parties to settle, not merely a sum of £3000, but the full benefit of the policy.

Declare that the sum of £885, the amount of the bonuses, is subject to the trusts of the settlement. No order made as to the costs of the assignee.

[393] BALDWIN v. THE SOCIETY FOR THE DIFFUSION OF USEFUL KNOWLEDGE. Nov. 19, 1838.

[S. C. 2 Jur. 961.]

Agreement. Specific Performance. Injunction.

By an agreement between the Plaintiffs and the Defendants, the former, in consideration of certain payments to be made by them to the latter, were to have the exclusive right of engraving and publishing a series of maps from drawings to be furnished to them, from time to time, by the latter. The Court refused to restrain the Defendants from acting in violation of the agreement, as it could not compel the Defendants to furnish the drawings; and therefore could not decree a specific performance of the agreement.

The bill stated an agreement between Messrs. Baldwin & Cradock, booksellers and publishers, and the Defendants, by which it was agreed that a series of maps, forming a complete atlas of ancient and modern geography, should be published, by Baldwin & Cradock, from drawings to be furnished by the Defendants; that the sole and exclusive right of publishing and selling the maps should belong to Baldwin & Cradock; that they should pay the expense of engraving the plates of the maps; that the maps should be sold in numbers consisting of two maps each; and that Baldwin & [394] Cradock should pay a certain sum to the Defendants for every 1000 numbers sold over and above 8000.

Baldwin & Cradock, after having published seventy numbers of maps under this agreement, became embarrassed in their circumstances, and made an assignment of their stock and effects to trustees for the benefit of their creditors. The insolvency of Baldwin & Cradock having, as the Defendants conceived, put an end to the agree-

ment, they published the three subsequent numbers of the maps at their office in Lincoln's Inn Fields, upon which the bill was filed by Baldwin & Cradock and their trustees, praying that an account might be taken of all sums of money received, or which should be received, by the Defendants or any person on their behalf, in respect of numbers 71, 72 and 73 of the publication, or any other numbers which they might thereafter publish or cause to be published otherwise than by or through the Plaintiffs as the publishers thereof under the agreement; and that they might be ordered to pay over to the Plaintiffs what should be found due on the said account, the Plaintiffs offering to make to the Defendants all the payments which would have been made, or would thereafter be made, by Baldwin & Cradock, in the due execution of the agreement, and otherwise fully to perform the same on their parts; and that the Defendants might be ordered to deliver up to the Plaintiffs all the copies of the maps contained in the said three numbers, or which should be contained in any future numbers of the publication which they might thereafter publish or cause to be published otherwise than through or by the Plaintiffs as the publishers thereof under the agreement, and also the engraved plates used or to be used for printing the said maps, or any maps being part of the before-mentioned series; [395] and that the rights and interests of the Plaintiffs under the agreement might be declared, protected and enforced; and that, in the meantime, the Defendants might be restrained from selling or exposing to sale, or otherwise disposing of numbers 71, 72 and 73; and from causing to be printed, and selling or exposing to sale any other numbers which should be so numbered or described, or be published in such a form as to purport to be a continuation of the work of which the first seventy numbers had been published by the Plaintiffs; and that they might be also restrained from printing, or causing to be printed, and from selling or exposing to sale any of the maps being part of the intended series of maps before mentioned.

Mr. Wigram and Mr. James Russell now moved for the injunction. They cited *Hogg v. Kirby* (8 Ves. 215).

Mr. Knight Bruce, Mr. Jacob and Mr. Booth, for the Defendants, cited *Clarke v. Price* (J. Wilson's C. C. 157), *Kemble v. Kean* (*ante*, vol. 6, p. 333), and *Kimberley v. Jennings* (*Ibid.* 340).

THE VICE-CHANCELLOR [Sir L. Shadwell], after stating other grounds for refusing the motion, said: How can I compel the Society for the Diffusion of Useful Knowledge to furnish the Plaintiffs with drawings of maps, from the engraving and publishing of which they are to derive a profit? If I cannot do so, the principle which Lord Eldon adopted in *Clarke v. Price* applies; and, as I am unable to compel a specific performance of the agreement between Messrs. Baldwin & Cradock and the Society, I cannot grant the injunction, which is merely ancillary to what the Court may do at the hearing of the cause.

[396] CROWFOOT v. MANDER. June 16, 1840.

Pleading.

Where a person named as a Defendant dies before appearance, an original bill, and not a bill of revivor, ought to be filed against his personal representative.

A person named as a Defendant died before appearance; upon which the Plaintiffs filed a bill of revivor against his personal representative.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that his attention had been often called to the point when he was at the Bar, and that he had always considered it to be a settled rule that, in such a case, a bill ought to be filed against the personal representative of the deceased, which would be an original bill as far as respected the Defendant, but a supplemental bill with respect to the suit; and His Honor ordered the cause to stand over in order that such a bill might be filed.

Mr. Knight Bruce, Mr. Spence, Mr. Jacob, Mr. Temple, Mr. Jeremy, Mr. Parry, Mr. Bazalgette, Mr. Rogers and Mr. Norie, appeared for the different parties.

[397] THOMPSON v. KENDALL. June 16, 19, 20, 1840.

Insolvent. Costs. Foreclosure.

The assignee of an insolvent mortgagor, who by his answer to a bill of foreclosure disclaimed, and, before the bill was filed, had consented to join in conveying the estate to the mortgagor, and had distributed the insolvent's estate amongst the creditors, was ordered at the hearing to be paid his costs of the suit by the Plaintiff.

This was a foreclosure suit.

About three years after the mortgage had been made, the Defendant Kendall, the mortgagor, took the benefit of the Insolvent Debtors Act, and the Defendant Kitching was the assignee of his estate. Kitching in his answer said that he did not claim any estate, right or interest in or to the mortgaged premises which passed to him as assignee, he believing that the same were mortgaged for considerably more than they were worth; that in July 1838 the Plaintiff's solicitors informed him that Kendall was ready to convey the premises to the Plaintiff, and that he was a necessary party to the conveyance as assignee, and desired him to inform them to whom they were to send the draft for perusal on his behalf: that he directed the draft to be sent to his solicitor, and the same was afterwards sent to and approved of by his solicitor, and then returned to the Plaintiff's solicitors; after which time no communication whatever was made by the Plaintiff or her solicitors to the Defendant or his solicitor until he was served with the *subpoena*: that he had duly distributed all the assets of the insolvent, which had come to his hands, amongst the creditors; and, under the circumstances aforesaid, he disclaimed all estate, right, title and interest in and to the mortgaged premises, and claimed to be paid his costs of the suit by the Plaintiff.

[398] Mr. Wigram and Mr. Solomon Atkinson, for the Plaintiff.

Mr. Wray, for the Defendant Kitching.

Mr. Simons, for the Defendant Walker, a mortgagee prior to the Plaintiff.

The Defendants Kendall and wife did not appear at the hearing.

The Plaintiff's counsel proposed to dismiss the bill as against the Defendant Walker, with costs, and, as against the Defendant Kitching, without costs; and to take a decree of foreclosure against Kendall and wife only.

Mr. Wray contended that as Kitching disclaimed and had disposed of the insolvent's assets, and as, before the bill was filed, he had consented to join in conveying the mortgaged premises to the Plaintiff, he ought to be paid his costs.

Mr. Wigram and Mr. S. Atkinson contended that Kitching was not entitled to his costs; and cited *Collins v. Shirley* (1 Russ. & Myl. 638), *Barry v. Wray* (Beames on Costs, 392), *Mountford v. Scott* (3 Madd. 34), *Woodward v. Haddon* (ante, vol. 4, p. 606).

THE VICE-CHANCELLOR [Sir L. Shadwell]. You have unnecessarily thrown upon the assignee [399] the expense of coming to the hearing in a case where he says by his answer that he disclaims all interest in the mortgaged estate, and that he has distributed the assets of the insolvent amongst the creditors. It seems very hard that in such a case the assignee is not to have his costs.

Before I decide the point, I must look to see how the case of *Collins v. Shirley* stands in Reg. Lib.

June 20. THE VICE-CHANCELLOR. I have examined the case of *Collins v. Shirley*, in Reg. Lib. A. 1829, fo. 2325, B.; and I find that the statement in the printed report that the assignees said they would have released the equity of redemption if any application for that purpose had been made to them does not appear from the registrar's book to have been in their answer; but they said that all the real and personal estate of the insolvent had been and then was vested in them; and then they disclaimed all interest in the mortgaged premises and the equity of redemption thereof; so that they admitted that they had the interest and then disclaimed it; and that admission not only made it necessary to bring them to the hearing, but also

shewed that they had a fund to answer all the costs to which they might be subjected by being brought to the hearing.

Here the assignee disclaims, and also states that he was ready to join with the mortgagors in conveying the mortgaged estate to the Plaintiff, and that all the estate [400] of the insolvent which has come to his hands has been distributed amongst the creditors: so that there is no fund applicable to answer the costs of bringing him before the Court: and, under these circumstances, I think that the Plaintiff ought to pay the costs of bringing the assignee before the Court.

[400] WILLIAMS v. MACDONNELL. June 17, 19, 1840.

New Orders. Construction of the 17th Amended Order.

The words, "the second term then next following," in the 17th Amended Order mean, not the second term following the undertaking to speed, but following the day on which the order for the commission to examine witnesses is served.

The 16th Amended Order requires that a Plaintiff, in order to prevent his bill from being dismissed for want of prosecution, shall appear upon the motion to dismiss, and give an undertaking to file a replication and serve a *subpoena* to rejoin; and, in case he requires a commission to examine witnesses, shall obtain and serve an order for such commission within three weeks from the date of the undertaking: and that in case the Plaintiff do appear upon the motion to dismiss and give the undertaking, then all the rules and regulations with respect to the commission and the return thereof, &c., expressed in the next order, shall apply to all cases under the 16th Order. The 17th Order directs that the commission to examine witnesses shall, at the latest, be returnable on the first return of the second term *then next* following; and that the Plaintiff shall give his rules to produce witnesses and pass publication, at the latest, in the same term, and shall set down his cause for hearing and duly serve the *subpoena* to hear judgment in the succeeding term.

[401] In this case the Defendants Macdonnell and wife moved to dismiss on the 25th of March. The Plaintiff appeared on the motion and undertook to speed: and in pursuance of that undertaking, he filed a replication on the 14th of April, and on the following day, which was *the first day of Easter term*, he served a *subpoena* to rejoin, and obtained and served an order for a commission to examine witnesses.

The order, which was drawn up on the undertaking to speed, required the Plaintiff to give his rules to produce witnesses and pass publication in Trinity term, and to set down the cause for hearing, and serve a *subpoena* to hear judgment, returnable in Michaelmas term.

On a motion being made, by the Plaintiff, to discharge this order, on the ground that Michaelmas term ought to have been mentioned in it instead of Trinity, and Hilary instead of Michaelmas,

THE VICE-CHANCELLOR [Sir L. Shadwell], after consulting Mr. Colville, the registrar, held that the objection was well founded, the words, "then next following," in the 17th Order, being referrible, not to the date of the order made on the undertaking to speed, but to the day on which the order for the commission to examine witnesses is served; and, as in this case, the order for the commission was served in Easter term, the order on the undertaking to speed ought not to have required the Plaintiff to give rules to produce witnesses and pass publication until Michaelmas term, or to set down the cause and serve the *subpoena* to hear judgment until Hilary term.

[402] Mr. Knight Bruce and Mr. Rolt appeared in support of the motion.

Mr. Jacob and Mr. Campbell opposed it.(1)

(1) The following is the form of the order on the undertaking to speed, as contained in Mr. Daniell's Treat. on Practice, vol. 2, p. 375 b. :—"That the Plaintiff do file a replication and serve *subpoenas* to rejoin, and obtain and serve an order for a commission to examine witnesses, if he requires such commission, within three weeks from this time, and give rules to produce witnesses and pass publication in term

[403] CLOWES v. CLOWES. Nov. 23, 1838.

Will. Construction.

Testator commenced his will as follows :—" All my property in the several public funds, excepting that in the three per cent. consols, is to be sold out, and, after defraying, from the produce thereof, my funeral expenses and debts, the remainder is to be placed in the three per cent. consols, in which fund I now stand possessed of £3700 capital stock. The annual dividends I leave in trust to my executor and executrix, to be by them paid, as the dividends shall become due, to the persons under mentioned during their natural lives ; namely, £30 per annum to my niece H., and £20 per annum to my niece S." The testator, in a subsequent part of his will, gave all his household furniture and all his property of every kind, *not specified above*, to his wife. Held, that the capital producing the two yearly sums of £30 and £20 passed to the wife, subject to the payment of those sums.

James Cobb, by his will, dated the 14th of December 1807, disposed of his property in the following words :—

"All my property in the several public funds, excepting that in the three per cent. consolidated annuities, is to be sold out, and, after defraying, from the produce thereof, my funeral expenses and all my just debts, and paying therefrom the sum of £100, which I bequeath to my dear brother, John B. B. Cobb, the remainder is to be placed, as soon as conveniently may be, in the three per cent. consolidated annuities, in which fund I now stand possessed of £3700 capital stock. The annual dividends upon the aggregate stock, which I compute altogether at £300 per annum, I leave in trust to my executrix and executor hereinafter named, to be by them paid, as the said dividends shall become due, to the persons undermentioned, during their natural lives, viz. :—

[404] "£150 per annum to my dear wife, Mary Cobb ; at her death, £30 per annum to my niece Harriet Cobb, and £20 per annum to my niece Sophia Cobb : the remaining £100 per annum, and the stock producing the same, to be bequeathed, by my wife, in full property, to any of the parties named in this my last will and testament, in such manner as she may think proper : or, if she should die intestate, then the said £100 per annum to go to the survivor or to the survivors of my five nieces named in this my last will, in equal shares, and she or they shall thenceforth possess, in full property, the stock producing such annual dividends of £100 per annum.

50 to my sister, Ann Crawford Drew, during her life ; at her decease, to my wife, and, at the decease of my wife, the stock producing the said dividend to the survivor or survivors of my five nieces, in full property and in equal shares, as above mentioned.

50 to my niece, Ann Drew.

30 to my niece, Elizabeth Drew.

20 to my niece, Sophia Browne.

£300 per annum."

"Of the three last-mentioned bequests, the share of the party who may die first shall, at her death, go to the survivors in equal proportions, and the last survivor shall possess the whole, and also, in full property, the stock producing the said dividend

(the term next but one after the order) and set down the cause for hearing, and serve *subpoenas* to hear judgment in term next (the third term after the date of the order), or, in default thereof, that the Plaintiff's bill do stand dismissed out of this Court with costs, the Plaintiff to pay to the Defendant the costs of this application, to be taxed by the Master in rotation, in case the parties differ."

or dividends. If circumstances should occur to increase or diminish the [405] amount of capital stock in any public funds whereof I now stand possessed, the amount of every bequest above mentioned, excepting that of £100 to my brother, is to be proportionably increased or diminished. I bequeath all my books, manuscripts and music, and my pianoforte to my brother. I bequeath all my household furniture and all my property of every kind soever not specified above, to my dear wife. I nominate and appoint my said wife and my brother as executrix and executor of this my last will."

THE SOLICITOR-GENERAL [Sir R. M. Rolfe] and Mr. G. L. Russell, for the Plaintiffs who claimed under the testator's widow. There is no mention in the will of the capital stock producing the two sums of £30 and £20 a year given to the testator's nieces, Harriet Cobb and Sophia Cobb; but the capital producing each of the other yearly sums is mentioned. The Court never holds that there is an intestacy unless there is an absolute necessity for it: and we say that the capital of those two yearly sums was part of the residue, and passed, as such, to the testator's widow.

Mr. Kinglake appeared for the surviving executor.

Mr. Knight Bruce and Mr. Prior, for the other Defendants, contended that the capital of the two sums of £30 and £20 a year either passed by the will to the two nieces absolutely, or was undisposed of. They said that the word "specified" meant "mentioned," and could not receive the same construction as "given or bequeathed;" and that the testator had specified the [406] capital of the two sums, though he had not disposed of it. *Davers v. Dewes* (3 P. W. 40).

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is plain that the testator was not skilled in professional language: but it seems to me to be perfectly plain that he intended his nieces, Harriet and Sophia Cobb, to take only life interests in the sums bequeathed to them: for, in every case in which he intended to give an absolute interest, he has used the expression, "in full property." Besides, in the preceding part of his will, the testator says: "The annual dividends upon the aggregate stock, which I compute altogether at £300 per annum, I leave in trust to my executrix and executor hereinafter named, to be by them paid, as the dividends shall become due, to the persons under mentioned, during their natural lives:" now Harriet Cobb and Sophia Cobb are two of the persons under mentioned; and, therefore, the question does not admit of doubt.

The next question is whether the capital of the sums given to those two ladies for their lives passed to the widow as part of the residue, or whether it is undisposed of. I think that the testator, when he used the expression, "all my property of every kind soever not specified above," meant interests not bequeathed in property which he might have before mentioned.

In *Davers v. Dewes* the testator, after giving his goods and furniture in Chevely House to his wife for her life, declared that he would dispose of those articles, after his wife's death, by a codicil; and then he be-[407]-queathed the residue of his personal estate, not before disposed of or reserved to be disposed of by his codicil, to his wife. So that he did not give to her all the property which he had not disposed of by his will, or which he might not dispose of by his codicil; but expressly excepted, out of the residuary bequest, the property reserved to be disposed of by his codicil: and, consequently, his wife could not be entitled to the goods and furniture absolutely, notwithstanding he made no disposition of those articles by either of the codicils to his will. But, in this case, I think that the testator meant to include, in the residuary bequest, the interests which he had not before disposed of in the stock which he had before mentioned.

Declare that the stock producing the £30 and £20 per annum, given to the testator's nieces, Harriet Cobb and Sophia Cobb, passed by the residuary gift, subject to their life interests, to the testator's widow.

[408] VIGERS v. LORD AUDLEY. Nov. 27, 28, 1838.

Practice. Process. Peer.

Where a peer is a Defendant to a supplemental bill, which prays that he may answer that bill and also the original bill, he ought to be served with office copies of both bills.

The original bill was filed against the late Lord Audley, who died before he had answered it, leaving the present Defendant, his son and heir. A bill of revivor and supplement was then filed against the present Defendant, praying that he might answer the original bill as well as the supplemental matter. The Plaintiff, however, when he served the Defendant with the letter missive, left an office copy of the bill of revivor and supplement only. The Defendant not having appeared, the Plaintiff served him with a *subpœna*, and afterwards obtained an order for a sequestration *nisi* against him.

Mr. Jacob and Mr. Toller, for the Defendant, now moved to discharge that order for irregularity, on the ground that, as the Defendant was required to answer the original bill as well as the bill of revivor and supplement, office copies of both bills ought to have been delivered to him with the letter missive.

Mr. Knight Bruce, Mr. Wakefield and Mr. Rogers, for the Plaintiff, said that, by the *subpœna*, the Defendant was called upon to answer the supplemental bill only, and that a peer could require no office copy, except of that particular pleading which the *subpœna* required him to answer. *Sayle v. Graham* (*ante*, vol. 5, p. 8); *Beckford v. Wildman* (11th Feb. 1818, cited by Mr. Wakefield, from his MSS. notes).

Nov. 28. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have been attended by Mr. Turton and another gentleman from the Six Clerks' Office, and I find that [409] the fact is this, namely, that there is no such order in *Beckford v. Wildman* as that which was referred to yesterday, and that there never has been any such order.

When a bill of revivor and supplement is filed against a person who represents a Defendant to the original bill, and that Defendant has appeared to but not answered the original bill, and the bill of revivor and supplement prays that the representative of the deceased Defendant may answer both bills, he is bound so to do, although the *subpœna* taken out is a *subpœna* that requires him to answer the bill of revivor and supplement only; and the answer, in such a case, is headed as the answer of that Defendant to the bill of revivor and supplement, and also to the original bill. And if, in the case put, a mere bill of revivor is filed, which asks that the Defendant may answer the original bill, an attachment will issue against the Defendant, if he do not answer the original bill.

In this case the process is wrong; for, as Lord Audley would have had to answer the original bill as well as the bill of revivor and supplement, the Plaintiff ought to have served Lord Audley with an office copy of the original bill as well as of the bill of revivor and supplement; and, consequently, the whole proceeding is wrong.

[410] WOODROFFE v. DANIEL. Nov. 27, 1838.

Practice. Amendment.

After an injunction had been continued on merits, the Plaintiff moved to amend without prejudice to the injunction. Held that, in such a case, the amendment could not prejudice the injunction, and therefore the motion was a simple application to amend, and ought to have been made before the Master.

In this case the common injunction had been continued on the merits. The Plaintiff afterwards moved to amend *without prejudice to the injunction*.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, when an injunction had been

either granted or continued on the merits, the amendment of the bill could not prejudice the injunction (see *Pratt v. Archer*, 1 Sim. & Stu. 433), and, therefore, the words in the notice of motion, "without prejudice to the injunction," were mere words of superfluity, and the motion was, in fact, a motion to amend *simpliciter*, and ought to have been made before the Master. (See 3 & 4 Will. 4, c. 94, ss. 13 and 14.)

Motion refused.

Mr. Jacob and Mr. Stuart appeared in support of the motion, and cited *Rees v. Edwards* (1 Keen. 465).

Mr. Knight Bruce and Mr. Chandless, *contra*.

[411] BLUCK v. COLNAGHI. Nov. 28, 1838.

Practice. Dismissal.

After a decree or decretal order, not directing inquiries merely, has been made, the bill cannot be dismissed.

This was a suit for winding up the affairs of a partnership between the Plaintiff and the Defendant.

By consent, an order had been made, on motion, for taking the accounts of the partnership; but the order had not been drawn up.

Mr. Whitmarsh, for the Defendant, now moved to dismiss the bill for want of prosecution.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the order which had been pronounced was a decretal order; and, though it had not been drawn up, yet either party was at liberty to draw it up: that an order in the nature of a decree, having been made in the cause, the bill could not be dismissed.(1)

Motion refused.

[412] WARDLE v. CLAXTON. Dec. 1, 3, 1838.

Practice. Demurrer. Motion.

The pendency of a demurrer does not prevent the Plaintiff from serving the Defendant with a notice of motion.

An order had been made for the appointment of a receiver in this cause; which, as usual, directed the Defendant to deliver to the receiver deeds and papers in his custody or power. The Defendant filed a demurrer to the bill. Afterwards, the Plaintiff served the Defendant with a notice of motion that he might be ordered to deliver the deeds and papers to the receiver.

The motion was now made by Mr. Barber.

Mr. Knight Bruce, for the Defendant, said that the pendency of the demurrer made the notice of motion irregular.

THE VICE-CHANCELLOR [Sir L. Shadwell], after consulting the registrar, said: I think that the objection which has been made cannot be supported, and that the motion is not irregular.

A case might arise of the most imminent danger; as, for instance, if a person were going to take a ward of the Court out of the jurisdiction, and then a demurrer should be filed, would the mere pendency of the demurrer prevent a motion from being made to restrain the party from taking the ward out of the jurisdiction?

(1) See *Anonymous*, 11 Ves. 169, in which case a bill was dismissed after a decree directing merely inquiries, the parties consenting to have such an order as could be made on further directions. See also *Lashley v. Hogg*, *Ibid.* 602, and *Handford v. Storie*, 2 Sim. & Stu. 196, which shew that, where creditors may take the benefit of the suit, the bill cannot be dismissed after decree, even with consent of all parties.

This is a motion to give effect to a previous order: but I do not decide on the circumstances of this case. I do not think that the mere fact of putting a demurrer on the file can prevent the Plaintiff from giving a notice of motion.

[413] MUNDY v. JOLLIFFE. Dec. 4, 5, 1838.

[Reversed, 5 My. & Cr. 167; 41 E. R. 334 (with note).]

Agreement. Specific Performance.

The bill stated a parol agreement, in part performed, for a lease of a farm to be granted by the Defendant to the Plaintiff, one term of which was that a certain arable field should be laid down in pasture. The Plaintiff entered and laid down the field, and it was afterwards severed from the farm, and an abatement in the rent was made in respect of it. The witness examined to prove the agreement did not state that it contained any provision as to laying down the field; so that the agreement proved, varied from that alleged in the bill; and, on that account, the Court refused to decree a specific performance.

This was a suit for the specific performance of a parol agreement, made in January 1824, for a lease of a farm in Hampshire to be granted by the Defendant to the Plaintiff. By the terms of the agreement, as stated in the bill, the Plaintiff was to drain the land at his own expense, and was to lay down a certain arable field in pasture. The Plaintiff entered upon the farm shortly after the agreement was made, and expended a considerable sum in drainage and repairs, and also laid down the field in pasture. That field was subsequently severed from the farm and an abatement in the rent was made in respect of it.

The Plaintiff, in order to prove the agreement, examined a gentleman named Hector, who was the Defendant's steward at the time when the agreement was alleged to have been entered into. The witness, however, did not state that it was one of the terms of the agreement that the Plaintiff should lay down the arable field in pasture.

THE SOLICITOR-GENERAL, Mr. Wakefield and Mr. Duckworth, for the Plaintiff, relied on the agreement having been partly performed by the Plaintiff.

Mr. Knight Bruce, Mr. Jacob and Mr. Stuart, for the Defendant, objected that the agreement which had [414] been proved varied from that stated in the bill, as it did not contain any provision for converting the arable field into pasture.

THE SOLICITOR-GENERAL [Sir R. M. Rolfe], in reply. I admit that if a Plaintiff proves an agreement different from that which he seeks to have performed, he cannot have relief: but, where an agreement has been entered into and certain terms of it have been performed, if the Plaintiff proves what is the agreement that he wishes to have performed, there is no authority for saying that this Court cannot perform it. In this case the agreement which we have proved is that which we allege to remain unperformed, and which we seek to have performed. As we have converted the arable field into pasture, and, especially, as it no longer forms part of the farm, any stipulation respecting it has become wholly immaterial, and it would be quite useless to insert any covenant for the conversion of it in the lease sought to be granted.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Defendant, in his answer, says that there was no valid or binding agreement between him and the Plaintiff, but he does not insist on the Statute of Frauds. The question then is whether the Plaintiff has proved the agreement which he has alleged in his bill. Mr. Hector, whom he has examined for that purpose, states, in substance, what is contained in the bill as to the duration of the lease and the rent to be reserved; but says nothing as to the laying down of the arable field in pasture; consequently, the agreement which he has proved is a different agreement from that which the Plaintiff has alleged; for, if one term is subtracted from an agreement, it is no longer the same agreement.

[415] This case must be dealt with precisely in the same way as it would have been if the bill had been filed and the cause brought to a hearing shortly after

the agreement was entered into; and if in that case the Court would not have given the Plaintiff relief, neither can it give him relief where he files his bill and brings his cause to a hearing at a later period. If the Plaintiff represents that by the agreement he was to have a lease which was to contain a certain term, and there is good reason to think that that representation is incorrect, his right to have the lease cannot be affected by anything that may have occurred since the agreement was entered into. He cannot get rid of the consequences of the misrepresentation by saying that something has been done since which renders it immaterial to inquire whether a term which he has represented to be an integral part of the agreement was so or not.

I think that the mode in which the Plaintiff in this case has stated the agreement makes it impossible for the Court to perform it.(1)

[416] GREENHALGH v. THE MANCHESTER AND BIRMINGHAM RAILWAY COMPANY.
Dec. 3, 6, 1838.

[Affirmed on different ground, 3 My. & Cr. 784; 40 E. R. 1128 (with note).]

Agreement. Railway Company. Corporation.

Two railways called A. and B. were projected, by different parties, to run from M. towards N. The line of A. passed through the centre of the Plaintiff's estate, and the line of B. through a corner of it. The projectors of A. agreed with the Plaintiff for the purchase of that portion of his land which they required; and they were to have power to vacate the agreement in case the Act for making their railway should not pass. Two bills were brought into Parliament for forming the railways, and were referred to a Committee, at whose suggestion the two projects were amalgamated; and an Act was passed incorporating the projectors of both railways into one company, and for making a railway partly in the line of A., and partly in the line of B., the latter being the line selected with respect to the Plaintiff's estate. Pending the Act, the promoters of the two railways agreed with each other that, where either company should have entered into contracts with landowners whose property might be affected by either line, though in a somewhat different mode, the contracts entered into by the company proposing the rejected line should be adopted by the united company. A copy of this agreement was subsequently sent to the Plaintiff by the united company. The projectors of line A. afterwards vacated their agreement with the Plaintiff. Held, that the Plaintiff could not enforce that agreement against the united company.

In 1836 two separate and independent railways were intended to be formed from Manchester towards Birmingham; one was to be called the Manchester South Union Railway, and was to terminate at Tamworth, in Warwickshire: the other was to be called the Manchester, Cheshire and Staffordshire Railway, and was to terminate at Rickerscote, in Staffordshire. The former railway was to be 88 miles, and the latter 67 miles in length. The line of the former passed through the centre, and the line of the latter through the western corner of the Plaintiff's estate.

In February 1837 an agreement was made between the Plaintiff, of the one part, and three members of the provisional committee of the South Union Company, on

(1) The Vice-Chancellor, in the course of his judgment, commented on other parts of the case, which it was thought unnecessary to notice; and the inference which he drew from them was that there was some talking about a lease, but the precise terms of it were never agreed to by either party.

The Plaintiff appealed from His Honour's decision to the Lord Chancellor, and his Lordship was of opinion that the facts of the case afforded sufficient evidence of an agreement; and referred it to the Master to settle a lease, pursuant to the terms of the agreement.

[417] behalf of themselves and the other subscribers to the undertaking ("and which said subscribers are intended to be incorporated as a company by an Act of Parliament to be applied for and obtained in the present or some subsequent session of Parliament"), of the other part, whereby the Plaintiff agreed to give his assent to the passing of the Act; and, if the Act should be obtained, to sell to the company, for the price therein mentioned, two plots of ground containing together 7040 square yards: and it was provided that, in case the Act should not be passed during the then session of Parliament, it should be lawful for the subscribers to vacate the agreement on giving the Plaintiff three calendar months' notice in writing under the hand of the chairman or secretary of the provisional committee; and, in the event of any other company obtaining an Act for the purposes of which it might become necessary or desirable to sell the ground to such company before the South Union Company should obtain their Act, or, in the event of the purchase not being completed within two years from the date of the agreement, then that the Plaintiff should, in like manner, be at liberty to vacate the agreement on giving three calendar months' notice to the chairman or secretary.

In pursuance of this agreement the Plaintiff gave his assent to the formation of the South Union Railway: and in the session of 1837 two bills were brought into Parliament, one for making the South Union Railway, and the other for making the Manchester, Cheshire and Staffordshire Railway. Both bills were referred to the same Committee of the House of Commons; and, after some investigation of the merits of the two lines, the Committee recommended that the two projects should be amalgamated. This recommendation was [418] adopted; and in May 1837 an agreement was entered into between certain persons acting for the promoters of each of the railways, which contained the following amongst other clauses:—"That, in every case, where either company shall have entered into any contracts or engagements with the landowners whose property may be affected by whichever of the two proposed lines may be adopted, though in a somewhat different mode, and the company projecting the accepted line shall not (although the other company may) have made contracts with individual landowners, the contracts so entered into by the company proposing the rejected line shall be adopted by the united company, having regard to the different mode in which this property may be affected by the adopted line." On the 13th of May 1837 a copy of this clause was sent to the Plaintiff by the solicitors of the united company.

On the 22d of May the Committee reported to the House of Commons that they had consolidated the two bills, and had adopted partly the line of the Manchester, Cheshire and Staffordshire Railway, and partly the line of the South Union Railway. The adopted line, so far as it passed over the Plaintiff's estate, was the same as that of the Manchester, Cheshire and Staffordshire Railway.

The Plaintiff represented in his bill that, in the number of assents to the adopted line, his name was included by reason of his assent given under the agreement of February 1837. This fact, however, was disputed by the Defendants, who deposed, in their affidavits, that the Plaintiff's name was included amongst the neutrals.

[419] The consolidated Act received the Royal assent on the 30th of June 1837; and thereby 37 persons were incorporated by the name of "The Manchester and Birmingham Railway Company." Of those 37, 22 (including the three gentlemen who signed the agreement of February 1837) were the subscribers named in the South Union Railway Bill, and 15 were the subscribers named in the Manchester, Cheshire and Staffordshire Railway Bill; and the persons who, at the passing of the consolidated Act, were the shareholders in the united company were the same as those who had been subscribers to the two proposed railways.

On the 7th of October 1837 the Plaintiff received a notice from the chairman of the South Union Railway Company, vacating the agreement of February 1837. On the 5th of December 1837 the Plaintiff received a letter from the chairman of the Manchester and Birmingham Railway Company, informing him that the company's engineers were about to enter on his land for the purpose of staking out the line and taking levels and surveys for determining the quantity of ground required by the company; and adding that, as soon as the engineer-in-chief should have reported to the directors the portion of the Plaintiff's property which would be wanted for the

railway, they were desirous of treating for the purchase of it. The Plaintiff, however, insisted that the agreement of February 1837 was binding on the Defendants, and refused to treat with them on any other basis, and threatened to take proceedings to enforce that contract: upon which the solicitor to the company informed him that such proceedings would be resisted. On the 6th of August 1838 the Plaintiff received a notice from the Defendants, stating that they [420] intended to take and use, for the purposes of their Act, two pieces of his land containing together 1352 square yards, and requiring him to treat with them for the sale thereof, and adding that if, for the space of ten days after service of the notice, he should refuse to treat, or should not agree with the Defendants for the sale, the Defendants would forthwith cause a jury to be summoned to assess the sum to be paid by them for the purchase.

On the 13th of August the bill in this cause was filed, insisting that the Plaintiff was entitled to have the contract of February 1837 performed by the Defendants, the same being binding on them, and that they were bound to purchase the whole of his land mentioned in that contract, and to pay the price thereby fixed for the same: that the Manchester and Birmingham Railway Company consisted of the same persons as were promoters of the South Union Railway, and were, by the contract of May 1837, bound to perform all the contracts entered into by the promoters of that railway. The bill prayed that the agreement of February 1837 might be declared to be binding on the Defendants, and that they might be decreed specifically to perform it; and that they might be restrained from causing a jury to be summoned to assess the sum to be paid for the purchase of the Plaintiff's land, and from entering thereon, except for the purposes of surveying and taking levels, until they should have paid to the Plaintiff the sum fixed by the agreement of February 1837.

Shortly after the bill was filed the Plaintiffs obtained the injunction *ex parte*. The Defendants now moved to dissolve it.

[421] Mr. Jacob, Mr. Koe and Mr. Lowndes appeared in support of the motion.

Mr. Knight Bruce and Mr. Sharpe, for the Defendants, relied on *Stanley v. The Chester and Birkenhead Railway Company* (*ante*, p. 264; and 3 Myl. & Craig, 773) and *Edwards v. The Grand Junction Railway Company* (*ante*, vol. 7, p. 337; and 1 Myl. & Craig, 650).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case I shall lay out of consideration all the minor points; because I think that the matter must be decided by looking at the agreement of February 1837, and at what happened with respect to the bill that was introduced into the House of Commons for making the South Union Railway.

I understand that the intended South Union Railway Company meant to have their railway commence in Store Street, Manchester, and run through Ardwick (where the Plaintiff's land is situate), and so on to Stockport, and then proceed through a very considerable track of country; so that, together with certain branches which were part of the original scheme, it would altogether have extended 88 miles: and, at the same time, the intended Manchester, Cheshire and Staffordshire Railway Company formed a design of making a railway, which also was to commence in Store Street, Manchester, and go through Ardwick to Stockport, and then to take a very different line of country from that of the South Union Railway, with respect both to its main line and to its branches. The whole extent of that main line and its branches was 67 miles. The [422] Plaintiff and three gentlemen who were members of the provisional committee of the intended South Union Railway Company made the agreement in question, which bears date the 14th of February 1837.

His Honor here read the agreement.

The Plaintiff did give his assent to the intended South Union Railway Bill; and, when the contending parties for the two different lines came into the House of Commons, the Committee to which the two rival bills were referred determined that neither railway should be carried into effect; but that an amalgamation should be made of the two original schemes, adopting 47 miles out of the 67 that the Manchester, Cheshire and Staffordshire Railway was to extend, and 27 out of the 88 that the South Union Railway was to extend, that is, they took more than two-thirds of the former line, and very little more than one-third of the latter. Then the Act of Parliament was passed which formed the promoters of the two bills into a body

corporate, not for the purpose of making either of the two projected railways, but a new and different railway, for all substantial purposes, from that which either party had contemplated: and I confess that I cannot understand how it can be fairly and truly said that, for the purpose of considering the agreement in question, the Act that was in contemplation by the projectors of the South Union Railway actually passed.

Now we are to consider that the persons who were projecting the South Union Railway looked to the probability of their having, in a great degree, the right conceded to them by Parliament, to make their railway through their favourite towns and places to the [423] extent of 88 miles in length, and which might therefore give them that remuneration on their capital which they expected. But it by no means follows, because some persons, with a view to having the South Union Railway carried into effect might think it a reasonable thing to make the bargain which was made with the Plaintiff, that they would have made the same bargain with him if the railway which they had in contemplation had been one of much less extent and going in a different line. I must then take it for granted that the agreement, as far as the provisional committee of the South Union Railway Company were concerned, was made with reference to that railway. But then the Committee of the House of Commons interfered; and ultimately an Act of Parliament was passed, not for making the South Union Railway, but a very different one which neither of the parties contemplated: and I must say that it appears to me to be absurd to say that that Act of Parliament was the same as that which had been contemplated by the intended South Union Railway Company.

Then there is another thing to be considered. The South Union Railway Company thought that they might be under the necessity of carrying their railway through the central part of the Plaintiff's property; and it might be very fair for the Plaintiff to say to them: "If you go through the central part of my property, I will not make a bargain to sell any part of it unless you will buy at the least 7040 square yards of it." But if the present company, whose line runs to the westward of the South Union Company's line had been treating with the Plaintiff, they might have said to him: "We want only the western corner of your land; and if you will not treat with us and make what we think a [424] reasonable bargain, we will defy you and take the measures which our Act of Parliament provides for obtaining that portion of your land which we require." Therefore it would not be just and fair if the same terms which the Plaintiff exacted from one company, who were under the necessity of going through the centre of his estate, were made applicable to another company which did not contemplate or feel that necessity.

Next, how does the case stand with respect to the assent which the Plaintiff had agreed to give by the agreement of February 1837? It appears that instead of giving his unqualified assent he stood neuter, and it is impossible to say what might have been the consequence if there had been a preponderance of neutrals over the assenters.

If then it be true that the Act of Parliament which was spoken of in the agreement of February 1837 did not pass, I cannot see that there is anything which bound, in equity, the persons who represented the intended South Union Railway Company not to give that notice which they did give, for the purpose of determining the agreement of February 1837.

I do not understand the Plaintiff to make, by his bill, any claim to be paid for the 1352 square yards of land which the Defendants require for their railway, according to the same rate as he was entitled to be paid for the 7040 yards, under the agreement of February 1837; but throughout his bill he insists on having the whole benefit of that agreement: and, therefore, the case is disembarassed of that difficulty which might have arisen if it had been put in the alternative and the Plaintiff had said: "If I am not entitled to the [425] whole benefit of the agreement of February 1837, then under the agreement of May 1837, which took place between the two companies and which was notified by them to me, I am entitled to have the 1352 square yards paid for in the same manner as the agreement of February 1837 provided for the payment of the 7040 square yards." Still, however, it seems to me that if the case had been so put, there would have been this difficulty, namely, that the agreement of May, which was between the two intended companies, left the agreement of February just as it was before. Now, as it was one of the conditions of the agreement of February that,

if the then intended Act should not pass, the parties to that agreement of the second part might put an end to it, and, as by the notice which they gave they did put an end to it, the agreement of February 1837 became just the same as if it had never had any existence at all. The truth, however, is that the Plaintiff has not put his case in that manner, but claims, by his bill, the full benefit of the agreement of February 1837.

My opinion is that the claim which the Plaintiff has made under that agreement cannot be supported: and the consequence is that the injunction must be dissolved: but, as there is something like a case, and considering the way in which the parties have been dealing with each other, I shall make no order as to costs.(1)

[426] In the Matter of WILLIAMS, Deceased. *Ex parte* BIRD.
June 26, 27, 1840.

[See Memorandum, 9 Sim. 494, and subsequent proceedings, 9 Sim. 642.]

Mortgagee. Construction of 11 Geo. 4 and 1 W. 4, c. 60, s. 8.

The case of a mortgagee leaving an heir, but who is not known, is not within 11 Geo. 4 and 1 W. 4, c. 60, s. 8.

This was a petition by the personal representatives of a mortgagee in fee of certain freehold lands, who died intestate as to his real estates in August 1824. It stated that though the mortgagee *left an heir*, it was not known who was his heir: (2) that the mortgage money was about to be paid to the Petitioners by the mortgagor, but no reconveyance of the mortgaged premises could be made unless the Court would appoint some person to reconvey them in the name of the mortgagee's heir: that, by 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, it is enacted that where it shall be uncertain whether the trustee last known to have been seized of any land upon any trust be living or dead, or, if known to be dead it shall not be known who is his heir, it shall be lawful for the Court to direct any person whom the Court may think proper to appoint for that purpose, in the place of the trustee or heir, to convey such land to such person and in such manner as the Court shall think proper: that, by 4 & 5 Will. 4, c. 23, s. 2, it is enacted that where any person seized of land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court to appoint a person to convey such land in like manner as is provided by the first-mentioned Act, in case such trustee or mortgagee had left an heir and it was not known who was such heir: that, by 1 & 2 Vict. c. 69, s. 3, it is enacted that the two first-mentioned Acts or either of them shall not extend to any case of any person dying seized of [427] any land by way of mortgage, other than such as are thereinbefore expressly provided for. The petition then stated that the case of a person dying seized of any land by way of mortgage and its not being known who is his heir is not one of the cases by the last stated Act expressly provided for; nevertheless, the Petitioners were advised that the case was within the first stated Act. The petition prayed that it might be declared that the deceased was, at his death, a mortgagee of the premises, and that he was a trustee thereof for the mortgagor within the meaning of some or one of the Acts thereinbefore referred to; and that some person might be appointed to convey the premises to the mortgagor on payment of the mortgage money.

Mr. Bird, in support of the petition, referred to *In the matter of Wilson's Estate* (*ante*, vol. viii. p. 392), and *Ex parte Whitton* (1 Keen. 278).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the petition stated that the mortgagee had left an heir, though it was not known who the heir was; that the cases cited were totally different from the present; that it clearly was not within either of the two last-mentioned Acts, and the only question was whether it was

(1) The Lord Chancellor affirmed the Vice-Chancellor's order, but on a different ground from that taken by His Honor. See 3 Myl. & Craig, 784.

(2) The petition did not account for the heir not being known

within the eighth section of 11 Geo. 4 and 1 Will. 4, c. 60 ; that it appeared, from the change in the language of the eighth section from that used in the fifth and sixth sections, that the Legislature meant that section to apply to the case of a trustee, and not to the case of a mortgagee ; and, therefore, the present case was one expressly intended by the Legislature not to be provided for by the statute.

[428] BICKFORD v. SKEWES. Dec. 10, 1838.

Practice. Affidavit of Service of Subpœna. Subpœna.

An affidavit of the service of a *subpœna* to appear, stating that the deponent served the Defendant with it by leaving a true copy of it, and of the endorsement thereon, with A., the wife of L., the sister of Defendant, at whose house the Defendant lodged, is insufficient, as it does not shew where the writ was served.

Motion to set aside an attachment for want of appearance for irregularity.

The affidavit of the service of the *subpœna* stated that the deponent served the Defendant with the *subpœna*, by delivering to and leaving with Ann, the wife of Stephen Lean, the sister of the Defendant, at whose house the Defendant lodged, a true copy of the *subpœna* and of the endorsement thereon, and, at the same time, shewing her the original writ ; and that, at the same time, the deponent explained to her the nature thereof ; by which said *subpœna* the Defendant was commanded, &c.

THE VICE-CHANCELLOR said that the affidavit did not, to any intent, shew where the *subpœna* was served ; and granted the motion. (See Beames's Orders, p. 169.)

Mr. Jacob and Mr. Bethell supported the motion.

Mr. Knight Bruce and Mr. Roupell opposed it.

[429] BRAY v. WEST. Dec. 14, 1838.

Trustee. Costs.

A trustee disclaimed by his answer, but was continued as a party until the hearing. Held, nevertheless, that he was entitled to costs as between party and party only.

One of the Defendants, who had been appointed a trustee of the property in dispute, disclaimed by his answer. The bill, however, was not dismissed as against him, but he remained a party to the suit at the hearing.

Mr. Stinton, for the Defendant, said that the Plaintiff, by allowing the Defendant to remain a party until the hearing, had treated him as a trustee, and caused him to incur further costs, and, therefore, he was entitled to costs as between solicitor and client.

Mr. Knight Bruce, Mr. Bayley, Mr. Willcock and Mr. W. Morley were counsel for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Defendant was first properly made a party as a trustee. When he put in his answer and disclaimer he divested himself of that character, and afterwards he remained on the record simply as a party who was not a trustee ; and, consequently, he is entitled to his costs as between party and party only.

[430] PEARSE v. PEARSE. Dec. 14, 1838.

[See *Attorney-General v. Lord Sudeley* [1896], 1 Q. B. 361 ; [1897] A. C. 11.]

Probate Duty.

The testator, who was domiciled in England, had, in the hands of his agents in India, certain securities of the Indian Government, the principal and interest of which was payable in India, either in cash or by bills on the India Company, at the option

of the creditor. Shortly before his death he accepted an offer made by the company to have his notes converted into stock, to be registered in England, and to be saleable and transferable there. The conversion was not completed at the testator's death nor until after his will had been proved in England; but, ultimately, the stock was transferred to his executors. Held, that no probate duty was payable in respect either of the notes or the stock.

At the death of the testator in the cause (who was domiciled in England), his personal estate consisted partly of certain promissory notes of the Indian Government, the principal and interest of which, when due, was payable in India, either in cash or by bills on the India Company, at the option of the holder; and, at his death, those securities were deposited with the Accountant-General and sub-treasurer at Madras.

A few months before the testator died the court of directors issued a notice giving the holders of such notes the option either of being paid off or of converting their securities into stock, with permission to proprietors in Europe to have their stock registered in England, so as to make it saleable and transferable in London, like other public stock. In consequence of this notice the testator intimated to the proper officer at the India House his election to have his notes converted into stock to be registered in England; but, although the India Company were bound by that intimation, the conversion and registry of the testator's notes were not completed until a considerable time after his will had been proved in England. The receipts for the stock were afterwards sent to the executors by the Accountant-General at Madras, and the stock was transferred into their names.

[431] On the hearing of a petition in this cause presented by the testator's executors, the question was whether probate duty was payable on the notes or on the stock into which they had been converted.

Mr. Swanston, for the Petitioners. The cases of *The Attorney-General v. Dimond* (1 Tyrwhitt's Rep. p. 243) and *The Attorney-General v. Hope* (1) shew that probate duty is not payable in respect of the property in question. It is impossible to distinguish those cases from the present; they are parallel to it in all essential circumstances. In those cases, as well as in this, the property existed at the time of probate; but it existed beyond the jurisdiction of the Ecclesiastical Courts of this country, and it was afterwards brought within the jurisdiction. The only distinguishing circumstance is the agreement by which the testator became entitled to have the notes converted into stock.

Mr. Knight Bruce and Mr. James Russell appeared for other parties, but did not address the Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. All that the Court has to do in deciding the present question is to consider what was the actual position of the property at the time when probate was granted; whether there was any agreement respecting it is immaterial.

The notes which the testator had were simply engagements by the Governor-General of India in Council, [432] to pay certain sums, when they should become payable, to the testator or his order, at the General Treasury at Fort William in Bengal, either in cash or by bills of exchange, at the option of the proprietor of the notes, to be drawn on the court of directors of the India Company. Therefore, all that the testator had was a right to be paid the amount of the notes or to receive bills for it at the Treasury in Bengal. He died in February 1835. In his lifetime a notice was issued by which an option was given to him and the other holders of notes of the same description, either to be paid off or to convert their notes into stock; and there can be no doubt that it was the testator's intention to convert his notes into stock. But, at the time when probate was granted, there was no debt due from the India Company to the estate of the testator, which could be sued for in this country.

The point appears to me to be settled by the decision in *The Attorney-General v. Hope*.

(1) 4 Tyrwhitt's Rep. p. 878. In p. 904 of the report of this case the seventh and eighth lines from the top ought to be transposed. S. C. 8 Bligh, 44.

[433] COPLAND v. MARTIN. Dec. 14, 1838.*Covenant. Specialty Debt.*

A. covenanted with B. to pay him a certain sum, by bills of exchange to be drawn by B. upon and accepted by A. A. only gave B. a bill for part of the sum; and that bill was dishonoured. Held that B. was a specialty creditor of A. for the whole sum.

This was a creditor's suit.

By an order in the cause, the Master was directed to state, specially, the circumstances connected with the debt due to George Cottam and Samuel Hallen, from the estate of Thomas Martin, the deceased debtor.

The Master found that, by articles of agreement made between Cottam & Hallen of the first part, Richard Satchell of the second part, and the testator, Thomas Martin, of the third part, after reciting that the testator was employed to build the carcass of King's College pursuant to a contract entered into between him and the incorporated governors and proprietors of the college, and that the testator would have occasion for a large quantity of wrought and cast iron and of ironfounders' and smiths' work in completing such contract, Cottam & Hallen, in consideration of £4090, to be paid to them as thereafter mentioned, agreed with the testator to supply him with all the iron required, and to do all the ironfounders' and smiths' work necessary to be done in and about the building, under such terms and stipulations as the testator was bound to perform the same under his contract, and, particularly, as to the making any deductions, additions and alterations in the work, or any extras or omissions as therein provided for, and that they should make such allowances and be entitled to such additions as the testator was liable or entitled to by virtue of such contract; and that, if Cottam & Hallen should not perform the works to the satisfaction [434] of Robert Smirke, the then architect of the college, or other the architect for the time being, and he should certify, by writing, that they ought not to be continued to do the works, then that the testator might employ some other person or persons to do such works; and that Cottam & Hallen should only be entitled to the difference between the amount which the testator should pay for the completion of the works and the £4090, such difference to be ascertained by the architect and certified by him: and, after making provision for the testator's deducting or being paid all such sums as he might become liable to pay by reason of any breach of the contract by Cottam & Hallen, the articles of agreement contained a stipulation in the words following: "And the said Thomas Martin, in consideration thereof and of the guarantee on the part of the party hereto of the second part hereinafter contained, agrees to accept of the said contract, and to pay, unto the said George Cottam & Samuel Hallen, the said sum of £4090, or the sum so to be certified as aforesaid (as the case may be) by bills of exchange to be drawn by the said George Cottam & Samuel Hallen upon and accepted by the said Thomas Martin, such bills to be drawn and dated quarterly during the progress of the works, beginning on and from the 1st day of March 1830, and payable respectively at three months after date, and to be respectively drawn for the estimated amount (subject to such deductions as aforesaid) of iron and work supplied in the quarter next immediately preceding the drawing thereof, such amount to be estimated at the following rates of charge (less 25 per cent.) viz.: Cast iron work at £10 per ton, and wrought iron at 2½d. per pound, the last of such bills to be given at the expiration of three calendar months next after Mr. Smirke, or other the architect aforesaid, shall have certified, in writing [435] under his hand, that the aforesaid contract with King's College (so far as it respects the smiths' and founders' work) is completed, and to be payable for the balance which shall then remain unpaid of the said sum of £4090, or other the sum to be certified as aforesaid, at three months after date." And, by such articles of agreement, after making provision for the performance of further new or extra works at King's College, Satchell, at the request of Cottam & Hallen, and in consideration of the agreements on the part of Martin, guaranteed to Martin the performance, by Cottam & Hallen, of their said

agreements. The Master further found that the articles of agreement were duly executed by and under the hands and seals of all the parties thereto: and that Cottam, by his affidavit made in the cause and sworn the 5th of May 1837, said that, in pursuance of the agreement of 30th of January 1830, he and his co-partner Hallen performed and completed the works mentioned in the contract and therein agreed to be performed by them in consideration of the £4090, so far as the same were required by the architect and according to his directions, and that the sum of £3635, 6s. 5d. became justly due and payable to the deponent and his partner, from Martin, in respect thereof: that, by various payments made by and allowances made to Martin, in his lifetime, to the amount of £2854, 7s. 3d., there remained due, in respect of the said sum of £3635, 6s. 5d., the sum of £780, 19s. 2d.: that Martin was, in his lifetime and at the time of his death, and his estate still was, justly and truly indebted unto the deponent and Hallen, his co-partner in trade, in the sum of £780, 19s. 2d. for the work so done and performed under and in pursuance of the contract: that neither he, the deponent, nor his partner Hallen, nor any person or persons by their or either of their order, [436] or to the deponent's knowledge or belief, for their or either of their use, had received the £780, 19s. 2d., or any part thereof, or any security or satisfaction for the same or any part thereof, except the said contract and a certain bill of exchange, drawn by the deponent and Hallen upon and accepted by Martin, for £374, 17s., which was dishonoured when it became due, and still remained unpaid; and that the whole of the £780, 19s. 2d., together with interest on the amount of the bill of exchange from the time when the same became due, still remained due and owing to the deponent and his partner from Martin's estate. The Master found that the £374, 17s. formed part of the sum which became payable to Cottam & Hallen under the contract, and that £406, 2s. 2d. formed the residue of the sum which became payable to them under the same contract.

The question was whether Cottam & Hallen were specialty creditors of Thomas Martin.

Mr. Knight Bruce, for Cottam & Hallen, said that the covenant was to give bills of exchange which should be paid, and, therefore, Cottam & Hallen were specialty creditors as to the £374, 17s. as well as the £406, 2s. 2d.

Mr. Jacob and Mr. Evans, for the other creditors. The covenant is to pay by bills of exchange to be drawn by Cottam & Hallen upon and accepted by Martin. The action on the covenant would not be an action of debt, but for not giving the bills. In order to make it a specialty debt, there must be a covenant that creates the debt. If A. covenants with B. to pay him a sum of money, B. may either bring an action on the [437] covenant or declare in debt; but, in a case like the present, he could not declare in debt, but only for unliquidated damages for not giving the bills of exchange. Here there is a covenant to pay by specific bills: those bills may not be eventually paid; but still, if the covenantors have given the bills, they have performed their covenant. The intention and effect of the articles of agreement was not to give a security for the payment, but merely to regulate the mode of payment.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The covenant was to pay by bills of exchange. Then, if a bill is given which is dishonoured, no payment is made by the bill.

If you were to bring an action on the covenant it would not be for unliquidated damages; for the whole damage would be the debt that remained unpaid; and, therefore, it is a covenant to pay a sum certain.

Declare that Messrs. Cottam & Hallen are specialty creditors for the £780, 19s. 2d.

[438] HADOW v. HADOW. Dec. 21, 1838.

Will. Construction.

Testator gave one-third of his residuary estate to his wife, and the other two-thirds to trustees in trust for his children at 21; and directed that, until the shares of his children should be payable to them, the income thereof should be paid to his wife,

to be by her applied, or, in case of her death, to be applied, by the trustees, for the maintenance of the children. Held, that the wife was entitled to the income of the children's shares during their minorities, she maintaining them in a proper manner.

Henry Patrick Hadow, Esq., by his will, dated 23d of December 1835, after giving plate, jewels and other articles to his wife, Jane Charlotte Hadow, gave and bequeathed all other his personal estate to trustees upon trust to invest, in their names in manner therein mentioned, so much of the trust monies as would, from the dividends thereof, yield the yearly sum of £300, and to pay out of such dividends to his three sisters therein named, during their respective lives, annuities of £100 apiece; and, as to a proportional part of the money so directed to be invested and of the securities on which the same should be invested, after the death of any of his sisters, in trust for his wife and his two children, and to be paid and transferred in the same manner as was thereinafter mentioned in respect to his remaining property. The will then proceeded thus: "And, after providing for the several annuities of £100 apiece to my said three dear sisters, upon trust that my said trustees, or the survivors or survivor of them, do and shall stand possessed of the residue and remainder of my said estate or effects upon trust, as to one equal third part or share thereof, for my dear wife, Jane Hadow, to and for her own absolute use, benefit and disposal, and to be paid to her so soon as conveniently may be after my decease; and, as to the remaining two-third parts thereof, upon trust that my said trustees do and shall place out the same at interest in some of the Parliamentary stocks or public funds of Great Britain, or on real securities at interest, and do and shall, from time to time, vary, alter, or transfer the same as may seem expedient; and, as to one moiety of such stocks, funds or securities, do and shall pay, assign or transfer the [439] same unto my son, Reginald Hadow, as and when he shall attain the age of 21 years; and, as to the remaining moiety of the said stocks, funds and securities, do and shall pay, assign and transfer the same unto my son Henry John Hadow, as and when he shall attain his age of 21 years; and, in case either of them, my said two sons, shall die without having attained the said age of 21 years, then the share of him so dying of and in the said stocks and securities shall go and be paid or transferred to the survivor, as and when his original share shall have become payable as aforesaid; and in case both of them, my said two sons, shall die without attaining the said age, then my will is that the said shares of both of my said sons of and in the said last-mentioned stocks, funds and securities shall, from and immediately after the death of the survivor of my said two sons, be paid and transferred to my said dear wife, Jane Hadow, to and for her own absolute use, benefit and disposal. Provided always, and my will is that, until such stocks, funds and securities shall become payable as aforesaid to my said sons, the dividends thereof shall be paid over, by them or him, (1) into the proper hands of my said dear wife, Jane Hadow, *to be by her applied*, or, in case of her death, *to be applied by my said trustees* or the survivors or survivor of them, for and towards the maintenance, education and advancement in life of my said sons or the survivor of them, in such manner as she or they shall think proper."

Henry John Hadow survived his father and died an infant in 1837.

The bill was filed by Reginald Hadow against his mother and the trustees of the will. It stated that the [440] Plaintiff was advised that, under the trusts of the will, he was contingently entitled to two-third parts of the testator's residuary estate, including the sum invested to answer the annuities, subject nevertheless to the payment of those annuities; and that, when he should attain twenty-one, he would become absolutely entitled to the two-third parts of the residuary estate subject as aforesaid; and that he was further advised that, out of the dividends of the two-third parts, a sufficient sum ought to be allowed to his mother for his maintenance and education; and that the surplus of such dividends ought to be accumulated for his benefit.

The bill prayed that the amount of the testator's estate and effects not specifically

(1) So in brief.

bequeathed might be ascertained ; and that the two-third parts thereof to which the Plaintiff was so entitled as aforesaid, subject as aforesaid, might be secured for his benefit ; and that, out of the dividends of the two-third parts, a sufficient sum might be paid to his mother for his maintenance and education, and that the surplus of such dividends might be accumulated for his benefit.

Mrs. Hadow, in her answer, said she was advised that, under the will, she was absolutely entitled to one-third part of the testator's residuary estate for her own absolute use and benefit, subject, as to such part thereof as was set apart to answer the annuities, to the same annuities ; and that, until the remaining two-third parts of the residuary estate should have become payable under the trusts of the will, she was absolutely entitled to the dividends of the same two-third parts, for her own use and benefit, she being willing to maintain, educate and advance the Plaintiff in a proper manner.

[441] THE SOLICITOR-GENERAL [Sir R. M. Rolfe] and Mr. G. L. Russell, for the Plaintiff. The proviso in the will directs the income of the children's fortunes to be paid to their mother, *to be by her applied* for the maintenance and education of the children as she may think proper. The mother, therefore, was not intended to take any part of the income for her own benefit. Besides, as the same words are used with respect to the trustees, the Court, if it decides in favour of the mother's claim, must hold that, if she were to die during the Plaintiff's minority, the trustees, if they maintained him, would be entitled to the income of two-thirds of the residue : that, surely, could not have been the testator's intention. Moreover, the testator has shewn the measure of his bounty to his widow ; for he has given her one-third of the residue absolutely. In *Berkeley v. Swinburne* (*ante*, vol. 6, p. 613) there was no gift to the testator's sisters. *Hammond v. Neame* (1 Swanst. 35), *Wetherell v. Wilson* (1 Keen, 80).

Mr. Knight Bruce, Mr. Jacob, Mr. Norton and Mr. F. Bayley appeared for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not think that the gift of a share of the residue to the wife at all alters the case.

The testator meant that his widow and children should live together, and that, during her life, she should have the income of the children's property to maintain them, without being liable to account.

Declare that the Defendant, Jane Charlotte Hadow, is entitled to the income of two-thirds of the testator's residuary estate, she maintaining and educating the Plaintiff in a proper manner.

[442] RAWSON v. SAMUEL. Nov. 29, 1838.

Discovery. Plaintiff.

A bill was filed for an account of dealings and transactions between the parties, and to restrain an action brought by the Defendant against the Plaintiff for a breach of contract in not accepting bills drawn on him by the Defendant. Held, that the Plaintiff was entitled to inspect those parts only of the books mentioned in the schedule to the answer which related to the matters in question in the suit ; and that, if he wished to inspect other parts of them with a view to his defence to the action, he must file a bill of discovery.

The bill was filed for an account of dealings and transactions which had taken place between the parties, and for an injunction to restrain an action brought by the Defendant against the Plaintiff for a breach of contract in refusing to accept bills drawn by the former upon the latter. The Plaintiff's defence to the action was that, when he refused to accept the bills, a balance was due to him from the Defendant ; and that by the terms of the contract he was not bound, when that was the case, to accept the Defendant's bills.

The Plaintiff had obtained an order for a production of books and papers which the Defendant admitted, in his answer, to be in his custody and power : and the

object of the present application, on the part of the Plaintiff, was to obtain an inspection, not only of those parts of the books and papers which related to the matters in question in the suit, but also of those parts which might contain evidence in support of the Plaintiff's defence to the action.

Mr. Knight Bruce, Mr. Jacob and Mr. Blunt appeared for the Plaintiff.

Mr. Wigram and Mr. Hull, for the Defendant, contended that the Defendant ought to be permitted to seal up those portions of the documents which did not relate to the matters in question in the suit, as there was no connection between those matters and the cause [443] of action, the bill not seeking to have the state of the accounts, at the time when the Plaintiff refused to accept the bills, ascertained.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Plaintiff was not entitled to inspect any portions of the books or papers, except those which related to the matters in question in the suit; and that, if he required to inspect any parts of them with a view to his defence to the action, he ought to have filed a bill of discovery for that purpose.

Motion refused.

[443] CURTEIS v. KENRICK. July 6, 1840.

[S. C. 4 Jur. 934; and at law, 3 Mee. & W. 461; 7 L. J. Ex. 169.]

Power.

By a marriage settlement, freehold lands were conveyed to trustees during the joint lives of the husband and wife, in trust to pay one moiety of the rents to the wife for her separate use, and the other moiety to the husband; and, after the decease of one of them, to the use of the survivor, with remainder to the use of the children of the marriage, with remainder, in default of such issue, if the wife should survive the husband, to the use of her in fee, but if not, then to such uses, &c., as she, notwithstanding her coverture, by her will, by her signed and published in the presence of and attested by three or more credible witnesses, should appoint, and, in default of appointment, to the use of her in fee. The wife died in her husband's lifetime, having made a will which purported to be signed, sealed and delivered by her, and by which, without referring to any power, she gave all the property of which she was possessed, whether real or personal, and also her reversionary interest or interests in any property or properties whatsoever, to her husband. Held, that the will was a due execution of the power given to the wife by the settlement.

In obedience to the decree in this cause, the following case was stated for the opinion of the Barons of the Court of Exchequer.

By indentures of lease and release, dated respectively on or about the 22d and 23d days of April 1832, the [444] release being made and duly executed between and by Anne Catherine Wykeham Martin, since deceased, late the wife of Richard Fiennes Wykeham Martin, by her then name and description of Anne Catherine Mascall, spinster, one of the three surviving daughters and co-heiresses of Robert Mascall, Esq., deceased, by Martha Mascall, his wife, of the first part, the said Richard Fiennes Wykeham Martin of the second part, William Waterman, Esq., and Richard Curteis Pomfret, gentleman, of the third part, and Francis James Newman Rogers, Esq., and Charles Wykeham Martin, Esq., of the fourth part; being the settlement made previously to the marriage of the said Richard Fiennes Wykeham Martin with the said Anne Catherine Wykeham Martin, which was afterwards solemnized; in consideration of the then intended marriage, she, the said Anne C. W. Martin, with the privity of the said Richard F. W. Martin, did grant, bargain, sell and release the undivided third part or share of the said Anne C. W. Martin (the whole into three equal parts or shares being divided) of and in the several manors, messuages, farms, lands and tenements therein particularly described, unto the said Francis James Newman Rogers and Charles W. Martin, in their actual possession then being, to

hold to them, their heirs and assigns, to the uses thereafter expressed (that is to say) after the solemnization of the said then intended marriage, to the use of the said Francis James Newman Rogers and C. W. Martin, their heirs and assigns, during the joint lives of said Richard F. Wykeham Martin and Anne C. W. Martin (without impeachment of waste), upon trust to pay one moiety of the rents and profits thereof to or for the separate use of her, the said Anne C. W. Martin, and to pay the remaining moiety of the said rents and profits unto the said Richard F. W. Martin, or as he [445] should, in manner therein mentioned, appoint, and after the decease of such one of them, the said Richard F. W. Martin and Anne Catherine, his wife, as should first depart this life, to the use of the survivor of them, the said Richard F. W. Martin and A. C. W. Martin, his wife, and his or her assigns during his or her life without impeachment of waste, with remainder to the use of Francis J. N. Rogers and Charles W. Martin, their heirs and assigns, during the life of such survivor, in trust to preserve contingent remainders, with remainder to the use of the children of the said R. F. W. Martin, by the said A. C. W. Martin, his wife, for such estates, and in such shares and interests as therein mentioned, with remainder in default of such issue, if the said Anne C. W. Martin should survive the said Richard F. W. Martin, to the use of her, the said Anne C. W. Martin, her heirs and assigns for ever; but, if the said Anne C. W. Martin should die in the lifetime of the said Richard F. W. Martin, then to such uses, upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations as the said Anne C. W. Martin, notwithstanding her coverture, by her last will and testament in writing, or by any codicil or codicils thereto by her signed and *published* in the presence of and attested by three or more credible witnesses, should direct or appoint; and in default of such direction or appointment, and so far as any such direction or appointment should not extend, to the use of the said Anne C. W. Martin, her heirs or assigns for ever.

The intended marriage between Richard F. W. Martin and Anne C. Mascall was duly solemnized: and Anne C. W. Martin, formerly A. C. Mascall, died some time in or about February 1833 without issue by the said [446] R. F. W. Martin, having first duly made and published her last will and testament in writing, or a paper writing purporting to be her last will and testament, of the date and in the words and figures following (that is to say), "I, Anne Catherine Wykeham Martin, do hereby make my last will and testament, and do give and bequeath, to my dearly beloved husband R. F. W. Martin, *all the property of which I am possessed whether real or personal*, and also all my reversionary interest or interests in any property or properties whatsoever: and I hereby nominate and appoint Francis James Newman Rogers, Esq., to be my executor."

"ANNE CATHERINE WYKEHAM MARTIN. (L. S.)"

Signed, sealed and *delivered* this 3d day of December 1832, in the presence of James Whatman, surgeon, Maidstone, Kent; Frances Anne Kenrick, Bourne Place, Kent; Elizabeth Benham.

The question for the opinion of the Court is whether the testamentary instrument of the 3d day of December 1832 was a due execution of the power given to Anne Catherine Wykeham Martin by her marriage settlement.

The Barons of the Court of Exchequer, by their certificate, dated the 3d of May 1838, certified as follows:—

"We have heard this cause argued by counsel, and have considered the same; and we are of opinion that the testamentary instrument of the 3d December 1832 is a due execution of the power given to Anne [447] Catherine Wykeham Martin by her marriage settlement."

"ABINGER. E. H. ALDERSON.

"J. PARKE. J. GURNEY."(1)

(1) See 3 Mecs. & Wels. 461. The certificate in the above case seems to be at variance with the decisions in *Lovell v. Knight*, ante, vol. 3, p. 275, and *Lempriere v. Valpy*, ante, vol. 5, p. 108. Since those cases were decided, a report has been published of the important case of *Churchill v. Dibben*. See 3d Lord Kenyon's Cases, p. 85. There

[448] The cause having come on for further directions, an order was taken without discussion, declaring the will [449] to be a due execution of the power contained in the settlement.

[450] Mr. Wigram and Mr. Morley appeared for the Plaintiffs, and Mr. Simons, Mr. Stinton and Mr. Willcock, for the Defendants.

[453] TURNER v. TRELAWNY. Jan. 17, 1839.

Practice.

If liberty is given to a party to exhibit further interrogatories for the examination of witnesses, he may re-examine a witness whom he has examined before, but not to the same matter.

On the 9th of November last, the Defendant obtained an order to enlarge publication, and for liberty to sue out a new commission for the examination of witnesses,

is also a note of it in Serjeant Hill's MSS., in Lincoln's Inn Library, vol. 31, p. 85, which is as follows :—

Churchill v. Dibben.

(Post. Hill. 27 Geo. 2. In Chanc.)

Will. Construction. Power. Feme Covert.

A married woman having freehold estates, which were settled on her marriage to her separate use with a testamentary power of appointment over them, made a will by which, without referring to the power, she disposed of certain of the estates, *nominatim*, and then gave all the rest of her goods, chattels, estate and estates to R. C. Held, that the residuary clause was a good execution of the power as to all the estates not previously mentioned.

If a married woman having a testamentary power of appointment makes a will, it must be intended to be an exercise of the power, although it contains no reference to it.

A married woman having real property settled to her separate use, with a testamentary power over it, may dispose of leaseholds and other chattels purchased with the produce of it, but not of real estate so purchased.

A bequest of "all my goods, chattels, estate and estates whatsoever," will pass real as well as personal property.

By articles made previous to the marriage of T. Dibben with Elizabeth Brown, particular lands therein mentioned are conveyed to trustees, to receive and pay the rents and profits over to the said Elizabeth, for her separate use and benefit, and then on this further trust, that they, their heirs and assigns, shall stand seized of all such premises, in trust and for the benefit and behoof of such persons, for such interest, estate and estates, and subject to such powers, provisoes, conditions, limitations or agreements, and in such manner and form, as the said Elizabeth Brown shall or may, at any time or times hereafter, after the said intended marriage shall be had and solemnized, notwithstanding her said intended coverture or whether she shall be sole, by any deed or writing by her to be signed or sealed in the presence of two or more credible witnesses, or by her last will and testament in writing, signed, sealed and delivered as aforesaid, direct, limit or appoint, and, in default, &c., in trust for the only use, benefit and behoof of the said Elizabeth Brown, her heirs and assigns for ever. There was likewise a power given her, by the settlement, to appoint £1000 of her personal estate, by her will, to such persons as she should think proper; and, for want of such appointment, it was to go to the executor that she should name in her will.

Elizabeth Dibben, with the savings out of the estate which she had to her separate use, purchased during the coverture several freehold lands; and she likewise contracted

and, from time to time, as long as publication should stand enlarged, to exhibit interrogatories for the examination of witnesses in chief and for their cross-examination, under the then existing and the new commission, as he might be advised.

The new commission having issued, the Defendant gave notice that one Sylvester was to be examined, as a witness on his behalf, on certain further interrogatories exhibited under the before-mentioned order. The Commissioners, however, declined to examine Sylvester, on the ground that he had been examined for the Defendant, under the former commission, and, therefore, they had no power to re-examine him without an order of the Court for that purpose. Whereupon the Defendant moved for liberty

with one Sanders for some other freehold lands at Nettlecombe; but the conveyance of them was not executed at her death.

May 14th, 1749, her husband being then alive, she makes her will, whereby, without taking any notice of the power given her by the settlement, she devises as follows:—"I give unto my sister, Mary, the wife of Richard Churchill, Esq., all my estate in Porten: Item, I give unto Thomas Churchill all the moiety of Mappercombe farm, now in my possession: I likewise give unto my aforesaid kinsman, Thomas Churchill, all the lands which I have purchased, except that which I purchased of W. Sanders at Nettlecombe: Item, I give unto Thomas Dibben, Esq., my husband, Buckham farm and the estate purchased of W. Sanders at Nettlecombe: Item, I give unto my kinswoman, Ann Churchill, £200, and to John Riglan, £5: All the rest of my goods, chattels, estate and estates whatsoever, I do give and bequeath unto Richard Churchill the younger, to him, his heirs, executors and assigns for ever."

Upon the residuary bequest there arose two questions, which the Lord Chancellor stated, with his opinion, as follows:—

The first question is upon the extent of the residuary clause, whether it comprises real as well as personal estate: if both, then secondly, whether it is not restrained by the incapacity of the testatrix who, as a *feme covert*, can devise only in execution of a power.

As to the first, I think the words of the residuary clause comprise both real and personal estate; and I consider the present in the same light as if it had been the will of an unmarried person who had a capacity of ownership, in which case there would be no room for the second question. It is said that the word "estate" stands coupled with others that carry a chattel interest, and, therefore, is restrained to relate to things *ejusdem generis*. The clear answer to this is that the word "estate" does stand so accompanied; yet it is with words that describe the whole personal estate: which distinguishes this from other cases where a gift of particular species of personalty as bonds, notes, stocks, furniture, &c., precedes the general word "estate." But when she has before given all the residue of her goods and chattels, what other personal thing could she give? Unless, therefore, the words "estate and estates" take in the realty, they can have no operation at all. That they may have this sense was determined in *The Countess of Bridgewater v. The Duke of Bolton* (1 Salk. 236). This case is not within the distinction of the determination in 1 Eq. Ab. 178 (*Wilkinson v. Merryland*). Another answer to the objection arises from the manner of penning this clause. The words are "estate and estates," in the plural number: the latter of which is never made use of to describe personal estate, but means the same in common speech, as lands and farms.

The second question relates to the capacity of the testatrix: and I think that this clause is sufficient to pass lands by virtue of the power. If it had been the devise of an unmarried woman, there could be no doubt but that this residuary clause would carry everything undisposed of. Is there any difference, as it is the devise of a *feme covert*, taking effect in the nature of an appointment in pursuance of a power in the marriage settlement? There are several kinds of powers: first, over another's estate; second, over one's own estate. If this had been of the former kind, the lands would not have passed. It was formerly doubted whether a *feme covert* could execute a power coupled with an interest; but, in *Rich v. Beaumont* (6 Bro. P. C. 152), it was determined that she may. In the present case there is no room for that question, because the power is given her to execute, whether sole or covert. Here the inheritance is in herself. This is her estate: she has a power over it as her own.

to examine witnesses, notwithstanding they should have been examined under the former commission, provided such examination should not be upon the same interrogatories as the witnesses had been before examined upon.

This application was supported by an affidavit stating that the Defendant's object in applying for the new commission was that he might be allowed to add further interrogatories in order to prove some new and additional facts, discovered since the opening of the [454] old commission, and most important to his case; and that it was of the utmost importance to his defence that Sylvester should be again examined, on further interrogatories, as to some of the facts thereinbefore referred to, and on

What difference is there between this and a person's capacity to make a will by the statute of Hen. 8, which in that case shall operate as it can, either by ownership or power? Here she could not give by virtue of the former. The expression "all my lands" comprehends the lands over which she has a power, and her ownership explains and completes that description, though she does not give by virtue of the ownership. I am of opinion that the lands will pass, and the rather because the Court must think it a will meant to execute a power, though there [451] is no reference to it, which makes no difference: it can have no other sense. By the very act of making a will, she could have nothing in view but to execute the power. That is plain, because as a *feme covert* she had no other capacity than what was reserved to her by the settlement; which differs this from what it would be if the words could mean a disposition of other lands than what are comprised in the power. If a man had a power by appointment of disposing of particular lands, and other lands of his own in fee, there the latter would satisfy the residuary devise. But here the testatrix must be intended by this disposition to have executed the only power she had. How are the goods and chattels to pass but by the power? In that manner they may, because the settlement has made them her separate estate.

As to the lands purchased after marriage, I think they will not pass by the will. Where a *feme covert* has a separate fortune, she may dispose of the produce of it by will, if she has such a power over her personal estate; but, if it is laid out in land, she cannot devise that to the disinheriting of her heir: that is, she shall not, by virtue of any power, though before marriage, devise a legal estate. But it is clearly otherwise where an estate is settled in trust, subject to such powers; there she may devise in execution of a power; for he who takes by the devise comes in under those who created the power. All these purchased estates are legal estates in her subject to the rules of law, and, therefore, not devisable by virtue of her ownership on account of her incapacity, nor by virtue of any power, for there neither was nor could be any such power. If the husband should agree, generally, with his wife, that she should have a power to make a will and dispose of her real estate, it would be void. The lands contracted for with W. Sanders, and devised to her husband, must be considered as if the conveyance had been executed. The vendor, who has still the legal estate in him, indeed, may, to some purposes, be considered as a trustee; but this will not give her any power of devising: for a *feme covert* can no more dispose of a trust than of a legal estate, without a particular power of appointment. I am of opinion, therefore, that, as the testatrix had no such power over those [452] lands, they will not pass at all, either by the particular devise to Thomas Churchill and her husband, or by the residuary devise to Richard Churchill.

As to the £1000, which, by the settlement, she was enabled to dispose of; as she has not given it to any one: that must go to her executor.* Having a power to make a will, she may, consequently, appoint an executor; as it is now the settled practice of the Ecclesiastical Courts to grant probate to such an executor. The husband being, generally, the wife's representative, is the only person that would contest this probate; and he has precluded himself by the express stipulation in the settlement.

Upon the whole, therefore, I am of opinion that this will passes all her estate real and personal, except the lands purchased during the coverture.

* It appears, from Lord Kenyon's report, that the testatrix appointed Richard Churchill the younger her executor; but Serjeant Hill's note omits that fact.

which the Defendant would have examined him under the old commission had he been then acquainted with those facts.

Mr. Knight Bruce and Mr. Steere, for the motion, said that the commissioners had acted against the established practice of the Court in refusing to examine a witness on fresh interrogatories merely because he had been examined before on the old interrogatories.

Mr. Jacob and Mr. G. Richards, for the Plaintiff, said that a witness who had been once examined could not be re-examined except under a special order. They cited *Asbee v. Shipley* (5 Madd. 467), 1 Smith's Pract. p. 395, and *Stanney v. Walmsley* (1 Myl. & Craig, 361).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the commissioners were not warranted in refusing to examine the Defendant's witness: for I never understood that where liberty is given to a party to exhibit fresh interrogatories the examination is to be confined to new witnesses.

Motion granted.

[455] BLUNDELL v. GLADSTONE. Jan. 17, 24, 1839.

Jurisdiction. Injunction. Commissioners for Examining Witnesses.

The Court will restrain commissioners for examining witnesses from bringing an action for their fees against a solicitor in the cause, and will refer it to the Master to ascertain what is due to them.

Motion by the Plaintiff's solicitor to restrain T. Fisher and James O. Watson, the Plaintiff's commissioners for the examination of witnesses in the cause, from proceeding with actions brought by them against the solicitor for fees claimed by them as such commissioners.

The solicitor had offered to pay Fisher and Watson a certain sum, being at the rate of two guineas a day each for 38 days, which was the time that they had been engaged in examining witnesses. Fisher and Watson, however, claimed to be paid a larger sum on account of their having been engaged more than 38 days in examining witnesses, indorsing exhibits and making up the return; and, because, on some of those days they had sat more than four hours, which was the time fixed by them for their daily sitting, and acquiesced in by the solicitors on each side at the opening of the commission.

Mr. Skirrow and Mr. Macdonnell, in support of the motion, said that the Court would interfere to stay the proceedings in an action arising out of a suit in this Court and brought by one officer of the Court against another. *Frowl v. Lawrence* (1 Jac. & Walk. 655), *In re Weaver* (2 Myl. & Craig, 441), *Barker v. Dacie* (6 Ves. 681).

[456] Mr. Jacob, for Fisher and Watson, referred to *Stockhold v. Collington* (1 Salk. 330), *Goslin v. Ellison* (*Ibid.*).

THE VICE-CHANCELLOR [Sir L. Shadwell]. This application in the form in which it is made is certainly new: but I do not think that it is distinguishable in principle from *In re Weaver*. I shall, therefore, grant the injunction: but, at the same time, provision ought to be made for securing to the commissioners the payment of what is justly and fairly due to them. A commissioner might not be able to sit longer than four hours a day without great inconvenience to himself; and, therefore, the stipulation, made by Messrs. Fisher and Watson, that they should not sit more than that number of hours daily may have been perfectly fair and reasonable. The order, therefore, that I shall make is that Messrs. Fisher and Watson be restrained by the order of this Court from proceeding any further in their two several actions: and it must be referred to the Master to inquire and state what is due to them for their fees on taking the examination and cross-examination of witnesses in this cause, having regard to any special circumstances.

[457] CALDECOTT v. HARRISON. July 11, 1840.

[S. C. 9 L. J. Ch. 331 ; 4 Jur. 885. See *Wilks v. Bannister*, 1885, 30 Ch. D. 517.]*Will. Cousins. Construction.*

Testator, by his will, gave legacies to several persons, describing each of them as his cousin. By a codicil he gave his residuary estate to all such of his cousins, both on his father's and mother's side, as should be living at his decease, and to all the children of such of his said cousins as might have theretofore died or might die in his lifetime. The testator left several first cousins and children of first and second cousins, and one first cousin once removed. Held, that none of them were included in the residuary bequest, except the first cousins living at the testator's death, and the children of first cousins who died in his lifetime.

Geo. Clubley, by his will, dated the 6th of March 1835, devised as follows:—

"I give and devise all and every my messuages, lands and hereditaments, situate within the township, precincts and territories of Waxholme in Holderness in the county of York, unto Francis Clubley of Waxholme aforesaid, the son of my cousin, John Clubley of Welwick, his heirs and assigns for ever, subject nevertheless to and charged and chargeable in exoneration of my personal estate, with the payment of the several annuities or annual sums of money following (that is to say) to Mrs. Smith, the wife of my late cousin, George Smith, an annuity of £30 for and during her natural life ; to my cousin, Francis Smith, and his present wife, an annuity of £30 for and during their joint natural lives and the life of the survivor of them ; to my cousin, Thomas Smith, and his present wife, an annuity of £30 for and during their joint natural lives, and the life of the survivor of them ; to my cousin, Ann Wilkin, and her present husband, an annuity of £30 for and during their joint natural lives and the life of the survivor of them ; to my cousin, Eleanor Caldecott, and her present husband, an annuity of £30 for and during their joint natural lives and the life of the survivor of them ; and to my cousin, Mary Musgrave, and her present husband, an annuity of £30 for and during [458] their joint natural lives and the life of the survivor of them." The testator then directed his other real estates to be sold, and, after giving several legacies out of the proceeds, proceeded thus:—

"I give and bequeath all the rest, residue and remainder of the monies arising from the sale of my said real estates, and all and singular my personal estates and effects, of what nature or kind soever, unto the said John Clubley of Welbeck, and the said Francis Clubley of Easington, for their own several and respective use and benefit absolutely."

The testator made a codicil, dated the 13th of April 1835, in the following words:—

"Whereas, in and by my said will, I have given and bequeathed all the residue and remainder of the monies to arise from the sale of my real estate therein directed to be sold, and my personal estate and effects, after paying or satisfying the several legacies therein mentioned unto my cousin, John Clubley of Welbeck, and Francis Clubley of Easington, for their own use: now I do hereby revoke and make void said bequest, and, instead thereof, I do hereby give and bequeath all said rest and residue of the said monies, personal estate and effects, unto and equally amongst all such of my cousins, both on my father's and mother's side, as may be living at the time of my decease, and unto and amongst all and every the child or children living at my decease, of such of my said cousins as may have heretofore died, or may die in my lifetime, leaving a child or children him, her or them surviving, the child or children of any such deceased cousin taking, between or amongst them in equal shares, such part or portion only of said monies [459] and effects as would have passed to his, her or their parent or parents, if living: and in all other respects I do hereby confirm my said will."

The decree referred it to the Master to inquire and state what cousins of the testator, both on the father's and mother's side, were living at his death, and if any of them were then dead, who was or were their legal personal representatives, and also

what child or children of such the testator's said cousins who had died in the testator's lifetime were living at his decease, and if any of them were then dead, who were their legal personal representatives.

The persons who came in and claimed before the Master were first cousins of the testator, children of his first and second cousins, and a first cousin of his father.

The cause now came on to be heard for further directions.

Mr. Knight Bruce and Mr. Elmsley, for the Plaintiffs, who were the first cousins of the testator living at his death, and the children of his first cousins who died in his lifetime.

The testator has mentioned in his codicil children of cousins as well as cousins. Now every child of a cousin is a cousin; and, therefore, it is necessary in construing the codicil to put a restricted sense upon the word cousins, and to hold that it means first cousins only. Besides, it appears from the report that every person whom the testator mentions in his will as his cousin was his first cousin.

[460] THE VICE-CHANCELLOR. If that be so, the testator has put his own interpretation upon the language which he has used.

Mr. Koe, for James Bradley, the first cousin of the testator's father. The language of the codicil must be taken in an extended sense; and James Bradley, who was a first cousin once removed of the testator, must be held to be included in the residuary bequest.

Mr. G. Richards, for the children of the second cousins who died in the testator's lifetime. The Court cannot put that confined construction upon the language of the codicil which the counsel for the Plaintiffs have contended for. On looking at the words which the testator has used in his codicil, it is plain that he meant to extend his bounty, and not to confine it within the former limits. The language is extremely general. It includes cousins both on his father's and mother's side. A second cousin or the child of a first or second cousin is as much a cousin as a first cousin is. The term is a flexible one; and there is nothing in this codicil to limit it to first cousins. *Silcox v. Bell* (1 Sim. & Stu. 301), *Mayott v. Mayott* (2 Bro. C. C. 125), *Charge v. Goodyer* (3 Russ. 140).

Mr. Twells, for the executors.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I admit that the word "cousins," if used *simpliciter*, would include cousins of every description. But the Court frequently is obliged to put a restricted sense on general words.

[461] In my opinion, wills, like all other instruments, are best construed when you can find out from the context of the instrument itself in what sense the testator has used the term, the meaning of which is disputed. Here it is stated that whenever he has named in his will persons as his cousins, they are all of them persons who stood in the relation of first cousins to him. In the codicil he gives his residuary estate to such of his cousins on his father's and mother's side as might be living at his decease, and to all the children living at his decease of such of his said cousins as might have theretofore died or might die in his lifetime. As, therefore, he uses the words "cousins and children of cousins," it is obvious that he must use the term "cousins" in a restricted sense; for the children of cousins are not meant to take directly, but by way of substitution.

I think that the true interpretation of the will and codicil, taken together, is that, by the word "cousins," the testator meant first cousins, simply and strictly, without any qualification. Therefore Bradley, who was a first cousin once removed, cannot take: nor can the children of first cousins, unless they happen to come in by way of substitution.

I assume that to be true which has been stated to me, namely, that every person called a cousin in the will is a first cousin. That is an important fact. (See *Slade v. Fooks*, ante, 386.)

[462] FORBES v. ADAMS. Jan. 23, 1839.

[See *Miller v. Collins* [1896], 1 Ch. 592.]

Feme Coverte. Fine.

By a marriage settlement, a Jamaica estate was limited to trustees for a term of years, in trust to raise £18,000 to be laid out in land, in Great Britain, of the value of £600 a year; and the land, when purchased, was to be settled on the husband for life, with remainder to the wife for life, with an option to her to have an annuity of £600 a year, out of the land, in lieu of her life-estate. Before the £18,000 was raised, the wife joined with her husband (both of them being resident in this country) in mortgaging the Jamaica estate in fee: and the wife acknowledged the mortgage deed before a magistrate, which, by the laws of Jamaica, was equivalent to levying a fine. The husband afterwards died. Held, that the wife had barred herself of all claim to the provision made for her by the settlement.

Charles Forbes, formerly of Jamaica but afterwards of Great Stanmore, Middlesex, by the settlement on his marriage with Mary Clutterbuck, dated the 29th of August 1800, demised, to trustees, two plantations in Jamaica, for 1000 years, subject to a proviso for cesser of the term in case he should in his lifetime, or his heirs, executors, &c., should, within two years after his death, pay to the trustees £18,000 sterling, with interest, if not paid in his lifetime, after the rate of £5 per cent. per annum, from the day of his death: and the settlement declared that the trustees should stand possessed of the £18,000 upon trust, with the consent of Forbes and his intended wife or the survivor of them, if they or either of them should be then living, and after the death of the survivor, then of the proper authority of the trustees, to invest the £18,000, or so much thereof as should be necessary, in the purchase of freehold or copyhold hereditaments, in fee-simple in possession, to be situate in Great Britain, of the clear yearly value of £600, to be settled and assured to the use of C. Forbes, for his life, and, after his decease, in case Mary Clutterbuck should survive him, to her use for her life, or at her option signified by her, whether covert or sole, by some writing under her hand and seal, to the use that she [463] and her assigns should, in the event aforesaid, receive a clear annuity or rent-charge of £600 out of the hereditaments so to be purchased, in lieu or instead of her life interest therein, and with a term of 100 years to be limited to trustees in such settlement to be named for that purpose, and to commence from the day of the death of Charles Forbes, upon trust, by the usual ways and means, for the further and better securing the payment of the rent-charge, and subject to such provisos and agreements as were usual in terms of the like nature and created for the like purpose: which said life-estate so to be limited to Mary Clutterbuck, upon the event of her surviving Charles Forbes, in the hereditaments so to be purchased as aforesaid, or the rent-charge of £600 so directed to be charged upon and made payable thereout, should be for a jointure for Mary Clutterbuck, and in bar of her dower or thirds at common law or by custom or otherwise, which she might claim out of any manors, messuages, &c., which Charles Forbes was or might be seized of or entitled unto, for any estate of inheritance, during the intended coverture; and after the decease of the survivor of Charles Forbes and Mary Clutterbuck, in case the hereditaments so to be purchased should, at the option of Mary Clutterbuck, be limited to her for her life, expectant and to take effect as aforesaid, or in case the rent-charge of £600 should be limited in the event aforesaid, to her for her life as aforesaid, then, after the decease of Charles Forbes (but subject to such rent-charge and the arrears and remedies and term of years for better securing the same) to the use of all the children of the marriage, equally, if more than one, as tenants in common in tail, with cross-remainders between them in tail, and, if there should be but one such child, then to the use of such only child in tail, and [464] with the ultimate remainder to the use of Charles Forbes in fee: and it was thereby further declared that, upon payment of the £18,000 and until an opportunity should offer for investing it in the purchase of lands to be settled as aforesaid, it should be lawful for

the trustees, with the consent of Charles Forbes and Mary Clutterbuck or the survivor of them, if they or either of them should be then living, and after the decease of the survivor of them, of the proper authority of the trustees, to invest the £18,000 in the usual securities, and that the trustees should apply the income of those securities in payment of an annuity of £600 to such person or persons as would be entitled to the rents of the hereditaments to be purchased and settled as aforesaid, in case the same were actually purchased and settled pursuant to the settlement, and should pay the residue of such income to Charles Forbes, his executors, &c.: and it was thereby further declared that it should be lawful for the trustees to receive from Charles Forbes in his lifetime, or from his heirs, executors or administrators after his death, any sum or sums of money on account of the £18,000, by such instalments and at such times as he or they should be desirous and find it convenient to pay, so as the sum to be paid at any one instalment should not be less than £500, and so as the payment of the whole thereof should not be postponed beyond two years from the death of Charles Forbes.

By an indenture, dated the 20th of February 1818, Charles Forbes and Mary, his wife, and each of them, conveyed the two plantations, and all the estate, right, title, interest, benefit, claim and demand whatsoever, either at law or in equity, of them and each of them, of, into or out of the same to the Defendants, [465] Adams, Robertson, Greenfield and Atkinson in fee, subject to redemption on repayment by Charles Forbes, his heirs, executors, &c., of two sums of £8000 and £6000 currency: and Mary Forbes appeared before the Mayor of Chichester and acknowledged that she executed the deed for the uses and purposes therein mentioned; and, being examined apart from her husband, she acknowledged before the mayor that she voluntarily executed the deed without any force, threat, compulsion or coercion of, from or by her husband or any other person or persons whomsoever, and that at the time of the execution thereof she knew the same to be a conveyance of the several plantations therein comprised to the Defendants for the purposes therein mentioned: and a memorandum of such acknowledgment was indorsed upon the deed and sealed with the mayor's official seal. The Defendants, by their answer, alleged that, by the law of Jamaica, such conveyances and acknowledgments as aforesaid were sufficient and effectual to pass the rights and interests of married women.

C. Forbes died on the 27th of July 1835, leaving his wife surviving. There was issue of the marriage seven children, two of whom were still living.

A sum of money having been awarded under the Act for the Abolition of Slavery (3 & 4 Will. 4, c. 73) as a compensation for the slaves on the two plantations, and that sum having been invested in stock in the name of the Accountant-General, the question on the hearing of a petition presented by Mrs. Forbes and her children and the trustees of the settlement was whether Mrs. Forbes was entitled, as against the mortgagees, to be [466] paid the dividends of the stock on account of the interest of the £18,000 which had never been raised.

Mr. Jacob and Mr. Koe, for the Petitioner. The question is whether Mrs. Forbes, by joining in and acknowledging the mortgage deed, passed to the mortgagees her interest in the estate to be purchased with the £18,000. There is nothing on the face of the mortgage deed to shew that she intended to transfer her jointure to the mortgagees. *Solly v. Whitfield* (Ca. temp. Finch, 277). Mr. Forbes might have paid the £18,000 out of his property in Jamaica, or out of any other property. He might have paid it in his lifetime: and, supposing that he had paid it before the mortgage deed was executed, would Mrs. Forbes's interest in it have passed to the mortgagees?

Mr. Knight Bruce and Mr. Mitchell, for the mortgagees. Mrs. Forbes, when she executed and acknowledged the mortgage deed, did an act which, by the laws of Jamaica, is equivalent to levying a fine. The fund which was to produce the £600 a year still remains to be raised, and as Mrs. Forbes has levied a fine of the estate out of which that fund was to be raised, she has effectually barred herself from claiming the £600 a year. *May v. Roper* (ante, vol. 4, p. 360).

Mr. Jacob, in reply. The case of *May v. Roper* does not at all affect the present question. Here the question is not whether [467] Mrs. Forbes's claim is barred or extinguished, but whether it has been transferred to the mortgagees.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It appears to me that Mrs. Forbes,

when she executed the deed and acknowledged it before a magistrate in this country, gave the same effect to the conveyance to the mortgagees as it would have had if it had been a conveyance of an estate in this country and she had levied a fine. In that case all possible interest that she might have previously had, either at law or in equity in the estate, would have been barred.

The £18,000, when raised, would have been to be laid out in the purchase of land in this country, in order to secure to her a jointure of £600 a year. The creation of the term was nothing but a method of charging the West India estate with such a sum as would produce the £600 a year.

This Court looks at the substance of a case, not at the form of it, and the substance is that Mrs. Forbes had, in equity, a charge of £600 a year upon the West India estate by means of the term: and the effect of her executing and acknowledging the deed was to bar herself of all interest as well in equity as at law, which she had in the estate.

The consequence is that she is not entitled to the dividends of the stock in which the compensation money has been invested, and the petition must be dismissed with costs. (See *Pearson v. Lane*, 17 Ves. 101.)

[468] LIVINGSTONE v. COOKE. July 9, 1840.

Practice. Contempt. Order to Amend.

If a Defendant is in contempt for want of answer, the Plaintiff does not waive the contempt by obtaining an order to amend.

Mr. Lovat moved that the Defendant, who was brought up under an attachment for want of answer, might be committed to the Fleet.

Mr. Terrell, for the Defendant, said that the Plaintiff had obtained an order to amend, which was a waiver of the contempt. *Symonds v. Duchess of Cumberland* (2 Cox, 411).

Mr. Lovat replied that where exceptions are taken to an answer, and the Plaintiff obtains an order to amend and for the Defendant to answer the amendments and exceptions at the same time, the contempt is waived, because the order prevents the Defendant from putting in his answer; but that it was not so where, as in the present case, the order that had been obtained was a simple order to amend; and that, in the case cited, the bill had been actually amended.

THE VICE-CHANCELLOR [Sir L. Shadwell]. A mere order to amend is not a waiver of the contempt; as it creates no obstacle to the Defendant putting in his answer.

Motion granted.

[469] WEBB v. KELLY. Jan. 23, 1839.

[See *In re Bowlby* [1904], 2 Ch. 700.]

Will. Construction.

Testator directed his trustee to apply the rents of his freehold estates, *during the life of his wife, for the maintenance and education* of his two great-nieces, and, after his wife's death, to sell the estates and apply the proceeds to the use and benefit of both his great-nieces, share and share alike, but if there should be but one of them living at his wife's death, to the use and benefit of the surviving great-niece only. One of the great-nieces died an infant in the lifetime of the wife. Held, that a moiety of the rents accrued between her death and the death of the widow did not go to the surviving great-niece or result to the testator's heir, but belonged to her personal representative.

Philip Montague, by his will, dated the 15th of March 1780, after reciting that he had, by a marriage bond then in the hands of William Barford, made a provision

for his wife Kezia, by the dividend of £1700 of his Old South Sea annuities, willed that the dividend of the remaining £2300, that is, the dividend of the whole £4000 of his said annuities, should be paid as an additional provision for his wife during her life, and that the said additional sum of £2300 should be, as soon as conveniently could be after his death, invested in the hands of William Barford and John Clementson for the same uses and trusts that he had before settled by the before-mentioned bond: and he willed that the said John Clementson should receive the rent of his freehold estates at Fiddington in the county of Somerset, and at Wingfield in the county of Berks, *during the life of his wife*, and apply it, in equal shares, *to the maintenance and education* of his two great-nieces, Mary Baker and Anna Maria Baker: and, after his wife's decease, he empowered Clementson and willed him to sell both the estates, and apply the monies arising therefrom in the most advantageous manner to the use and benefit of both of his said great-nieces, share and share alike, or, if there should be but one of them living at the time of his wife's decease, to the use and benefit of the surviving sister only; but he declared that he made [470] that bequest to his two great-nieces upon a supposition that the public security would continue good, and the dividend of his above-named annuities be regularly paid his wife during her life; but that if public security should fail, and the dividends of the above-mentioned Old South Sea annuities should not be regularly paid his wife, he empowered Clementson and willed that he should sell both the above-named estates, and, with the money thence arising, purchase her the best annuity he could for her life: and he appointed his wife and Clementson executors of his will.

The testator died shortly after the date of his will. Mary Baker died in July 1784, an infant and unmarried. Kezia Montague, the testator's widow, died in November 1815. Anna Maria Baker married Edward William Webb, and died in November 1834.

The dividends on the South Sea stock having been regularly paid during the widow's life, one question, on the hearing of a petition in the cause, was whether Anna Maria Webb became entitled on the death of her sister, Mary Baker, to the whole of the rents of the estates at Fiddington and Wingfield.

Mr. Knight Bruce, for parties claiming under Anna Maria Webb. The sole object in postponing the sale of the freehold estates was to secure an income of a certain amount to the wife. Supposing that object to be removed, there is an absolute gift to the two great-nieces; for both the income and the produce of the two estates are given to them; and there is a gift over to the survivor in the event of one of them dying in the widow's lifetime. It is plain that the testator intended the income to go [471] over with the capital; for it would be unreasonable that the representatives of the deceased great-niece should continue to receive one moiety of the income *pur autre vie*, after the capital has gone over.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The only subject of the gift over is the monies arising from the sale of the freehold estates. In the preceding clause the testator wills that John Clementson should receive the rent of his estates during the life of his wife, and apply it in equal shares to the maintenance and education of his two great-nieces: they are, therefore, made tenants in common of the rent during the life of the wife. Then, after the death of the wife, Mr. Clementson is to sell the estates; and the monies arising therefrom are to go to the two great-nieces equally, if both survive the wife; but, if only one survives, the whole is to go to the survivor. Consequently, there is no doubt that, as against parties claiming under Anna Maria Webb, the representatives of Mary Baker are entitled to one moiety of the rent accrued in the lifetime of the widow.

Another question was whether the testator's heir was entitled to a moiety of the rents that accrued between the death of Mary Baker and the death of the widow.

Mr. Jacob, for the heir. The only trust that is declared of one moiety of the rents is for the maintenance and education of Mary Baker: therefore, no trust is declared beyond her life; and, consequently, there is a resulting trust for the heir, as to one moiety of the rents accrued between her death and the death of the widow.

[472] Mr. Matthews, Mr. Willcock, Mr. Webster and Mr. Stone appeared for the other parties.

THE VICE-CHANCELLOR. I think that a gift for the maintenance and education of the legatee is an absolute gift ; so that in this case Mary Baker was entitled to a moiety of the rents during the life of the widow.

[472] MORRIS v. THE DUKE OF NORFOLK. May 4, 5, 1840.

Jurisdiction. Discovery. Tithe Commutation Act.

A Court of Equity will compel a discovery and production of documents in aid of proceedings at law to try a disputed right under the Tithe Commutation Act, notwithstanding special provisions are contained in that Act for those purposes.

The bill stated that in 1822 the Plaintiff was presented by the late Duke of Norfolk to the Rectory of Shelfanger in Norfolk ; that the Defendant, the present duke, and his ancestors, for a great many years past, had been and the Defendant then was seised in fee of certain lands in the parish, which had for some time constituted one farm called the Shelfanger Hall farm ; that in October 1838 the Commissioners appointed under the Tithe Commutation Act, 6 & 7 Will. 4, c. 71, determined to ascertain and award the rent-charge to be paid in lieu of the tithes of the parish, no agreement binding upon the parish having been made under the authority of the Act ; that certain suits then were and still continued to be pending in the Court of Exchequer, touching the Plaintiff's right to the tithes of the farm, which were commenced by the Plaintiff against Richard Ellis as tenant of the farm under the Defendant, and against his executors by original bill and bill of revivor, and also against Charles Ellis as the subsequent tenant under the Defendant, and that R. Ellis, in his answer to the first of the said bills, insisted that the farm was an ancient farm and was covered by a modus of £14 a year : that such suits were, in fact, defended by and at [473] the expense of the Defendant, and, consequently, a question had arisen between him and the Plaintiff, touching the existence and validity of the alleged modus ; and the Assistant Commissioner appointed under the Act for the purpose of ascertaining and awarding the rent-charge to be paid in lieu of the tithes of the parish appointed a time and place for hearing and determining such question, and having heard the same, he made his award, dated the 25th of June 1839, and thereby determined that the modus was good and valid : that the Plaintiff being dissatisfied with the award, and the yearly value of the tithes of the farm greatly exceeding £20, he, under the authority of the Act, caused an action to be brought in the Court of Exchequer against the duke, within the time prescribed by the Act, and caused a feigned issue to be delivered therein, in order that such disputed right might be tried ; such issue being whether a modus of £14 a year was then lawfully payable by the occupiers of the farm to the rector of the parish in lieu of the tithes of the farm ; that the Defendant, his solicitors or agents, had in their possession or power divers ancient and other deeds, books and documents by which, if produced, it would appear that no such modus had been payable from time immemorial, and from which several matters would appear utterly inconsistent with the alleged immemoriality and validity of the alleged modus : that from such deeds, books, &c., it would appear that in and before the reign of William the Conqueror, or at an early period subsequent thereto, the rectory was divided into mediety, and that one mediety was appendant to the manor of Hoes in the parish, and the other to the manor of Visedeliens in the same parish. The bill then stated the names of the successive lords of the two manors and of the incumbents of the rectory down to the year 1375, when [474] the two mediety of the rectory were consolidated and alternate rights of presentation to the consolidated rectory were given to the lords of the two manors. It next stated who were the lords of the manors from 1375 down to 1532, when they were purchased by the then Duke of Norfolk ; and that, from the several deeds, books, &c., by which the several matters thereinbefore mentioned appeared (all which or some copies thereof or extracts therefrom were in the possession or power of the Defendant, his solicitors or agents), it would appear that tithes in kind were payable in respect of all the lands in the parish, and particularly in respect of the farm ; that it would

also appear from such deeds, &c., and from certain other deeds, &c., then or late in the possession or power of the Defendant, his solicitors or agents, that, upon the foundation of the parish church, the parish constituted two distinct rectories which were endowed with lands and tithes by different lords of manors or other persons who, by reason or in respect of such endowments, held and exercised the advowson of each mediety, the person or persons who had endowed the church with one portion of such lands and tithes holding the advowson of one mediety, and the person or persons who had endowed the church with the residue of such lands and tithes holding the advowson of the other mediety; that it was impossible or highly improbable that the patrons or rectors of each mediety could, at any time before the period of legal memory, have agreed to one composition or pecuniary payment in respect of the tithes of the entirety of the farm; that the Defendant, his solicitors or agents then had or then lately had in their possession or power divers deeds and writings conveying or otherwise relating to the advowson of the rectory or the advowson of the two medieties thereof, or of one of them, and to the manors [475] and the lands alleged to be covered by the modus, and, in particular, the deeds by which the advowson of the rectory and the said lands were granted to his ancestors or to some person from whom he derived title thereto, and also divers leases and counterparts of leases of or touching the said lands; that, by and from such deeds, writings, leases and agreements, it would appear that the said lands were subject to tithes in kind, and that no such modus as aforesaid had subsisted from time immemorial, and that the annual rents of the said lands were not more until recently, or were, at least, little more than the yearly sum of £14; that, during the reign of James the First, leases of the said lands were granted by one of the Defendant's ancestors, which contained covenants for the payment of the tithes thereof; that the Defendant, his solicitors or agents, then had or then lately had, in their possession or power, divers receipts for tithes or compositions for tithes of the lands, and also divers accounts, books of account and memorandums of or by stewards, bailiffs, receivers and agents, in which payments for tithes or compositions for tithes were entered or stated, and also the court books and rolls of the two manors, from which the matters before stated would appear; that the lands had not constituted one entire farm until a period comparatively recent, but the same, together with other lands, did in ancient times and at the beginning of the reign of Richard the First, constitute a park, and yielded no produce but grass, which was eaten by the deer which were kept in the park, and, in fact, yielded little or no titheable produce whatever; that grants of free warren over the lands had been made at different times to the lords of the two manors, and such grants were, or then lately were, in the possession or power of the Defendant, or of his solicitors or agents, and it would appear there-[476]-from that the lands did not constitute an ancient farm or yield any other produce than grass; that, in order to defend the suits in the Exchequer and to substantiate the validity of the alleged modus, the Defendant had employed persons to make searches amongst ancient records and documents, and such persons had made reports to the Defendant of the result of their searches, and sent to him copies, extracts or abstracts of and from such records and documents, all which were in his possession or power, and they tended to shew the invalidity of the modus, and the Defendant had refused to produce the same to the Plaintiff; that, on the 30th of November 1839, Sir R. M. Rolfe, one of the Barons of the Exchequer, made the following order in the said action at law; "*Morris, Clerk, v. The Duke of Norfolk*. Upon hearing counsel and the attornies or agents on both sides, I do order that the Defendant do produce to, and that the Plaintiff or his attorney or agent be at liberty to inspect all deeds, books, papers and writings, terriers, maps, plans and surveys relating to the matters in issue in this cause, now in the custody or power of the Defendant, at the office of Messrs. Few & Co. on the 4th of December next, with liberty to the Plaintiff to apply for further time if necessary;" that the time for producing the documents mentioned in the order was afterwards enlarged to the 13th of December 1839, on which occasion the Defendant's attorney produced only four papers and five small books purporting to be rectors' books, and refused to produce divers other documents which the Plaintiff's attorney then required him to produce, and, amongst others, the court books of the manors and the conveyance of the lands alleged to be covered by the modus, to the Defendant's ancestors; in consequence of which

the Plaintiff's attorney required Messrs. Few, the De-[477]-fendant's attornies, to produce the court books and conveyances ; but Messrs. Few declined to give any answer as to those documents, on the ground that the Defendant had complied with Mr. Baron Rolfe's order ; that, at an adjourned meeting before the Assistant Commissioner, the Defendant, upon a question being addressed to him, on the Plaintiff's part, in reference to the immemoriality of the alleged modus, stated that he ought to have had an opportunity of informing himself, and that he was taken by surprise and had no information, but, if he had had an intimation beforehand, he might have answered ; and, in order therefore that the Defendant might be prepared to furnish the Plaintiff with the necessary information touching the matters before stated, the Plaintiff, on the 18th of February 1840, sent to him a notice requiring him, either personally or by some experienced agent, to search for and examine the various deeds, &c., in his possession relating to the alleged modus and the lands alleged to be covered thereby, and, especially, the several documents which, by a certain summons by the Assistant Commissioner, bearing date the 18th of May 1839, and by the order of Mr. Baron Rolfe, the Defendant was required to produce, and also all such deeds, &c., in the Defendant's possession or power, as would enable him to give the discovery required by a bill in the Court of Chancery which the Plaintiff was about to file against him ; that the Defendant, or his solicitors or agents, then had, or then lately had, in their possession or power, the several documents aforesaid, and also divers other writings tending to shew that the alleged modus was invalid, but he refused to produce the same ; that the Defendant ought, by himself or his agents, to search for the several documents required to be produced before he should answer the bill, in order that the result of such search [478] might be fairly stated in his answer thereto ; that the Defendant or his agents had burnt, destroyed, obliterated, defaced or improperly parted with divers of the documents aforesaid, with the view of preventing the Plaintiff from availing himself of the benefit thereof on the trial of the feigned issue ; and that the Plaintiff was unable to proceed with effect in the prosecution and trial of the issue without a discovery from the Defendant of the several matters aforesaid, but which he refused to make.

The bill then required the Defendant to answer all the matters aforesaid, and, more especially, that, after making or causing to be made such search as he was thereafter required to make, he might answer the interrogatories.

The bill prayed that the Defendant, before filing his answer to the bill, might, either personally or by some experienced person, search his depositories and muniment rooms, and all other proper places for all such deeds, books, papers and particulars as he was therein required to discover and produce, and might examine or cause to be examined such several deeds, books, papers and particulars, and might then answer the premises, and might, in his answer, state whether he had made or caused to be made such search and examination as aforesaid, and when and where and in what manner and by whom and for how long the same search and examination had been made, and might set forth what instructions and directions had been given, and by whom, to the person or persons making such search and examination as aforesaid, touching the nature, mode, object and particulars of such search and examination ; and that the Defendant might then make a full and true [479] disclosure and discovery touching the matters aforesaid ; and that, in the meantime, he might be restrained from taking any proceeding to compel the Plaintiff to proceed with the trial of the action or feigned issue.

The Defendant put in a demurrer stating that the Plaintiff had not, by his bill, made such a case as entitled him, in a Court of Equity, to any discovery from or against the Defendant touching the matters contained in the bill or any of such matters, and had not, by his bill, shewn any right or title to the discovery or to the injunction thereby sought.

Mr. Jacob, Mr. Wigram, Mr. Bethell and Mr. Loftus Wigram, in support of the demurrer.(1) [480] The Tithe Commutation Act has created an entirely novel and

(1) The following sections of the Tithe Commutation Act were referred to in the course of the argument :—

Sect. 10. "That the said Commissioners or any Assistant Commissioner may, by

special jurisdiction, armed with extensive [481] powers calculated to answer all the purposes of the Act. The 46th section provides that a party who is dissatisfied with the decision of the Commissioners or Assistant Commissioner may either bring an action against the party in whose favour the decision has been made, or may state a special case for the opinion of a Court of law. The Act, however, did not mean to give the common right of action with all its incidents. It prescribes the course of proceeding with great particularity, and subjects it entirely to the discretion of the Judge at common law. It is, in some respects, analogous to an action or an issue directed by this Court, or in bankruptcy. Where either an action or an issue is so directed, no bill of discovery can be filed without the leave of the Court or jurisdiction that directed the action or issue. *Cooke v. Marsh* (18 Ves. 209), *Ex parte Coles* (Buck. 293). *Few v. Guppy* (1 Myl. and Craig, 487; Hare on Discovery, 124). *A fortiori*, therefore, in a case like the present, where the Act prescribes, with great minuteness, the course of proceeding in the action which it authorizes to be commenced, and makes the whole of it subject to [483] the discretion of a Judge at common law, no bill of discovery can be filed without the permission of that Judge or of the Court in which the action is brought.

Besides, the Act has given to the Commissioners and to the Judge the power of doing everything that this Court can do in an ordinary case. Under the 10th sect. the Commissioners have the power of examining the parties on oath, and of compelling

summons under their or his hand, require the attendance of all such persons as they or he may think fit to examine upon any matter, brought before them or him as hereinafter mentioned, relating to the commutation of tithes, and also make any inquiries and call for any answer or return as to any such matter, and also administer oaths, and examine all such persons upon oath, and cause to be produced before them or him upon oath, all books, deeds, contracts, agreements, accounts and writings, terriers, maps, plans and surveys, or copies thereof respectively, in anywise relating to any such matter: provided always that no such person shall be required, in obedience to any such summons, to travel more than ten miles from the place of his abode, or to produce any deeds, papers, or writings relating to the title of any lands or tithes."

SeCT. 45. "That if any suit shall be pending touching the right to any tithes, or, if there shall be any question as to the existence of any modus or composition real, or prescriptive or customary payment, or any claim of exemption from or non-liability, under any circumstances, to the payment of any tithes in respect of any lands or any kind of produce, or touching the situation or boundary of any lands, or if any difference shall arise whereby the making of any such award by the Commissioners or Assistant Commissioner shall be hindered, it shall be lawful for the Commissioners or Assistant Commissioner to appoint a time and place, in or near the parish, for hearing and determining the same; and the decision of the Commissioners or Assistant Commissioner shall be final and conclusive on all persons, subject to the provisions hereinafter contained."

SeCT. 46. "That any person claiming to be interested in any lands or in the tithes thereof, who shall be dissatisfied with any such decision of the Commissioners or Assistant Commissioner, may, if the yearly value of the payment to be made or withheld according to such decision, shall exceed the sum of £20, cause an action to be brought, in any of His Majesty's Courts of law at Westminster, against the person in whose favour such decision shall have been made, within three calendar months next after such decision shall have been notified in writing, in such manner as the Commissioners or Assistant Commissioner shall direct, to the parties interested therein, or to their known agents, in which action the Plaintiff shall deliver a feigned issue, whereby such disputed right may be tried, and shall proceed to a trial at law of such issue at the sittings after the term, or at the Assizes then next, or next but one after such action shall have been commenced, to be holden for the county within which such lands or the greater part thereof are situated, with liberty, nevertheless, for the Court in which the same shall have been commenced, or any Judge of His Majesty's Courts of law at Westminster, to extend the time for going to trial thereon, or to direct the trial to be in another county, if it shall seem fit to such Court or Judge so to do; and every Defendant in such action shall enter an appearance thereto, and

the production of documents ; and, under the 46th sect., the Judge has the power of compelling the production of documents not only before, but at the trial of the action. Therefore, the interference of this Court is not only unnecessary, but would be improper, as it might create a conflict with what the Common Law Judge has done. In this very case Mr. Baron Rolfe has made an order for a production of documents : and, if that production is deficient, the Plaintiff, instead of filing a bill in this Court, ought to have obtained a second order from that learned Judge for the purpose of supplying the deficiency.

It is laid down by Lord Redesdale that when, as in this case, the Court in which any civil action is pending can, itself, give the discovery required, a Court of Equity will not interfere. (Treat. on Plead. 186, 4th edition.) Neither will a Court of Equity interfere, when it has not the means of making the discovery effectual. By the provisions of the Act, the action must be tried at the next Assizes or the next Assizes but one, unless the Judge or the Court of Common Law shall direct the contrary. This Court, therefore, has no power to postpone the trial so as to render the discovery effectual. *Gwinett v. Bannister* (14 Ves. 530).

[484] Lastly, the injunction prayed for by the bill is a special injunction : it is one not known to the ordinary practice of this Court.

THE VICE-CHANCELLOR. If that be so, the bill is a bill for relief as well as discovery.

Mr. Knight Bruce and Mr. Sidebottom, in support of the bill. The Legislature,

accept such issue ; but, in case the parties shall differ as to the form of such issue, or in case the Defendant shall fail to enter such appearance, or accept such issue, then the same shall be settled under the direction of the Court in which the action shall be brought, or by any Judge of His Majesty's Courts of law at Westminster, and the Plaintiff may proceed thereon in like manner as if the Defendant had appeared and accepted such issue ; and the parties in such action shall produce to each other and their respective attornies or counsel, at such time and place as any Judge may order, before trial, and also to the Court and jury upon the trial of any such issue, all books, deeds, papers and writings, terriers, maps, plans and surveys, relating to the matters in issue, in their respective custody or power ; and it shall be lawful for the Judge by whom any such action shall be tried, if he shall think fit, to direct the jury to find a verdict subject to the opinion of the Court upon a special case ; and the verdict which shall be given in any such action, or the judgment of the Court upon the case subject to which the same may be given, shall be final and binding upon all parties thereto, unless the Court wherein such action shall be brought shall set aside such verdict and order a new trial to be had therein, which it shall be lawful for the said Court to do, if it shall see fit : provided also, that, in case any such decision shall involve a question of law only, and the parties in difference shall be agreed upon the facts relating thereto and whereon such decision shall have been founded, the said Commissioners or Assistant Commissioner, at the request of the person dissatisfied (such request to be made in writing within three calendar months after such decision, and at least fourteen days' previous notice in writing of such request to be given in like manner to the other parties in difference or to their known agents), shall direct a case to be stated for the opinion of such one of His Majesty's Courts of law at Westminster as the Commissioners or Assistant Commissioner shall think fit, which case shall be settled by them or him or under their or his direction, in case the parties differ about the same, and may be set down for argument and be brought before the Court in like manner as other cases are brought before the Court ; and the decision of such Court upon every case so brought before it shall be binding upon all parties concerned therein : provided always, that after such verdict given and not set aside by the Court, or after such decision of the Court, the said Commissioners or Assistant Commissioner shall be bound by such verdict or decision ; and the costs of every such action, or of stating such case and obtaining a decision thereon, shall be in the discretion of the Court in or by which the same shall be decided, which may order the same to be taxed by the proper officer of the Court, and the like execution may be had for the same as if such costs had been recovered upon a judgment of record of the said Court."

when it passed the Tithe Commutation Act, did not mean to abridge the rights of the tithe-owner. An ordinary tithe suit is in the nature of a mere possessory action; but the proceedings under the Act were intended to settle the rights of the tithe-owner *in perpetuum*: therefore he ought to have the means of procuring all the discovery he can.

The means of obtaining discovery, which the Act gives the tithe-owner, are not effectual. There are two powers given by the Act to different individuals, which, it is said, render it unnecessary to apply to this Court for that purpose. The first is given by the 10th section. Suppose, then, that the landowner, in obedience to the order of the Commissioners, produces certain deeds and papers; and, on being asked whether he has any more, he answers not that he knows of; and that he is then asked whether he has made any search; and he replies, no. What power have the Commissioners to compel him to make the search? Next, no person is to be obliged to travel more than ten miles from his place of abode, or to produce his title-deeds. Therefore the remedy given by the 10th section is not effectual.

Then what is the power which the 46th section gives [485] to the Judge? It empowers him to order the parties in the action to produce, both before and at the trial, all books, deeds, &c., relating to the matters in issue, in their respective custody or power. But this remedy also fails: for the section in question relates to documentary evidence only: no power is given by it to examine the party, on oath, before the Judge, nor are the books, &c., to be produced on oath. Where then is the power of ascertaining whether the party has produced all the documents which are in his custody? In this very case the Defendant's solicitors, on being asked by the Plaintiff's solicitor whether the Defendant had in his possession the court books of the manor and the conveyance of the farm to the Defendant's ancestor, and whether the Defendant had produced, in the terms of the Judge's order, all deeds, &c., in his possession, declined to answer those questions, and added that the Defendant had complied with the Judge's order. All that we got under that order was a few documents of no value; consequently, the remedy given by the 46th section proved ineffectual, and we were under the necessity of filing the present bill. It is true that the 10th section gives the Commissioners the power of examining the parties and of compelling them to produce documents upon oath: but the time for availing ourselves of that provision is passed; and, moreover, we may have now discovered something which we did not before know of, and which makes it necessary to file a bill of discovery.

It was said that, by the provisions of the 46th section, the Plaintiff is deprived of his right to file a bill of discovery. But what is there in that section which interferes with that right? All the exceptions to the Plaintiff's common law right are specifically men-[486]-tioned: and when the Legislature gave, to the party dissatisfied with the decision of the Commissioners, the right of bringing an action against the party in whose favour the decision should be made, it intended him to have all the same privileges as a Plaintiff at common law has, except those which are expressly taken away. One of those privileges is the right to examine his adversary, on oath, in a Court of Equity (*Hare on Discov.* 119): and that general right cannot be taken away without express words.

It has been truly said that there are some cases in which the Court will not allow a bill of discovery to be filed without its permission. The reason is that the Court, in the order or decree by which it directs the action to be brought, provides for the making of all such admissions and for the production of all such documents as it considers proper to be made and produced at the trial. (18 Ves. 210.) In *Few v. Guppy* this Court ordered an action to be brought, and a bill of discovery was filed without its leave; but, nevertheless, the Court acted on the bill of discovery; which it would not have done if the filing of the bill had been clearly wrong. Besides, the present case relates to an action not brought by the direction of this or any other Court: and who ever heard of an application being made to a Court of law for leave to file a bill of discovery? If it is said that the application ought to have been made to the Commissioners, the answer is that their functions were at an end before the action was commenced.

If the form in which the injunction is prayed makes the bill a bill for relief, then

the demurrer is bad : for [487] it treats the bill as a bill of discovery. But all that the injunction is prayed for is that the discovery may be available, that is, that it may not come too late. But suppose that the Court cannot grant the injunction, is that a reason for the Defendant's not answering the bill?

The bill also prays that the Defendant may search his depositories and muniment rooms : but neither does that make it a bill for relief. It is consistent with what is found in old precedents ; and the only object of it is that the Defendant may put himself in a situation to give the required discovery. Besides, the bill prays that the Defendant may answer all the premises aforesaid ; so that it seeks for oral as well as documentary discovery.

Mr. Jacob, in reply. The injunction prayed by the bill is not only not the common injunction, but it is one which is wholly unknown to this Court. The common injunction stays execution only ; but, in a case like the present, there is no execution ; the verdict is final and conclusive, unless the Court shall think fit to direct a new trial. The common injunction, therefore, would be of no use ; but, in order to be effectual, it must be an injunction which will stay the trial of the action. The Act, however, directs that the trial shall take place within a limited time ; and, if the injunction should stay the trial beyond that time, the action would be at an end.

It has been said that the power of compelling discovery given by the tenth section is ineffectual ; because the person who is to be examined or to produce the documents cannot be required to travel more [488] than ten miles from the place of his abode. But the Commissioners may adjourn from place to place, and may go to him, if he will not come to them.

Next, as to the quarter to be applied to for leave to file the bill of discovery. I admit that the application is not to be made to the Commissioners ; but why is it not to be made to the Court of Exchequer, whose order has not been obeyed ? The Plaintiff ought to state to that Court, on affidavit, that there is good ground for thinking that the Defendant has in his possession documents which he has not produced ; and the Court would attach him for the contempt in disobeying its order. The Courts of Common Law have power to examine a party on oath before the Master for a contempt ; but, if they should think that a bill of discovery was the better mode of obtaining the discovery, they would direct a bill to be filed for that purpose.

In a common law action the Plaintiff is *dominus litis* : but the proceedings in an action brought under this Act are not under the controul of the Plaintiff. He must deliver a feigned issue, which is to be settled either by the Court or by a Judge, in case the parties differ about the form of it. There is to be no writ of error ; and the costs of the action are to be in the discretion of the Court. In short, it resembles an issue directed by this Court much more than an action at common law.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have had an opportunity, during the argument of this demurrer, of looking a good deal into the Act of Parliament ; and I do not find that there are any sections which relate to the matter, other than the 10th, [489] the 45th and 46th sections, with the exception of one section, upon which I shall presently make an observation.

The bill before me is, in my opinion, a mere bill of discovery ; and the particular mode in which the injunction is asked does not appear to me to vary its character at all. The form in which the injunction is asked is certainly very unusual ; but I do not think that anything turns upon that. Whether the Court would grant such an injunction or not I am not now to determine ; but, by the frame of the bill, nothing is asked but discovery and an *interim* injunction ; the bill is therefore to be considered as a mere bill of discovery.

I apprehend that, in all respects, that which was the law before the passing of the Act remains the law after the passing of it, except so far as it can be shewn that the law has been altered by express words which have taken away a portion of the ancient law or altered it, or that the provisions which the Act has substituted are of themselves necessarily inconsistent with the former state of the law. I make that observation because it is very well known that a very serious question arose after the Act of Parliament was passed which first created the Court of Review, whether that Act of Parliament had taken away the jurisdiction which was exercised by the Vice-Chancellor's Court generally, and also by the Lord Chancellor. In that Act, there

were no express words which took away the jurisdiction of the Vice-Chancellor's Court; but it was held, after very considerable discussion, that, although there were no express words, yet the general provisions of the Act had the effect of taking away that particular jurisdiction-[490]-tion; and that was the opinion which Lord Brougham gave in the case which was argued, at his request, before himself and me.

It is quite clear, on the face of this Act, that there is nothing whatever in the shape of express provision, which takes away the right of the Plaintiff or Defendant in the action which the Act has directed to be brought in certain cases to file a bill of discovery. But the question is whether, if there be no express words to take away that right, there is anything to be found in the general provisions of the Act which has that effect. Now what has the Act of Parliament done? It first of all speaks of some proceedings before the Commissioners, which are no farther to be noticed here than by observing that they have taken place, and the result has been that, under the provisions of the Act, the present Plaintiff in equity (who was dissatisfied with the decision of the Commissioners) did, within the time appointed by the Act, cause an action to be brought, in one of Her Majesty's Courts of law at Westminster, against the person in whose favor the decision was made. He has brought his action; and I do not see why, when, under the provisions of the Act of Parliament, he has once become a Plaintiff in one of the Superior Courts of law, he is disabled from filing a bill of discovery in the Court of Chancery for the purpose of supporting his action. The Act of Parliament, it is true, does provide that the action shall be tried within a limited time, subject only to this, namely, that liberty is given to the Court in which the action has been commenced, or to any Judge of His Majesty's Courts of law at Westminster (which I apprehend means a Judge acting in the absence of the Court), to extend the time for going to trial. It has been said that the [491] effect of that provision is, or rather may be, to prevent the bill of discovery from being useful. But the same objection also lies with respect to filing any bill of discovery at all; because, in a case where the bill of discovery is to extract that information which a Defendant personally has, it is perfectly obvious that the object of the bill may be defeated by the death of the Defendant before he puts in his answer; and, therefore, the mere circumstance that the bill of discovery may not be useful to the Plaintiff has not been held to be a reason why the Plaintiff may not file such a bill. I admit that the time for trial might come on before an answer had been put in; and in that case the bill of discovery would be of no avail. But I cannot but suppose that, if this Court had thought that there should be an answer to a bill of discovery, the very fact that there was a bill of discovery pending would be a reason, either with the whole Court of law or with a single Judge, for postponing the trial of the issue until the answer had been put in to the bill of discovery. Then the Act goes on to direct that the parties in such action shall produce to each other and to their respective attorneys or counsel, at such time and place as any Judge may order before trial, and also to the Court and jury upon the trial of any such issue, all books, deeds, papers and writings, terriers, maps, plans and surveys relating to the matters in issue, in their respective custody or power. Now, if an order were made in the terms of the Act, the benefit of it would be by no means equivalent to that which the Plaintiff might derive from an answer to a bill of discovery. For, suppose that the Defendant had, just prior to the making of the Judge's order, destroyed any of the documents; in that case, no order which the Judge could make under this Act would have the effect of [492] bringing that fact to light; because the Judge could only order that the books, deeds, papers and writings in the custody or power of the Defendant should be produced. I mention that, because I observe that it is charged by the bill that the Defendant has burnt or destroyed certain documents. Supposing that allegation to be true, it is quite plain that no order of the Judge would have the effect of obtaining from the Defendant an admission of the fact, or, what is still more important, a knowledge of the contents of the deeds which had been so destroyed.

Then it was said that this action which the Act has directed to be brought is perfectly under the control of the Court of law; but to that I do not agree. It seems to me peculiarly not under the control of the Court; because some things are made imperative in the Act of Parliament. But, at any rate, it is not an action in

the nature of an issue directed by this Court to a Court of law. It is an action which the Legislature has expressly given to the party dissatisfied with the decision of the Commissioners. The fact that there can be no writ of error only goes to shew that that proceeding is not allowed by the Act of Parliament: but, nevertheless, the action is still an action in one of the Superior Courts of law at Westminster; and, consequently, it is an action liable to all the incidents of an action, one of which is that the Plaintiff in the action may file a bill of discovery in the Court of Chancery. One thing has occurred to me in looking over this Act of Parliament, which, in my opinion, plainly shews that the Legislature did mean that all such rights and remedies should remain as are not taken away. By the 66th section it is enacted that no confirmed agreement, award or apportionment shall be impeached, after the [493] confirmation thereof, by reason of any mistake or informality therein or in any proceeding relating thereunto: so that the proposition is expressly confined to the ground of mistake or informality. But, notwithstanding that provision, a confirmed agreement, award or apportionment, if it was obtained by fraud, might be set aside: and I cannot but think that the marked manner in which this section is expressed shews that it was the intention of the Legislature that all the rights and remedies of the parties to the proceedings under this Act of Parliament should remain, so far as they are not expressly taken away by the provisions of the Act.

Upon the whole, my opinion is (after the full discussion which I have heard) that there is nothing so peculiar in the mode in which this action is directed to be carried on as to authorize me to say that the person who, under the provisions of the Legislature, has exercised his liberty of bringing his action shall be deprived of what I conceive to be accessary to bringing the action, that is, the right of filing a bill of discovery in this Court in order to support that action. The consequence is that the demurrer must be overruled.

Demurrer overruled.

[494] MEMORANDUM.

After the case, *In re Williams*, ante, p. 426, was sent to press, Mr. Bird (having obtained leave for that purpose) mentioned the petition again. THE VICE-CHANCELLOR said that he must take time to consider the Acts of Parliament referred to. [See 9 Sim. 642.]

[497] EVELYN V. CHIPPENDALE. Jan. 24, 31, March 22, 1839.

Practice. Costs.

Motion that the Plaintiff, a naval officer on half-pay, who had resided 16 years in Barbadoes, where he held the office of Captain of the Port, under the appointment of the Crown, might give security for costs, refused.

Mr. Moore, for the Defendant, moved that the Plaintiff, who was a lieutenant in the Royal Navy on half-pay, but had resided 16 years in Barbadoes, where he held the offices of Harbourmaster and Captain of the Port, might be ordered to give security for costs.

Mr. Heathfield, for the Plaintiff, said that every naval and military officer of Her Majesty was exempt from giving security for costs. *Colebrook v. Jones* (1 Dick. 154); *Lord Aliborough v. Burton* (2 Myl. & Keen, 401); *Lillie v. Lillie* (*Ibid.* 404).

THE VICE-CHANCELLOR directed Reg. Lib. to be searched for the case of *Colebrook v. Jones*.

Jan. 31. THE VICE-CHANCELLOR [Sir L. Shadwell] said that Mr. Bicknell, the registrar, had searched Reg. Lib. for the order in *Colebrook v. Jones*, mentioned by Dickens, but had found no entry of it.

Mr. Heathfield. It appears, from Reg. Lib., that on the 22d of November 1751 three of the Defendants in that cause obtained orders for time to answer, which confirms Dickens's report. Reg. Lib. A. 1751, fo. 67.

THE VICE-CHANCELLOR. Mr. Bicknell has a manuscript note of an application made to Lord Eldon, C., by Mr. Wetherell, on the 9th of February 1810, in *Loft v. —*, that the Plaintiff might be ordered to give security for costs, he being absent with his regiment on foreign service; and that his Lordship refused the application, and added that he did not conceive that a person who was abroad under His Majesty's command came within the rule.

March 22. The motion having stood over, it was mentioned again on this day, when it appeared that the title of the offices held by the Plaintiff was "Her Majesty's Captain of the Port and Harbourmaster," and that the office of Captain of the Port was in the gift of the Governor, and the office of Harbourmaster in the gift of the House of Assembly of the Island.

THE VICE-CHANCELLOR ruled that as the Plaintiff held the office of Captain of the Port under Her Majesty he was not compellable to give security for costs.

Motion refused, with costs.(1)

[500] WATSON v. HAYES. Jan. 25, 30, 1839.

[Varied, 5 My. & Cr. 125; 41 E. R. 319 (with note).]

Legacy. Vesting.

Testator directed all his property to be sold by his executors, and the proceeds to be invested in Government or real securities, to be disposed of as after mentioned. He then desired his executors to pay £25 yearly for the maintenance and education of his natural daughter until she attained 21 or married, when he required them to pay her the sum of £500. The daughter died under age and unmarried. Held, nevertheless, that the £500 vested in her.

J. Watson, the testator in the cause, by his will directed all his estates, of what nature or kind soever, to be sold by his executors, and the proceeds to be invested in real or Government securities, to be disposed of as after mentioned. He then desired (amongst other things) his executors to pay the sum of £25 yearly, by equal quarterly payments, for the maintenance and education of Sophia, his natural daughter by Sophia Leeson, until she should attain 21 or be married, which should first happen, when he required his executors to pay to her the clear sum of £500 for her own sole use and benefit.

The legatee survived the testator, but died under 21 and unmarried; and one question in the cause was whether the legacy of £500 thereby became lapsed.

Mr. Jacob, Mr. Piggott and Mr. T. Turner, for the Plaintiff, who represented one

(1) In *Lord Nugent v. Harcourt*, in the K. B. Practice Court, Mr. J. Patteson discharged a rule to shew cause why the [499] Plaintiff, who was an Irish peer and was abroad as Commissioner of the Ionian Islands, should not give security for costs, saying: "In the case of an officer in the army the absence is certainly involuntary. But, I think, if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of His Majesty, he stands in the same situation as if he were compulsorily abroad, and, therefore, ought not to be compelled to find security for costs. I do not give this opinion on the ground of his being a peer; but because he is abroad, and also having a residence and property in this country." 2 Dowl. P. C. 578.

In a case in H. T. 1839, reported under the name of *Evering v. Chiffenden*, but which appears, from the statement of it, to have been an action between the parties to the cause mentioned in the text, the same learned Judge discharged a similar rule, saying: "He is resident abroad for a temporary purpose in the service of Her Majesty; and I do not see the difference between this case and that of *Lord Nugent v. Harcourt*. This is not a case of voluntary absence from the country; but the Plaintiff is fulfilling a duty which, I take it, is always performed by a naval officer." 7 Dowl. P. C. 536.

of the testator's residuary legatees, said that this was not a case in which a sum of money was given to the legatee at 21 or marriage, and *the interest* of it directed to be paid to her or applied for her benefit in the meantime; and, consequently, that the legacy of £500 did not vest in the testator's natural daughter. *Batsford v. Kebbell* (3 Ves. 363; see also *Pulsford v. Hunter*, 3 Bro. C. C. 416; and *Hanson v. Graham*, 6 Ves. 249).

[501] Mr. Knight Bruce, Mr. Bethell, Mr. Purvis and Mr. Martin appeared for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Twenty-five pounds is the amount of interest on £500 at £5 per cent.; and, as that is the rate of interest which money is usually considered to bear, the £25 directed to be applied for the maintenance and education of Miss Leeson may be fairly regarded as intended to be the interest of the £500 which is directed to be paid to her on her attaining 21 or being married. Therefore, I think that she took a vested interest in the £500.

[501] In the Matter of KENT. Jan. 25, 1839.

[S. C. 8 L. J. Ch. 169.]

Infant. Mortgagee. 11 Geo. 4 and 1 Will. 4, c. 60.

The executors of a mortgagee in fee who had died intestate leaving an infant heir, having, in exercise of a power in the mortgage deed, agreed to sell the estate, the heir was ordered, on a petition presented by the executors under 11 Geo. 4 and 1 Will. 4, c. 60, s. 6, to convey the estate to the purchaser.

This was a petition presented under 11 Geo. 4 and 1 Will. 4, c. 60, *by the executors of a mortgagee in fee*, who had agreed to sell the mortgaged estate in exercise of a power contained in the mortgage deed, praying that the infant heir of the mortgagee might be ordered to convey the estate to the purchaser.

Mr. Barber, for the Petitioners, submitted to the Court whether the case was within the 6th section of the Act, and, if not, whether it was within the 8th section. He added that he entertained some doubt upon the point, as the present Lord Chancellor, when Master of the Rolls, had held, in *In re Dearden* (3 Myl. & Keen, 508), that [502] the heir of a mortgagee was not a trustee within the Act.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is not a case within the 8th section of the Act; but it seems to me, as far as the infant is concerned, that it is expressly within the 6th section. That section applies to infants who are seized of land either by way of mortgage or upon any trust. Here the mortgage was a mortgage in fee; and the mortgagee died intestate: consequently his heir is a person seized by way of mortgage.

Order made.

[502] ELLIOTT v. REMMINGTON. Jan. 25, 1839.

Affidavit. Practice.

A. sold a fund to which his wife was entitled in reversion; and, when it fell into possession, he was resident in Africa. The wife consented to waive her equity to a settlement and that the fund should be transferred to the purchaser. Held, that the usual affidavit that there was no settlement affecting the fund might be made by the wife alone.

In this case, a fund to which a married woman was entitled in reversion had been sold by her husband; and, on its falling into possession (at which time the husband was resident at Cape Coast Castle in Africa), the wife consented to waive her equity to a settlement out of it, and that it should be transferred to the purchaser.

The only question was whether an affidavit, made by the wife alone, that there was no settlement or agreement for a settlement affecting the fund was sufficient.

THE VICE-CHANCELLOR [Sir L. Shadwell] held the affidavit to be sufficient, and ordered the fund to be transferred to the purchaser.

[503] Mr. Heathfield, Mr. Cook and Mr. Elderton appeared for the different parties.

[503] JUBBER v. JUBBER. Jan. 26, 1839.

Will. Construction. Legacy. Uncertainty.

Testator gave to his wife the use of all his property for the benefit of herself and unmarried children, that they might be comfortably provided for so long as she should live; and, after her death, he disposed of it amongst all his children. The testator left four married and three unmarried children. One of the three married after his death. Held, that the widow and the three children who were unmarried at the testator's death were entitled equally to the income of the property during the widow's life.

A request, by a testator, that a handsome gratuity should be given to each of his executors is void for uncertainty.

Geo. Jubber made his will, dated the 10th of February 1836, in the following words:—

"First, I will have all my lawful debts paid and discharged: 2dly, I will and bequeath to my wife Martha, at my decease, £500 of lawful money of Great Britain for her own use and disposal, *also the use of all my property*, whether houses, land, money in the funds or elsewhere, interest of money, rents or goods or chattels, *for the benefit of herself and unmarried children, that they may be comfortably provided for as long as my wife Martha may remain in this life*; and, when it shall please God to call her hence, I will and bequeath as follows: 3dly, I will and bequeath to my eldest son, Jas. Morris, £25 sterling, he having had already considerably more than his share of my property, and has no right to have more: 4thly, I will and bequeath to my six remaining children, viz., Henry, Anne, Susan, Emma, Louisa and George, the remainder of my property after all my debts and legacies are paid, to be equally divided; and, if any of the six aforesaid sons and daughters shall have received any part of my property in advance, for furniture, &c., such sum or sums shall [504] be deducted from their share of the remainder: 5thly, that if my two sons, to whom I have granted a lease of the premises in the High Street, Oxford, shall be disposed to purchase the premises they now rent in the High Street, Oxford, they shall be at liberty so to do for a sum of money not exceeding £2200, including all the fixtures, and shall have three months to consider of their determination after they have received notice in writing of a determination, on the part of my executors, to offer the premises for sale: 6thly, I expect that, after all the debts due to me are collected and my debts paid, there will be a considerable sum over and above all demands on me; I will have all such sum or sums funded for the benefit of my wife and children as aforesaid: 7thly, I have to request that my son Henry, Mr. Bridgewater and Mr. Underhill will see this my will executed, or any two of them, with liberty to choose a third person."

The testator shortly afterwards made a codicil, but without date, and which was as follows:—"I request a handsome gratuity to be given to each of the executors: 8thly, I will and bequeath to my granddaughter £50 of good lawful money of Great Britain, free from duty, &c.: 9thly, I will and bequeath to Elizabeth Burden £50 of good lawful money of Great Britain, free of duty, &c.: 10thly and lastly, that if any one or more should attempt to put this will of mine into Chancery, he, she or they shall be excluded from the whole of the benefit arising out of it. If any dispute shall occur, it shall be settled by arbitration, which shall be final, without appeal and without reference to the law. My meaning is merely this, that all my six remaining children shall equally share alike either in money or pro-[505]-perty valued to them, and that not to take place till after the death of my wife Martha."

The testator died on the 20th of May 1837, leaving Martha Jubber, his widow, and seven children, all of whom had attained twenty-one, him surviving.

At the testator's death four of the children, who were Defendants, were married. The Plaintiff, Henry Jubber, afterwards married; but the two other children had never been married.

The bill alleged that considerable doubts had arisen with respect to the nature and extent of the interest which, under the provisions of the will, Martha Jubber was entitled to in the property, the use of which was given to her for the benefit of herself and her unmarried children; that Martha Jubber claimed to be entitled to receive, for her life, the rents, issues and profits of all such property, to her own exclusive use, so long as or in case none of the testator's unmarried children should choose or continue to reside with her and to form part of her family; and that, on the other hand, such of the testator's children as were not married at the time of his death claimed to be entitled to some share or interest in the rents, issues and profits jointly with Martha Jubber; and they alleged that she was a trustee, for them, of some certain and definite proportion of such rents, issues and profits, and that they were respectively entitled to receive such proportion whether they resided with her or not, so long as they continued to be unmarried, and that their rights to such proportion would not be forfeited or lost by reason of any subsequent marriage, inasmuch as they were not married persons, and answered the description in the will of the testator's [506] unmarried children at the date of his will and at the time of his death.

The bill prayed that the will might be declared well proved, and that the trusts thereof and of the codicil might be carried into execution, and that the rights and interests of all persons under the same might be declared and secured.

Mr. Mylne, for the Plaintiff, said that his client was satisfied that his father intended his mother to have the absolute control over the income of the residuary property; but if the Court should be of opinion that she was a trustee of it for herself and her unmarried children, then that the Plaintiff was entitled to one-fourth of it, and that his interest did not cease on his marriage.

Mr. Knight Bruce and Mr. Willcock, for Geo. Jubber, one of the unmarried children, said that each of the testator's unmarried children was entitled to a share of the residue: that the testator had given a specific portion of his property to his wife for her own use and disposal; but had not used those words in the bequest in question, which shewed strongly that he intended her to take the property which was the subject of that bequest, in a different manner. *Wetherell v. Wilson* (1 Keen, 80); *Woods v. Woods* (1 Myl. & Craig, 401).

Mr. Craig, for Mrs. Jubber and the other children, all of whom were favourable to their mother's claim, contended that the testator had given the whole income of his residuary estate to Mrs. Jubber, in anticipation [507] that his unmarried children would live with her, which they had a right to do if they thought fit; and he cited *Robinson v. Waddelow* (*ante*, vol. viii. p. 134).

THE VICE-CHANCELLOR, having said in the course of the argument that the word "unmarried" had two significations, one, a person who had never been married, and the other, a person who had ceased to be married, but that a gift to an unmarried person, had never been held to mean a gift to that person so long as he should remain unmarried, delivered judgment as follows:—

My opinion is that the children who were unmarried at the death of the testator are entitled to participate with their mother in the income of the fund. The term "unmarried" is *designatio personarum*; and, if once the child is entitled to participate in the fund by filling the character of an unmarried child, he will not lose that right if he subsequently marries.

The testator draws a marked distinction between the legacy of £500, which he gives absolutely to his wife, to be applied by her as she thinks proper, and the fund which he gives to her for the benefit of herself and her unmarried children; and he has gone on to explain his meaning. He says, "That they may be comfortably provided for." Therefore, he not only confers a bounty, but assigns a reason for it.

I am inclined to think that the widow and unmarried children take the provision made for them, as tenants in common; but I will not make any declaration as to

whether they take in that character or as joint-tenants, as, at present, it would be premature so to do.

[508] I am of opinion that the request that a handsome gratuity should be given to each of the executors is void for uncertainty ; but I shall not give any such recommendation as was given by Sir Joseph Jekyll in *Peck v. Halsey* (2 P. W. 387), as I do not think I am at liberty so to do.

Declare that the widow and the children who were unmarried at the testator's death are entitled equally to the income of the residuary fund during the life of the widow, and that the bequest to the executors is void for uncertainty.

[508] WARBURTON v. EDGE. Jan. 26, 28, 1839.

[S. C. 8 L. J. Ch. 111 ; 3 Jur. 166. Discussed, *In re Hawkes* [1898], 2 Ch. 9.]

Solicitor. Lien.

A solicitor who had been employed by an administratrix in the administration of the deceased's estate was also employed as her solicitor in a suit subsequently instituted by a creditor of the deceased. Pending the suit, the administratrix went to reside abroad, and forbade the solicitor to proceed any further with the suit. Afterwards the creditor obtained a decree, and a receiver of the estate was appointed. Papers relating to the estate had come into the solicitor's possession, not for the purposes of the suit merely, *but for those and other purposes*, and he claimed a lien on them for his costs of the suit, *and other business*. A petition by the creditor praying for a reference to ascertain whether the solicitor had any lien on the papers, and that he might be ordered to deliver them up to the receiver, was dismissed.

By the decree in this cause, made on the 10th of June 1837, it was referred to the Master to take an account of the sums of money which, in the lifetime of W. P. Warburton, the testator in the cause, were received and paid by Andrew Edge, as the solicitor, agent or attorney of W. P. Warburton. By an order of the 7th of July 1838, it was referred to the Master to appoint a receiver of A. Edge's personal estate, and it was [509] ordered that the Defendant, who was his daughter and administratrix, should deliver over to the receiver all securities in her hands for such personal estate, together with all books, papers and writings relating thereto ; and that the Defendant, her solicitors, attornies or agents, should be restrained, until the further order of the Court, from receiving certain sums therein mentioned which were due to A. Edge's estate, and also any monies, being part of the proceeds of that estate, then in the hands of Messrs. Snow & Co., bankers, or of C. H. Stedman, gentleman, or any agent of the Defendant, or any other monies, securities for money, stocks, funds or effects belonging to A. Edge's estate. On the 6th of August 1838 a receiver was appointed. By the decree on further directions, made in July 1838, it was declared that A. Edge was, at his decease, indebted to W. P. Warburton's estate in £7263, and the Defendant was ordered to pay that sum to the Plaintiffs out of A. Edge's assets come to her hands ; and, if she should not admit assets sufficient for that purpose, then an account was to be taken of A. Edge's estate possessed by her.

In 1835 the Defendant had gone to reside in France, and, as it was alleged, carried with her large sums the produce of A. Edge's estate.

The Defendant had employed Stedman to act as her solicitor in the administration of A. Edge's estate ; and she also employed him as her solicitor in this cause until some time in the year 1837, when she wrote to him from Paris, saying that she wished no further proceedings to be taken or expense incurred in the suit. She, however, continued to employ him to collect A. Edge's personal estate, and to remit the produce to her. [510] Stedman, in the course of his acting as the Defendant's solicitor, got into his possession various deeds, &c., relating to A. Edge's estate ; and he claimed a lien upon them for costs *in this suit and in other matters* in which he had so acted.

The Plaintiffs being unable, owing to the Defendant's residing abroad, to make effectual that part of the order of July 1838 which directed the Defendant to produce all the papers in her custody relating to A. Edge's personal estate, presented a petition stating as above, and submitting that Stedman, as the solicitor for the Defendant in this suit, and as an officer of the Court, was subject to an order of the Court in all matters relating to the suit; and praying that he might be ordered to deliver to the receiver, or to deposit with the Master, all deeds, &c., in his custody or power, belonging or relating to A. Edge's personal estate, subject nevertheless to such his right or interest by way of lien thereon as he might be entitled to, make out or establish; and, in case he should claim any such lien, then that he might, within ten days subsequently to such delivery or deposit, deliver into the Master's office a particular in writing of such lien: and that it might be referred to the Master to inquire into the validity, nature and extent thereof; and in case such lien should be claimed in respect of any bill of costs, then that the Master should be at liberty, if required by the parties and if necessary, to tax such costs and to take such accounts as might be necessary to ascertain the amount due in respect of such lien, to the intent that the same might be satisfied out of such personal estate of A. Edge as might be recovered, received or made available out of or by means of the deeds, documents or papers so being in Stedman's [511] possession, or otherwise out of such personal estate as might come to the hands of the receiver, if deemed proper and just; and that Stedman might account before the Master for all sums of money received by him, as such solicitor and agent of the Defendant, on account of the personal estate of A. Edge not paid over by him before he had notice of the order of July 1838; and that, for the better discovery of the matters aforesaid, Stedman might be ordered to produce before the Master upon oath all books, papers and writings in his custody or power relating thereto; and that he might be examined upon interrogatories or otherwise as the Master should direct.

Stedman made an affidavit in which he deposed that the documents came into his possession, as the Defendant's solicitor, for general purposes and not merely for the purposes of the suit.

Mr. Knight Bruce and Mr. Anderdon, in support of the petition, said that the Petitioners wanted those papers only that related to Andrew Edge's personal estate, against which they had established a heavy demand; that Stedman took the papers with notice of the pending suit; that he no longer acted for the Defendant Miss Edge; that, if the papers had remained in Miss Edge's possession, she must have delivered them up to the receiver; that a solicitor could not stand in a better situation than his client; but that what the latter was bound to do, the former was bound to do; and they relied on *Baker v. Henderson* (*ante*, vol. iv. p. 27) and *Bell v. Taylor* (*ante*, vol. viii. p. 216).

[512] Mr. Jacob and Mr. Torriano, for Mr. Stedman. The Plaintiff did not claim any specific right against the estate of Andrew Edge, but merely as a general creditor on his estate; the doctrine of *lis pendens*, therefore, has no application; for that doctrine applies only where a party claims by virtue of a specific title. The order for a receiver was obtained in 1838; can that give a prior equity to a lien that attached three or four years before? The appointment of a receiver does not, like an act of bankruptcy, have relation back to some antecedent period. The Plaintiffs' counsel have taken it for granted that the documents in question came into Stedman's possession in the course of this cause and for the purposes of this cause; but that is not so. They did not come into his possession for the purposes of this cause merely, but for those and other purposes; and the lien that he claims upon them is for business done in this cause and for other matters. He was Miss Edge's solicitor at the time when she took out administration to her late father; and some portion of the costs for which he claims the lien arose in respect of business done prior to the filing of the bill. In *Ex parte Shaw* (Jacob, 270) (which was a case in bankruptcy where there is more difficulty with respect to the question of lien) a commission of bankrupt had been superseded, and a new commission was issued; upon which the party who had taken out the new commission petitioned that the solicitor under the late commission might be ordered to deliver up the proceedings to the solicitor under the new commission. Lord Eldon said that, if there was a lien for the bill of costs,

the assignees would be liable to pay it; and his Lordship declined to make any order upon the petition as it then stood.

[513] In this case, if the Plaintiffs have any equity against Mr. Stedman they cannot enforce it, in a summary way, by petition; but ought to file a bill for that purpose: *Brown v. Newall* (2 Myl. & Craig, 558, see 573), *Pentland v. Quarrington* (3 Myl. & Craig, 249).

THE VICE-CHANCELLOR [Sir L. Shadwell]. When this case came before me on Saturday last, my attention not having been then called to the nature of Mr. Stedman's affidavit, I was impressed with the notion that it would be governed by the decisions in *Baker v. Henderson* and *Bell v. Taylor*. But in *Baker v. Henderson* the decree had directed the estates to be sold, and the title-deeds to be deposited with the Master in the usual manner; and it was stated, as a fact, that the Plaintiff's solicitor was in possession of the deeds, and claimed a lien on them for his costs of the suit, and refused to produce them. And what the Court said was that the solicitor had no lien on the deeds anterior to the suit, and that they were in his hands for the purposes of the suit. In *Bell v. Taylor* the deeds had been deposited by the Defendant with his attorney, for the purposes of the suit, and were admitted to be either in his possession or in that of his town agents. Moreover, the deeds were directed by the decree to be given up to the Plaintiff; so that they must be taken to have belonged to him *ab origine*; and consequently no lien could have attached upon them.

This case is totally different from either of those cases; for here the deeds did not come into the possession of the solicitor solely for the purposes of the suit, as in *Bell v. Taylor*; nor, as in *Baker v. Henderson*, does the solicitor claim a lien on the deeds for the costs [514] of the suit only. What he says in his affidavit is, that all and every the documents came into his hands, after the death of Andrew Edge, for general purposes as well as the purposes of the suit. Nor does he claim a lien on them for costs incurred in this suit only; but also for other business done for Miss Edge as the administratrix of her late father. And it appears from the affidavit that there was other business done by him, for Miss Edge, in the administration and for the protection of the estate. Therefore he must have a lien on the deeds prior to the right of Miss Edge to take them out of his hands, and, consequently, prior to the right of the Plaintiffs, who are merely general creditors on the deceased's estate, and who, therefore, can only take the estate as they find it.

It does not at all follow that, because Miss Edge might have asked for the taxation of Mr. Stedman's bills, therefore the Plaintiffs may ask for it. For, if all the debts were paid and the residue ascertained, and Miss Edge had thought proper to assign the whole of it to A. B., could A. B. have claimed to have those bills taxed which were not his bills? The Plaintiffs come in, incidentally only, by virtue of the decree; and therefore the Court has no jurisdiction to direct the taxation of the bills on their application. Nor would it, I think, have had that jurisdiction if this petition had been the petition of the receiver as well as of the Plaintiffs; but, in fact, it is not so.

Mr. Stedman chooses to stand upon his legal right; and therefore I cannot make any order on this petition.

Petition dismissed without costs.

[515] HALL v. SEVERNE. Jan 30, 1839.

Will. Construction.

Testator, by his will, gave pecuniary legacies to several persons, and directed his residue to be divided amongst his before-mentioned legatees in proportion to their several legacies thereinbefore given. By a codicil, which he directed to be taken as part of his will, he gave several pecuniary legacies to persons some of whom were legatees under his will, and declared that the several legacies mentioned in the codicil were given to the therein-mentioned legatees, in addition to what he had given them or any of them by his will. Held, that none of the legatees under the codicil were entitled to share in the residue in respect of their legacies under the codicil.

William Metcalfe, by his will, dated the 20th September 1831, gave pecuniary legacies to several individuals and charities, and, amongst the former, a legacy of £100 to Henrietta Bannister: and then expressed himself as follows:—"I give and bequeath, unto my executors and trustees hereinafter mentioned, my leasehold house, No. 45 Fore Street, in the City of London, and my leasehold warehouse in London Wall, upon trust to receive the annual rents thereof, and to invest the same in some or one of the public funds, in their joint names, and to pay, distribute and divide the annual interest and dividends of any of my stocks and funds which may remain after paying the before-mentioned legacies, during the continuance and term of my said leases of my said house in Fore Street and warehouse in London Wall, *unto and amongst all and every the before-mentioned individual legatees* (but not charities) who shall be then living, in the proportions which their several legacies shall bear to the amount of the said interest and dividends: and from and after the expiration of the said leases, then I direct my said executors and trustees to sell out the said monies so standing in the funds in their joint names, and to pay and distribute and divide the same unto and amongst all and every *the said individual legatees* who shall be [516] then living, in the proportions aforesaid; and I give and bequeath, unto my executors and trustees hereinafter named, the lease of my house in which I now reside, all my household furniture, plate, linen, china and other my effects therein, and all that annuity or yearly sum of about £180 payable to me by one Daniel Alder on his bond, and all other my estate and effects not hereinbefore specifically bequeathed or disposed of, upon trust to sell and dispose thereof as early as convenient after my decease, and to pay and divide the monies to arise therefrom, after defraying the expences of such sale and incident thereto, unto and amongst all and every *my before-mentioned legatees*, or such of them as shall be then living, in the proportions that their several personal legacies *hereinbefore given and bequeathed unto them* shall bear to the produce of my said leasehold house, plate, china, annuity and effects."

The testator, by a codicil, dated the 4th of October 1836, which he directed to be added to and taken as part of his will, gave pecuniary legacies to several persons (some of whom were legatees under his will), and, amongst them, a legacy of £200 to Henrietta, the wife of John Powell Bannister, to whom he had given a legacy of £100 by his will; and he declared that the several legacies therein mentioned were given to the therein mentioned legatees *in addition to what he had given to them or any of them by his will*.

On the hearing of the cause for further directions, one question was whether the legatees under the codicil were entitled to share in the residue with the legatees under the will.

Mr. Knight Bruce and Mr. G. Richards appeared for the Plaintiffs.

[517] Sir W. Horne, Mr. Lloyd and Mr. Bagshawe, for the testator's personal representative. The will directs the residue to be divided amongst the *before-mentioned* legatees in proportion to the legacies *thereinbefore* given to them; consequently those who are legatees under the codicil only are wholly excluded from sharing in the residue; and those who are legatees under both the will and the codicil are excluded from sharing except in respect of their legacies under the will. *Henwood v. Overend* (1 Mer. 23), *Bonner v. Bonner* (13 Ves. 379).

Mr. Craig, for Mr. and Mrs. Bannister. Mrs. Bannister is entitled to a share of the residue proportionate to the aggregate amount of the legacies given to her by the will and codicil; for the testator has directed that his codicil shall be taken as part of his will; therefore the will is to be read as if it contained a gift of £300 to Mrs. Bannister. Moreover, the testator has declared that the legacies given by the codicil are to be in addition to the legacies by the will; and when a legacy is given in addition to a prior one, it partakes of all the incidents of that prior legacy. Consequently, the legacy given to Mrs. Bannister by the codicil attracts with it a share of the residue. *Overend v. Gurney* (*ante*, vol. vii. p. 128), *Sherer v. Bishop* (4 Bro. C. C. 55).

[THE VICE-CHANCELLOR. The opinion attributed to Lord Commissioner Eyre in the report of that case seems a very extraordinary one.]

That case goes much further than it is necessary for me to contend for. *Henwood v. Overend* does not resemble the present case. It does not appear that [518] the legatees under the codicil were also legatees under the will. Besides, real as well as

personal estate was devised by the will to trustees in trust to sell and pay legacies; and the codicil does not appear to have been attested so as to pass freehold estates. It is plain that the Master of the Rolls decided that case on the authority of *Bonner v. Bonner*, in which the question was whether legacies given by an unattested codicil were charged on real estate, which is quite a different question from that now before the Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator, by his will, directs his residuary estate to be divided amongst his before-mentioned legatees, in proportion to their several legacies thereinbefore given and bequeathed to them; consequently the persons who are to take the residue are the legatees named in the will, and the proportions in which they are to take it are the proportions which the legacies thereinbefore given to them respectively bear to the amount of the residue.

His Honor then read the codicil.

It appears to me that the legacy of £200 given to Mrs. Bannister is a substantive gift of £200 declared to be in addition to what he had given her by the will, but not to carry a further share of the residue in proportion to itself.

I cannot say that I accede to the decision in *Sherer v. Bishop*.

Declare that the legatees under the will are entitled to distributive shares of the clear residue of the testa-[519]-tor's estate rateably with and in proportion to the amounts of their respective legacies under the will. And declare that the legatees under the codicil are not, nor are or is any or either of them, entitled, in respect of their legacies under the codicil, to any distributive shares or share of the said residue.

[519] PHILLIPS v. JONES. Jan. 31, 1839.

[S. C. 3 Jur. 242. See *Ridgway v. Sneyd*, 1854, Kay, 636; *Simpson v. Ingleby*, 1872, 26 L. T. 545.]

Landlord and Tenant. Lease of Mines. Injunction.

The Plaintiff was lessee of a coal mine at the rent of £300 a year and subject to a royalty of 10s. for every wey of coals raised in each year, above 600, that being the quantity considered to be paid for by the £300 a year; and the Plaintiff was authorized to determine the lease on the coal being worked out. The Plaintiff worked the mine for several years; and when it was nearly exhausted he was prevented, by accidents and defects in it, from continuing to work it, except at a ruinous expense. The Court refused to restrain the Defendant from suing for the rent of £300 a year, although the Plaintiff offered to pay him 10s. per wey for all the remaining coal.

The Plaintiff was lessee for 21 years, under the Defendant, of a piece of ground in Monmouthshire, with liberty to dig for coals under it, at the yearly rent of £300, to be paid whether any coal should or should not be raised, and subject to a royalty of 10s. for every wey that should be raised in each year of the term over and above 600, that being the quantity considered to be paid for by the yearly rent of £300. The lease contained a proviso enabling the Plaintiff to determine the term in case all the coal should be exhausted before the expiration of it.

After the Plaintiff had worked the mines for some years, and had paid the Defendant £2780 in respect of the rent and royalty, he discovered that, owing to certain unforeseen defects in the mines and to accidents in [520] attempting to work them (which were mentioned in the bill), he could not continue the working except at a ruinous expense; and thereupon he gave the Plaintiff notice of his intention to determine the lease; but the Defendant refused to accept a surrender of it, insisting that the Plaintiff was bound to get the remaining coal, and brought an action against him for the rent of £300 a year.

The bill prayed for an injunction to restrain the action, the Plaintiff offering to pay the Defendant 10s. per wey for all the coal which, on a reference to the Master,

should be found to have been under the land at the date of the lease, on being allowed what he had already paid.

Mr. Knight Bruce, Mr. Jacob and Mr. Puller now shewed cause against dissolving the injunction. The object of the parties to the lease was a sale of the coal at a certain sum per wey, and the price of it is thrown over the whole term by instalments of not less than £300 a year. By the terms of the lease the Plaintiff will be at liberty to determine it when the coal is exhausted; but in exhausting it he will ruin himself. The quantity remaining (if any), is very small; and ought it not to be considered as exhausted, when it cannot be gotten except at a most ruinous expense? If the Plaintiff (as he offers to do), pays the Defendant for the whole of the coal that was under the land, every object of the lease will be answered. Indeed, the Defendant will be placed in a better situation than if he had waited for his money until the whole of the coal had been worked out. *Smith v. Morris* (2 Bro. C. C. 311). The [521] argument for the Plaintiff in that case prevailed; and every word of it is applicable to the present case. The Plaintiff was to pay for 600 weys of coal yearly, whether he raised that quantity or not: and it would be defeating all the purposes of justice if the £300 a year, which he was so to pay, were not put on the footing of a penalty. *Astley v. Weldon* (2 Bos. & Pull. 346).

Mr. Spence and Mr. Girdlestone appeared for the Defendant, but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: This case is materially different from the case of *Smith v. Morris*: for that case proceeded on this, namely, that, by the terms of the lease, the lessee was bound to work the mine; and, in respect of the produce, a certain royalty was to be paid to the lessor; and it was said that the circumstances of the mine were such that the lessee would be ruined if he were compelled to work it, and therefore it was just that he should be relieved from the covenant to work the mine if he gave the landlord all that he could have been entitled to if the mine had been worked according to the covenant, that is, a royalty of 9s. 6d. for every wey of coals contained in the land. But this lease is constructed in a different manner. In the first instance, there was to be paid yearly, during the term of 21 years, a gross sum of £300, whether the coal was worked or not; and a royalty of 10s. per wey was to be paid if more was raised than 600 weys; and there was a covenant in the lease which bound the lessee to work the mines. Then came a proviso enabling the lessee, on giving notice, [522] to determine the lease when all the coal should be worked out: and, consequently, when all the coal should be exhausted, the tenant might, by giving the required notice, free himself from all the obligations of the lease. If an action had been brought on the covenant to compel the Plaintiff to continue the working of the mines, and there had been no other reservation in the lease than a royalty of a certain sum per wey on all the coal raised, then the Court would have applied the principle of *Smith v. Morris*, and would have relieved the Plaintiff from the expense of working an unprofitable mine, on his paying the Defendant for all the coal under the land; which would, in substance, be giving him all that he was entitled to under the lease; for he could derive no benefit from compelling the Plaintiff to continue the working of the mine. In this case, however, there is a fixed sum of £300 a year to be paid, whether the mines are worked or not: and, therefore, the Court cannot relieve the Plaintiff from the payment of that sum.

The consequence is that the order for dissolving the injunction, so far as it restrains the action on the covenant to pay the £300 a year, must be made absolute.

[523] GRAVER v. TEMPLE. Jan. 31, 1839.

Practice. Pro Confesso.

An affidavit that the deponent had used all due diligence to discover where the Defendant resided, or where her last place of residence was, but without success, save that he had been informed and believed that she had assumed male attire in order to disguise herself, and that she was occasionally seen in the neighbourhood of a certain place, is sufficient to warrant the Court in making an order under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3, with a view to taking the bill *pro confesso*.

Mr. Lovat, for the Plaintiff, moved for the usual order under 11 Geo. 4 and 1 Will. 4, c. 36, s. 3, on proceeding to take a bill *pro confesso*. He said that the Plaintiff had been unable to discover where the Defendant's usual place of abode was, and therefore was unable to depose that he had made the inquiry directed by the Act.

The affidavit in support of the motion, after stating an order for service of the *subpoena* to appear on the Clerk in Court of the Defendant Mary Ann Temple, and that the *subpoena* had been served accordingly, but no appearance was entered for her, whereupon attachments were issued to the Sheriffs of London and Middlesex, who had returned *non est inventa*, proceeded thus:—"And this deponent verily believes that, at the respective times of suing forth the said writs, the said Defendant was in the county of Middlesex, or in the City of London; that, in consequence of no appearance having been entered for the Defendant, and, previous to the issuing of the said writs, this deponent, by himself and other persons, made inquiries after the Defendant and her place of residence; that the result of such inquiries was that this deponent hath been informed and believes that the said Defendant did assume and wear male attire in order to conceal and disguise herself, and that she was occasionally seen in or about the neighbourhood of the Royal Exchange and Whitechapel; but this deponent was unable, notwithstanding all due dili-[524]-gence was used, to discover where she resides, or where her last place of residence is."

THE VICE-CHANCELLOR held that, under the circumstances of the case, the affidavit was sufficient; and made the order.

[524] WARDLE v. CLAXTON. Feb. 4, 1839.

[S. C. 8 L. J. Ch. 119; 3 Jur. 145.]

Will. Construction. Separate Use.

Testator bequeathed his residuary estate to trustees, in trust to pay the income to his wife, for her life, to be by her applied for the maintenance of herself and such children as he might leave at his death. Held not to be a trust for the separate use of the wife.

Testator bequeathed his residuary estate to trustees, in trust to invest the same in real or Government securities, and to pay the interest and dividends thereof to his wife, for her life, to be *by her applied* for the maintenance of herself and such child or children as the testator might happen to leave at his death.

The question on the argument of a demurrer was whether the testator's widow, who had married again, was entitled to the income of the property for her separate use.

Mr. Knight Bruce and Mr. Purvis, in support of the demurrer, said that it was impossible to give effect to the words, "to be by her applied," &c., without giving to the lady the sole disposal of the property; that stronger words could not be used for that purpose; and that it was unreasonable to suppose that the testator intended that, in case his widow should marry a second time, the provision which he had made for her and her children by him should be subject to the control of her second husband. 2 Roper on Hus. and Wife, [525] 157, Jacob's edit.; *Hartley v. Hurle* (5 Ves. 540), *Dixon v. Olmius* (2 Cox, 414), *Prichard v. Ames* (Turn. & Russ. 222), *Lee v. Prieaux* (3 Bro. C. C. 381).

Mr. Barber and Mr. R. Atkinson appeared in support of the bill; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: I do not think that this is a gift to the separate use of this lady. In all the cases that have been cited the sole object of bounty was the woman who was married or going to be married. But in this case the words, "to be by her applied," &c., have reference, not only to the testator's widow, but to all the children that he might have by her.

Demurrer overruled.

[526] THE ATTORNEY-GENERAL v. WILSON. Feb. 5, 1839.

[See *Lee v. Angus*, 1866, L. R. 2 Eq. 63; *Crowther v. Appleby*, 1873, L. R. 9 C. P. 29.]

Witness. Subpœna duces tecum.

A witness, a partner in a bank, was required, by *subpœna duces tecum*, to produce all books and accounts, in his custody or power, containing any entries relating to £6500 consols, or to the dividends thereof, or the application or disposition thereof, or relating to the matters in question in the suit. Held, that the witness was not compellable to produce any books, &c., because the language of the *subpœna* was too general, and because the books, &c., relating to the stock were partnership property, and his co-partners would not consent to his producing them.

This case is reported, on the argument of a demurrer, *ante*, page 30.

A commission having issued for the examination of witnesses in the cause, Thomas Blayds, who was one of the partners in the bank of Messrs. Beckett & Co., at Leeds, was served by the relators and Plaintiffs with a *subpœna duces tecum*, requiring him to produce before the Commissioners all and every the books and book of account and other books and accounts, in his custody, possession or power, containing any entries relating to the sum of £6500 three per cent. consolidated Bank annuities, and the sum of £500 secured on the tolls of the Leeds and Wakefield turnpike road, then or late respectively belonging to the mayor, aldermen and burgesses of the borough of Leeds, or any part thereof respectively, or the dividends or interest thereof respectively, or the application thereof, or the purchase or investment of the said Bank annuities or of any part thereof: and all books, accounts, papers and writings in his custody, possession or power, relating to the said Bank annuities and sum of £500 or any part thereof respectively, or the dividends or interest thereof, or containing or shewing the sums of money belonging to the said mayor, aldermen and burgesses invested in the public funds or elsewhere, and the securities for the same, and the proceeds and accumulations thereof, or the application or disposition thereof, or relating to the matters in question in this cause.

[527] Mr. Blayds declined to produce before the Commissioners the books mentioned in the *subpœna*, on the ground that he had none such in his individual possession, and that it was not competent to him to remove or produce the books of the partnership without the assent of his co-partners. Whereupon the relators and Plaintiffs served him with notice of a motion that he might be ordered to attend before the Commissioners at his own expense, and to produce before them all and every the books, and book of account, &c., following the words of the *subpœna*.

Mr. Jacob and Mr. Walker, in support of the motion.

Mr. Knight Bruce, for Mr. Blayds, said that the *subpœna* was too vague: that it was the duty of the party issuing a *subpœna duces tecum* to describe, with particularity, the documents which he required the witness to produce: and that though a Plaintiff had a right to subject a Defendant to the trouble of examining all his books in order to discover whether they contained any entries relating to the subject of the suit, yet there was no such right with regard to a mere witness, who was not at all interested in the matter in dispute: that, moreover, Mr. Blayds deposed that he was unable to produce the books without the consent of his co-partners, and that they would not give their consent.

Mr. Jacob, in reply, referred to *Bradshaw v. Bradshaw* (*ante*, vol. iii. p. 285, and 1 Russ. & Myl. 358), and said that the description of the documents in the *subpœna* was as particular as the parties who had [528] issued it were enabled to give, and as, under the circumstances of the case, could be reasonably required; and that Mr. Blayds had an unquestionable right to take the partnership books for any lawful purpose.

THE VICE-CHANCELLOR [Sir L. Shadwell]. No case has been cited to me in which effect has ever been given to a *subpœna duces tecum* couched in such terms as these: for an application is now made to me, not that Mr. Blayds may attend and produce some

five or six given, specified documents, but that he may "attend and produce, before the Commissioners, all and every the books and book of account, and other books and accounts, in his custody, possession or power, containing any entries relating to the sum of £6500 three per cent. consolidated Bank annuities, and the sum of £500 secured on the tolls of the Leeds and Wakefield turnpike road, now or lately respectively belonging to the mayor, aldermen and burgesses of Leeds, in the county of York, or any part thereof respectively, or the dividends or interest thereof, or the application thereof, or the purchase or investment of the same Bank annuities, or of any part thereof; and all books, accounts, papers and writings in his custody, possession or power, relating to the said Bank annuities and sum of £500, or any part thereof respectively, or the dividends or interest thereof, or containing or shewing the sums of money belonging to the said mayor, aldermen and burgesses invested in the public stocks or funds, or elsewhere, and the securities for the same, and the proceeds and accumulations thereof, or the application or disposition thereof, or relating to the matters in question in this cause."

In my opinion this *subpoena* is much too large and [529] vague to enable the Court to act upon it: for it extends, not by any particular description but by a general description, to all books and accounts in the possession or power of Mr. Blayds which relate to the matters in question in the cause.

Now I think that, if a *subpoena duces tecum* is issued for a vast variety of documents, it cannot be an objection to the conduct of the party who refuses to produce them, that there were some which he might have produced, and others which he could not produce: because he is not called upon to produce some of the documents, but he is called upon to produce all of them.

I never remember to have seen a *subpoena duces tecum* in this form: and it strikes me that it would be very singular if this Court should take upon itself to order the witness to produce these documents, when, if it were called upon to order a Defendant to produce documents (though he had admitted every one of them to be in his possession and to be material to establish the Plaintiff's case) it would not make an order for the production of any of them, if they were merely described in the manner in which they are described in this *subpoena duces tecum*.

Then Mr. Blayds is called upon to produce those documents which are in his possession or power. But it is as plain as it can be, upon the face of the affidavits in opposition to the motion, that these documents are not in his possession or power, so that he alone, without the consent of his co-partners, can produce them: and nothing whatever is sworn to on behalf of the Plaintiffs, which shews me or induces me to believe that Mr. Blayds has that possession or power over the books [530] which will enable him to produce them, his co-partners objecting to their being produced.

In my opinion, then, this is a case quite of a novel kind. In the first place, the *subpoena* is too general for the Court to give effect to it; and, in the next place, it not only does not appear that Mr. Blayds has the documents in his possession or power, but it does most satisfactorily appear that, if I were to make the order, it could not be complied with; because the two Messrs. Becketts, the partners with Mr. Blayds, would not allow the production of the documents; and consequently this motion ought to be refused, with costs.

[530] HALL v. ELLIS. Feb. 6, 16, 1839.

[Distinguished, *In re Warner and Powell's Arbitration*, 1866, L. R. 3 Eq. 265.
See now Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 8, 18.]

Jurisdiction. Witness. Arbitrators. Stat. 3 & 4 Will. 4, c. 42.

Courts of Equity have no jurisdiction, under 3 & 4 Will. 4, c. 42, to order witnesses to attend arbitrators.

This was a suit for taking the accounts of a partnership.

By an order in the cause, made on the 23d of January 1838, it was ordered that

all matters in difference between the parties should be referred to an arbitrator, and that his award should be made an order of the Court, on the application of either party.

Mr. G. Richards now moved that certain persons named, who had refused to attend the arbitrator, might be ordered to attend him, in order to give evidence touching the cause and the other matters referred.

This application was made under the 3 & 4 Will. 4, c. 42 (for the further amendment of the law and the better advancement of justice), the preamble of which recites that it would greatly contribute to the diminishing of expense in suits in the Superior Courts of [531] Common Law at Westminster, if the pleadings therein were, in some respect, altered, and the questions to be tried by the jury left less at large than they then were according to the course and practice of pleading in several forms of action; but that that could not be conveniently done otherwise than by rules or orders of the Judges of the said Courts from time to time to be made, and doubts might arise as to the power of the said Judges to make such alterations without the authority of Parliament. Then the 39th sect., after reciting that it was expedient to render references to arbitration more effectual, enacts that the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of Court or Judge's order or order of Nisi Prius, in any action then brought, or which should be thereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission should be made a rule of any of His Majesty's Courts of Record, should not be revocable by any party to such reference, without the leave of the Court by which such rule or order should be made, or which should be mentioned in such submission, or by leave of a Judge, and that the arbitrator or umpire should and might and was thereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation should not afterwards attend the reference, and that the Court, or any Judge thereof, might from time to time enlarge the term for any such arbitrator making his award. The 40th section enacts that, when any reference should have been made by any such rule or order as aforesaid, or by any submission containing such agreement as aforesaid, it should be lawful for the Court by which such rule or order should be made or which should be mentioned in such agree-[532]-ment, or for any Judge, by rule or order to be made for that purpose, to command the attendance and examination of any person to be named, or the production of any documents to be mentioned in such rule or order, and that the disobedience to any such rule or order should be deemed a contempt of Court, if, in addition to the service of such rule or order, an appointment of the time and place of attendance in obedience thereto, signed by one at least of the arbitrators or by the umpire before whom the attendance was required, should also be served either together with or after the service of such rule or order: provided always that every person whose attendance should be so required should be entitled to the like conduct-money and payment of expenses and for loss of time as for and upon attendance at any trial: provided also that the application made to such Court or Judge for such rule or order should set forth the county where such witness was residing at the time, or satisfy such Court or Judge that such person could not be found: provided also, that no person should be compelled to produce, under any such rule or order, any writing or other document that he would not be compelled to produce at a trial, or to attend at more than two consecutive days to be named in such order.

Mr. Richards said that the statute applied to Courts of Equity as well as law, as it used the word "order," which was applicable to a Court of Equity as well as the word "rule," which was applicable to a Court of law, and that the Court of Chancery, on one side of it, was a Court of Record.

THE VICE-CHANCELLOR [Sir L. Shadwell], after taking time to consider the point, said: There is but one section in the Act in which express mention is made of Courts of Equity, that is the 42d: [533] and, with the exception of the 39th, 40th and 41st sections, which may be called the debateable sections, there is not one which, on the face of it, is not solely and exclusively applicable to Courts of law. The whole of the preamble too has reference to Courts of law only: and it is remarkable

that in the 42d section, where the object was to include Courts of Equity, there is no ambiguity whatever. That section recites that it would be convenient if the power of the Superior Courts of Common Law and Equity at Westminster, to grant commissions for taking affidavits to be used in the said Courts respectively, should be extended: and then it enacts "that the Lord High Chancellor, Lord Keeper or Lords Commissioners of the Great Seal, the said Courts of law and the several Judges of the same, shall have such and the same powers for granting commissions for taking and receiving affidavits in Scotland and Ireland, to be used and read in the said Courts respectively, as they now have in all and every the shires and counties within the kingdom of England and dominion of Wales and town of Berwick-upon-Tweed, and in the Isle of Man, by virtue of the statutes now in force."

Looking at the whole statute together, my opinion is that, with the exception of the 42d section, it must be taken as having reference to Courts of law only; and the submission to arbitration must be taken to have reference to Courts of law; and, therefore, this Court, as a Court of Equity, cannot interfere; especially as the subject of the reference is not one that is cognizable on the common law side of this Court.

Motion refused.

[534] SPRY v. BROMFIELD. Feb. 12, 1839.

[S. C. 10 Sim. 94; 5 Jur. 864; and at law, 7 M. & W. 545; 10 L. J. Ex. 457.]

Will. Construction.

Testator gave all his estates, real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses and lands to his wife for life; "and, after the decease of my wife, I give my houses, lands and estates in B. to J. B., but, at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly during their lives; and, if the said children shall die before they arrive at the age of 21, I will that my houses and estates in B. go to H. S." Held, that J. B.'s children took the B. estate for their lives only; and, they having attained 21, that the inheritance was undisposed of.

Philip Bromfield made his will, dated the 14th of February 1799, and which was partly as follows:—

"To my executors in trust, who shall hereafter be named, I give all my estates, real and personal, monies in the funds, outstanding debts due to me, and all other chattels, goods and effects whatsoever I may die possessed of, to be disposed of by them as follows:—To my wife, Celia Bromfield, I give all my real estates, houses and lands, furniture, plate, books, clothes and linen, for her sole use and benefit as long as she shall live; and, within one year after my death, I give the following legacies:—£100 each to my cousins, Ann and Elizabeth Bromfield, formerly of Gerrard Street, Soho; £100 to my cousin, Mary Bromfield, daughter of my uncle, the Rev. John Bromfield; £100 to the Rev. Hume Spry, son of the Rev. Benjamin Spry, of Bristol; and I charge my estates at Lymington and Boldre, real and personal, with a rent-charge of £100 per annum to my sister, Mary Bromfield, of Lymington, to be paid to her half-yearly, during her life, by my wife; and, after her decease (if my sister outlives her), the said rent-charge to be continued to my said sister for the term aforesaid by whoever may possess my houses, lands and estates [535] in Boldre parish; and, at and after the decease of my wife, I give my houses, lands and estates in the parish of Boldre, to my cousin, the Rev. John Bromfield, subject to the rent-charge above mentioned, but, at his death, *the whole shall be for the use of the said John Bromfield's wife and children*, and which children, at the death of their mother, *shall inherit* the same jointly during their lives; and, if the said children shall die before they arrive at the age of 21, I will that my houses and estates in the parish of Boldre go to the Rev. Hume Spry, and to the use and benefit of him and his children;" and,

after bequeathing a few specific legacies, the testator appointed his wife and two other persons the executors of his will.

The testator died in 1799, leaving his wife and the other persons named in his will him surviving.

The Rev. John Bromfield and his wife had three children at the date of the will and at the testator's death; and one who was born afterwards.

The bill was filed against those children by Hume Spry, who was the testator's heir at law; and the question which was discussed on the argument of a demurrer was whether the Defendants took the Boldre estate in fee, or for their lives only.

Mr. Jacob, Mr. Wilbraham and Mr. Hodgson, in support of the demurrer. The testator sets out with giving all his estates, both real and personal, to his executors, in trust to be disposed of by them as after mentioned; and he then proceeds to deal with the fee in his real estates, which he had thus given to his trustees. The devise of all his [536] houses, lands and *estates*, in the parish of Boldre, to the Rev. John Bromfield would, if it stood alone, pass the fee; but that devise is followed by the words "but at his death," which shews that John Bromfield was intended to take a life-estate only. Then follow these words:—"The whole shall be for the use of the said John Bromfield's wife and children;" and then, in order to shew how the wife and children are to take, the testator adds, "and which children, at the death of their mother, shall *inherit* the same jointly during their lives." The words, "jointly during their lives," are merely modal or formal, and ought to be read as if they were in a parenthesis, and then the will is clear of all doubt. The children take joint estates for their lives with several inheritances. The gift over to the Plaintiff confirms the construction which we are contending for. The testator says: "And if the said children shall die before they arrive at 21, I will that my houses and estates in the parish of Boldre go to the Rev. Hume Spry;" that is, in that event, and in that only, they shall go to Dr. Spry. These last words were unnecessary, unless the testator meant to give estates of inheritance to the children. *Frogmorton v. Holyday* (3 Burr. 1618); *Doe v. Cundall* (9 East, 400); *Doe v. Stenlake* (12 East, 514); *Doe v. Green* (4 Mees. & Wels. 229).

Mr. Knight Bruce and Mr. Malins appeared in support of the bill; but,

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The question raised by this demurrer is a question of law; but I will give my opinion upon it, if the parties [537] desire that I should do so. It seems to me, on looking at the whole scope of the will, that the testator had no notion of anyone taking beyond an estate for life. First, there is a disposition of all his real and personal property to trustees; then he gives to his wife all his real estates, houses and lands, as long as she shall live. That is a gift of one life-estate. Then, after giving some pecuniary legacies, he charges his estates at Lymington and Boldre with a rent-charge of £100 per annum to his sister, Mary Bromfield, to be paid to her half-yearly, during her life, by his wife, and, after his wife's decease, if his sister should outlive his wife, he directs the rent-charge to be continued to his sister, for the term aforesaid, by whoever may possess his houses, lands and estates in Boldre parish; and, after the decease of his wife, he gives his houses, lands and estates in that parish to his cousin, the Rev. John Bromfield. There the words used would, of themselves, have carried the fee; but it is clear, from what the testator afterwards says, that he intended John Bromfield to take for his life only; for he proceeds in these words:—"But, at his death, the whole shall be for the use of the said John Bromfield's wife and children." Those words, if they had stood alone, might be construed to pass the fee; but then he adds: "And which children, at the death of their mother, shall inherit the same jointly during their lives." Therefore, the real construction is that the father takes for life, the wife takes for life, and the children take for their lives jointly; and, in my opinion, there is nothing extraordinary in the testator giving the estate over in the event of the children dying under 21.

In *Frogmorton v. Holyday* and *Doe v. Cundall*, the property was given to the devisees generally, without [538] any words of restriction or limitation; and, therefore, those cases are not applicable to a case like the present, where the gift is to the children for their lives *expressly*.

My opinion is that, according to the true construction of this will, there is a gift

of the Boldre estate to the children of John Bromfield jointly during their lives, with a gift over in the event of their dying under 21 : and, as all the children have attained 21, the consequence is that the inheritance is undisposed of.(1)

Demurrer overruled.

[539] GINGELL v. HORNE. Feb. 12, 1839.

Will. Jurisdiction. Demurrer.

After a will of personalty had been proved, *per testes*, in the Ecclesiastical Court, a bill was filed by the next of kin, alleging that the testator's signature to the will was obtained when he was not of sound and disposing mind ; that his medical attendants were not called as witnesses when the probate was obtained ; and that the evidence of the testator's incompetency did not come to the knowledge of the Plaintiffs until after the time allowed for appealing from the sentence of the Ecclesiastical Court, had expired ; and praying that the will might be declared to have been fraudulently obtained, and that the residuary legatee might be declared a trustee for the Plaintiffs. A demurrer to the bill was allowed, a Court of Equity having no jurisdiction to relieve against the probate of a will, unless the consent of the next of kin to the granting of it was fraudulently obtained.

John Simmonds, by his will, dated in 1833, gave legacies to certain individuals and charities, and appointed J. Towne and two other persons his executors. By a codicil, dated the 3d of January 1835, which was a few days before his death, he gave all his property not disposed of by his will to A. Towne, the daughter of J. Towne. The will and codicil were proved, *per testes*, by all the executors.

The bill, which was filed by the testator's next of kin against the executors and A. Towne, alleged that J. Towne prepared the codicil and procured the execution of it at a time when the testator was not of sound and disposing mind ; that the testator's medical attendants were not called as witnesses when the will and codicil were proved ; that the testator's incompetency was unknown to the Plaintiffs until the time allowed for appealing from the sentence of the Ecclesiastical Court had expired ; and, consequently, they were wholly without remedy in that Court. The bill prayed that the codicil might be declared to have been fraudulently obtained, and that the executors might be declared to be trustees of the testator's residuary estate for the Plaintiffs.

The Defendant, A. Towne, demurred to the bill [540] on the ground that the case was not within the jurisdiction of the Court of Chancery.

Mr. Jacob and Mr. Bethell appeared in support of the demurrer : but THE VICE-CHANCELLOR desired to hear the counsel in support of the bill.

Mr. Knight Bruce, Mr. Cooper and Mr. Elderton, in support of the bill. A notion has been entertained that the Ecclesiastical Courts possess exclusive jurisdiction in all matters relating to the personal estate of deceased persons : but that opinion has been formed too hastily. We admit that those Courts do possess exclusive jurisdiction, in all cases where the only question is whether a paper is testamentary or not : but, in all cases of fraud, Courts of Equity may interfere with the judgments or sentences of all other Courts, whether of common or civil law. *Barnesly v. Powel* (1 Vez. 119 and 284 ; and see *Belt's Supplement*, 74 and 143) ; *Glascott v. Lang* (*ante*, vol. viii. p. 358, and 3 Myl. & Craig, 451) ; *Jarvis v. Chandler* (Turn. & Russ. 319). The case of *Welles v. Middleton* (1 Cox, 112) also shews that Courts of Equity possess a most extensive jurisdiction in cases of fraud. Here the demurrer admits, not only that the codicil was obtained by fraud, but also that the fraud was not discovered until the time for making that defence available in the Ecclesiastical Court had expired.

In *Seagrave v. Kirwan* (1 Beatt. 157 ; see 163), Sir A. Hart says : "It has been argued that the relief prayed in this bill, if granted, [541] would, in fact, set aside the will : that a Court of Equity is not the proper *forum* for such a purpose ; and that

(1) On the 7th of March 1839 a case was sent, on the application of the Defendants, for the opinion of the Court of Exchequer.

the Plaintiffs ought to be left to the Ecclesiastical Court, which has the sole jurisdiction. That the Ecclesiastical Court has, exclusively, the power to decide what is or is not a will of personalty cannot be controverted. Its seal to a probate is conclusive in every Court of Justice: but it is equally clear that to this Court belongs the authority to give construction and effect to the will; and that there may be circumstances attaching, personally, on those who take by force of it, which will authorize this Court to engraft an equity on the gift, and convert them into trustees for other persons. The rule of equity by which an executor having a legacy is made a trustee for the next of kin is founded on this principle. Other implications arising from particular expressions in the will, which convert an executor into a trustee of an undisposed residue, are the same. The will still remains operative in all its legal effects, as established by the Ecclesiastical Court: but the Court of Equity controls it according to rules of conscience. The law of the Court in this respect is not confined to implications arising on the face of the will: it extends to all cases wherein fraud or other circumstances peculiarly cognizable in equity occur. The case of *Marriot v. Marriot* (1 Stra. 666; see p. 673) is an authority for this position. The following are there laid down as the rules which the Court adopts on this head:—‘Courts of Equity may declare a legatee, who has obtained a legacy by fraud, to be a trustee for the amount: as, if the drawer of a will should insert his own name instead of the name of a legatee, no doubt he would be a trustee for the real legatee.’ Then, after adverting to the cases in which [542] the Court, by reason of a legacy given to the executor, declared him a trustee of the residue for the next of kin, the case proceeds thus: ‘The Court, to answer the real intention of the testator, may declare a trust upon a will, though it be not contained in the will itself, in these three cases: first, in that of fraud upon a legatee before mentioned: secondly, where the words imply a trust for the relations, as in the case of a specific devise to executors and no disposition of the residue: thirdly, in the case of a legatee promising the testator to stand as trustee for another: and nobody has thought that declaring a trust in any of these cases is an infringement of the ecclesiastical jurisdiction.’ The case of *Barnesly v. Powel* carries the doctrine still further. That case arose upon a paper on which the Defendant claimed the property, and which had been proved under a consent obtained from the sole next of kin by misrepresentation. Lord Hardwicke lays down the law of the case in the following terms: ‘As to the sentence of the Prerogative Court, as at present advised, that will create no difficulty if the will is found forged: for then, the Plaintiff’s consent appearing to have been obtained by the misrepresentation of that forged will, that fraud infects the sentence against which the relief must be here. I should not scruple decreeing the Defendant, who obtained that probate, to stand as a trustee in respect of the probate, which would not overturn the jurisdiction of that (the Ecclesiastical) Court.’ In the same case, which came on after a trial had, and the will shewn to be a forgery, Lord Hardwicke repeated this doctrine as to the Court having authority to declare the Defendant a trustee for the Plaintiff, and added: ‘The Court of Equity, though it could not set aside a fine levied by fraud, as the Court of Common Pleas might do: yet, in a conveyance so obtained, it [543] would not send the party to the Common Pleas to set it aside, but consider the person so obtaining the estate, a trustee, and decree him to reconvey.’ In *Barnesly v. Powel*, Lord Hardwicke did not immediately decree the Defendants trustees for the Plaintiff; because it was alleged there were other wills which might be good, and he would not deprive the parties of the opportunity to establish them, if they could. But it is clear, from the whole context of his judgment, that, had it not been for the alleged prior wills, he would not have sent the Plaintiff to the Ecclesiastical Court, to revoke the probate, but would have declared the Defendants trustees of the probate for the Plaintiff. It would be superfluous to add further authorities to confirm Lord Hardwicke: and, as the Court has gone to that extent in contracting the legal operation of a will, without considering itself as interfering with the constitutional jurisdiction of the Ecclesiastical Court, the question is whether the inherent principles of equity found in those cases, do not exist in this.” The language of Sir A. Hart, and of Lord Hardwicke in *Barnesly v. Powel*, goes the whole length of our argument.

It may be said that, if the party has had an opportunity of going through his case in a Court of competent jurisdiction, this Court cannot grant a new trial or revise

the sentence of that Court. But, in this case, the proceedings in the Ecclesiastical Court were had when the party was ignorant of the circumstances of fraud; and he did not discover them until it was too late to avail himself of them. [THE VICE-CHANCELLOR. I know no case in which the lateness of discovery has been made a ground for the interference of this Court. Lord Redesdale says: "A will and probate, even in the common form, in the proper [544] Ecclesiastical Court, which is in the nature of a sentence, is a good plea to a bill by persons claiming as next of kin to a person supposed to have died intestate. And if fraud in obtaining the will is charged, that is not a sufficient equitable ground to impeach the probate, for the parties may resort to the Ecclesiastical Court, which is competent to determine upon the question of fraud. But where the fraud practised has not gone to the whole will, but only to some particular clause, or if fraud has been practised to obtain the consent of the next of kin to the probate, the Courts of Equity have laid hold of these circumstances to declare the executor a trustee for the next of kin. Where there are no such circumstances, the probate of the will is a clear bar to a demand of personal estate." (Treat. on Plead. 4th edit. 257.)] There is no authority in support of the distinction drawn by Lord Redesdale between fraud affecting part of a will and fraud affecting the whole of it. *Segrave v. Kirwan*, *Barnesly v. Powel*, and *Jarvis v. Chandler* are at variance with that distinction. The Ecclesiastical Court does deal with part of a will which is affected by fraud, and leaves the rest of the will untouched. Where is the difference, in principle, between a partial intestacy on the ground of fraud, and a total intestacy on the ground of fraud? *Jarvis v. Chandler* is at direct variance with any such notion. Moreover, the reason assigned by Lord Redesdale for the negative proposition which he lays down is that the parties may resort to the Ecclesiastical Court; but in this case the parties cannot resort to the Ecclesiastical Court, and consequently his Lordship's reason does not apply.

The other cases cited in support of the bill were [545] *Podmore v. Gunning* (ante, vol. v. p. 485, and vol. vii. p. 644), *Marriot v. Marriot* (*ubi supra*), *Taylor v. Sheppard* (1 Youn. & Coll. 271), *Haly v. Goodson* (2 Mer. 77), *Andrews v. Powys* (2 Bro. P. C. 504), *Thynn v. Thynn* (1 Vern. 296), *Devenish v. Baines* (Prec. Ch. 3), *Herbert v. Louns* (Rep. Ch. 12). And the statutes 24 H. 8, c. 12, 25 H. 8, c. 19, and 3 & 4 W. 4, c. 41, s. 20, were referred to in order to shew that the time allowed for appealing from a sentence of the Ecclesiastical Court was only fifteen days; and it was said that, by 2 & 3 W. 4, c. 92, s. 3, commissions of review, which, before that Act passed, might have issued at any time, were abolished.

On *Podmore v. Gunning* being cited, THE VICE-CHANCELLOR said that the question in that case was whether Sir Thomas Staines had not left his property to Lady Staines, on an undertaking, on her part, that she would dispose of it in a particular way; and that in that case the Court did not act against the will, but in furtherance of a trust appearing on the face of it. With respect to *Andrews v. Powys*, His Honor observed that there appeared to him to be an irreconcilable difference between that case and *Kerrich v. Bransby* (7 Bro. P. C. 437).

Mr. Jacob, in reply. In *Barnesly v. Powel* the Defendant had practised a fraud, not on the testator, but on his next of kin. The probate had been granted to the Defendant, with the consent of the next of kin, and that consent had been fraudulently obtained; and Lord Hardwicke declared that the benefit of the fraud should be taken from the [546] Defendant, and that a Court of Equity was the proper tribunal for that purpose; and he decreed the Defendant to go to the Ecclesiastical Court and consent to the probate being revoked. The judgment in *Segrave v. Kirwan* contains some expressions which may be considered, perhaps, as going too far; but it is sufficient to observe that the objects of that suit and of this were totally different from each other. In that the object was to have the executor declared a trustee of the residue for the next of kin; in this the Court is asked to strike out part of a testamentary disposition, on the ground that it was introduced by fraud.

The probate is conclusive of the fact that the testator did make this codicil, and that, at the time when he made it, he was competent to do so; consequently, every word in this bill is an averment against the record.

It was said that this Court has a concurrent jurisdiction with the Ecclesiastical Court in a case like the present. Supposing that to be so, still, as the Ecclesiastical

Court has exercised its jurisdiction and pronounced a decree, this Court cannot interfere. This Court has a concurrent jurisdiction with the Court of Exchequer; but if that Court has made a decree, this Court cannot alter it.

Lord Redesdale, in that part of his work which has been referred to, lays it down, as a general rule, that, if fraud in obtaining a will is charged, that is not a sufficient equitable ground to impeach the probate. It is true that he mentions two cases of exception to that general rule; but no one can fail to observe that he speaks of those two excepted cases in a very doubting way.

[547] There are two other grounds on which this case is attempted to be supported. One is that the *probate* of the will and codicil was obtained by fraud. If that were so, then the Plaintiffs ought to have asked the same relief as was granted in *Barnesly v. Powel*. But the relief which they have prayed is of a totally different nature; and therefore it is not open to them, on this bill, to say that they are entitled to the same relief as was given in *Barnesly v. Powel*. Then what is the fraud which they allege to have occurred in obtaining the probate? It is that the executors did not call the testator's medical men as witnesses when the probate was applied for. But it is quite idle to make such an allegation. [THE VICE-CHANCELLOR. Upon that principle every order made by this Court on motion might be set aside on the ground that the party who obtained the order did not produce affidavits from those persons who could have deposed against him. A party is at liberty to establish his case by such evidence as he thinks best; and it was never before contended that it was incumbent on him to produce evidence against as well as for himself.] The remaining ground on which the Plaintiffs have rested their case is that the evidence was not discovered until the time for appealing had expired. But all Courts are open to applications to appeal, on special grounds: and, though there may be a certain time fixed for appealing, it does not follow that that time would not be enlarged, if a proper case were made for granting the indulgence. The case, however, made by the bill, is not a case for an appeal on account of an erroneous judgment on the facts before the Court, but for a proceeding in the nature of a bill of review; as the bill alleges that new evidence has been discovered. The time allowed for bringing a bill of review in this Court is 20 years; and there is no allegation, in this bill, [548] that the Plaintiffs may not now institute a proceeding in the Ecclesiastical Court analogous to a bill of review. But suppose that the time is expired, and that by the rules of the Court no further proceedings can be had; then it is part of the law of the land. The rule that there can be no new trial after a certain time may be a bad rule, but it cannot be relieved against.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I entertain the same opinion as I did at first with respect to this case, and that is that the demurrer ought to be allowed.

The impression which has been fixed in my mind for several years is that it is settled law that there is no method of escaping from the effect of probate when granted, unless in a case like that of *Barnesly v. Powel*, in which Lord Hardwicke set aside the ground on which the probate was obtained. In this case, however, no fraud was practised on the Plaintiffs in obtaining the probate. It is alleged, indeed, that the testimony of the testator's medical men was withheld; but that allegation is perfectly futile; for no party to any legal proceeding whatever is bound to produce evidence against himself, or any evidence except such as he thinks proper to produce. This bill therefore does not afford any such materials for the interference of the Court, as there were in that case of *Barnesly v. Powel*, in which Lord Hardwicke made a decree, which afforded an opportunity of having the matter reconsidered in the Ecclesiastical Court.

My opinion is, on the authority of *Kerrich v. Bransby*, which was so much considered by Lord Hardwicke, and on the authority of Lord Redesdale, that this demurrer must be allowed.

[549] JARVIS v. POND. Feb. 15, 1839.

[S. C. 8 L. J. Ch. 167. See *In re Potter's Trust*, 1869, L. R. 8 Eq. 58 ;
In re Lucas's Will, 1880-81, 17 Ch. D. 792.]

Will. Construction.

Testatrix having two sons and two daughters living, gave a legacy to each of them, and then gave the residue to Mary, one of her daughters, for life : "and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the decease of the said Mary ; and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their fathers' or mothers' part." The testatrix had had another son and daughter, both of whom were dead at the date of her will, leaving children. Held, that their children were entitled to shares of the residue.

Mary Pond made her will, dated in the year 1807, in the following words : "I give and bequeath unto my son-in-law, John Gurr, the sum of £200 ; to my daughter-in-law, Hannah Pond, widow of my late son Gilbert Pond, deceased, the sum of £200 ; to my son, William Pond, the sum of £200, to be paid to them within six months next after my decease : also I give and bequeath to my son, Samuel Pond, the interest of £200, being £10 a year, to be paid to him or his present wife during the term of their or either of their natural lives ; to my daughter, Elizabeth Such, the interest of £200, being £10 a year, to be paid to her during the term of her natural life. The last two legacies I leave in the manner mentioned, in consideration that neither of the parties have children. Also I give and bequeath to my daughter, Mary Pond, all the residue and remainder of my property, goods and chattels, subject to the payment of the above-mentioned legacies, during her natural life ; and, after her decease, I will that the said property be equally divided amongst such of my sons and daughters as may be living at the time of the decease of the said Mary Pond ; and in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their fathers' or mothers' part, to be equally divided amongst them."

[550] The testatrix died in 1809. Four of her children survived her, namely, Samuel, William, Elizabeth, the wife of J. Such, and Mary, but none of them had any issue. The testatrix had had three other children, Gilbert, John, and Sarah, the wife of John Gurr, all of whom were dead at the date of her will. Gilbert and Sarah left children, but John left no issue. Mary Pond, the daughter, died in 1837, at which time all the testatrix's children, except William, were dead. The Plaintiff claimed a share of the testatrix's residue under an assignment from a child of Sarah Gurr.

Mr. Knight Bruce and Mr. Romilly, for the Plaintiff. There is nothing in this will which necessarily requires that the words, "in case of the decease of any of my said sons and daughters," should be held to mean either a future or a contingent event. Those words mean, "in any case of the death of any of my said sons and daughters, whether it has happened or may happen." *Tytherleigh v. Harbin* (*ante*, vol. vi. p. 329), *Giles v. Giles* (*ante*, vol. viii. p. 360). There was more difficulty in arriving at the conclusion in those cases than there is here ; but there the decisions were founded on the presumed natural intention of the testator, and the words were considered sufficient to enable the Court to give effect to that intention.

Mr. G. Richards and Mr. Lewis, for a Defendant in the same interest as the Plaintiff, relied on the expression "the surviving children of any of my sons and daughters" (not "*said* sons and daughters"), as shewing an intention to include all the testatrix's sons and daughters.

[551] Mr. Younge and Mr. Sydenham Clarke appeared for other Defendants in the same interest as the Plaintiff.

Mr. Jacob and Mr. Piggott, for the Defendant William Pond. This case is different from those that have been referred to. Those cases proceeded on the rule of adhering to the strict meaning of the words in the will. In *Tytherleigh v. Harbin*

the gift was to the children of Robert Tytherleigh who should be living at the time of his decease, and the issue of such of them as should be then dead leaving issue; referring in plain terms, to any one who should be then dead, without regard to the period of death. The expression in this will, "in case of the decease of any of my said sons or daughters," means "in case of any of my sons or daughters, whom I have before named, dying in the lifetime of Mary Pond." The words, "in case," naturally refer to futurity, and not to an event that has happened many years before. Besides, the testatrix says, "the surviving children of any of my sons or daughters to have their father's or mother's part." It is true that the parts of the sons and daughters who were living were contingent. Those words, however, are applicable to presumptive parts; but they are entirely inapplicable to the part of a son or daughter who was dead at the date of the will, and therefore never, in any event, could have taken a part. In *Tytherleigh v. Harbin* the issue were not to take their father's or mother's part, but the part which their parents or parent *would have been entitled* to if then living. It is obvious that the only difficulty in that case was as to the construction to be put upon the words "if then living." In *Giles v. Giles* the testator bequeathed his residue in trust for all and every the children and child of his body living at the decease of [552] his wife; and if any of such children should be dead at the decease of his wife and should leave issue, then the children of such his son or daughter were to be entitled to their parents' share; and your Honor held that no meaning could be affixed to the words "such son or daughter," except "child or children;" and there was nothing in that case to refer to a future death; and, consequently, there was no reason why the children of a daughter who was dead at the date of the will should not be included in the bequest. In *Smith v. Smith* (*ante*, vol. viii. p. 353) the son who died was precisely within the words of the will; as he died in the lifetime of the testator's wife.

In this case it is impossible to hold that the words, "in case of the decease of any of my said sons or daughters," refer to the death of children who died several years before.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is a very simple case.

The testatrix made her will at a time when one of her children, John, was dead; and of him no notice is taken. At the date of her will she also had two other children who were dead, and those were the only ones who left issue. She had also four other children, and then she makes her will [His Honor here read the bequests to John Gurr, Hannah Pond, William Pond, Samuel Pond, and Elizabeth Such], and she takes notice that neither of the two last-mentioned legatees had children. This affords a reasonable presumption that she was aware that Sarah and Gilbert had left children. Then she says, "also I give and bequeath [553] to my daughter, Mary Pond, all the residue and remainder of my property, goods and chattels, subject to the payment of the above-mentioned legacies, during her natural life." Now it is plain, under this bequest, that neither Mary Pond nor any of her children could be intended to take any share of the residue. Then she says: "And after her decease, I will that the said property be equally divided between such of my sons and daughters as may be living at the time of the decease of the said Mary Pond." Now, there were no children who could answer the description of daughters in the plural number, except Elizabeth, who was alive, and Sarah, who was dead. Then the testatrix says: "And, in case of the decease of any of my said sons or daughters, the surviving children of any of my sons or daughters to have their father's or mother's part." It has been argued that the words "in case of the decease" cannot be held to include predeceased children, but must be considered as applicable to living children alone. But it appears to me that the expression, "in case of the decease of any of my said sons or daughters," exactly comprehends a predeceased child. But you are not to take only those words, "in case of the decease," for, if you go on to what follows, you find what she means to do, namely, to provide for the contingency of children living at the death of Mary Pond, who should be children of sons or daughters who were then deceased; and then the expression, "in case of the decease," means only this, "in case any child or children shall be then alive who are the issue of any of my children who are then dead." So that it seems effectually to include the children of all those who were then dead, as well of those who were

then living. And then she says, "To have their father's or mother's part to be equally [554] divided between them;" and though there is some violence in assigning a share to the father or mother, when they never would have taken any, yet it is plain that she intended that the children living at the decease of Mary Pond should take a share of her property, and also that the children of such of her sons and daughters as should be then dead were to take the shares which their parents would have been entitled to if they had been living at the death of Mary Pond.

There is not half so much difficulty in this case as there was in the case of *Collins v. Johnson*, reported in the note to *Smith v. Smith* (*ante*, vol. viii. p. 356), and yet it was held there that the children of deceased children took. *Tytherleigh v. Harbin* and *Smith v. Smith* do not immediately apply to this case; but *Giles v. Giles* does, for there there was a child entitled to a portion, and it was held that the children of a deceased child would have taken: and, therefore, it appears to me that, on the plain words of this will, there is no difficulty.

Declare that such of the children of Gilbert Pond and Sarah Gurr as survived Mary Pond, the testatrix's daughter, are entitled respectively to such shares of the testatrix's residuary personal estate as their respective parents would have taken if they had survived Mary Pond.

[555] *Ex parte MARSHALL. Feb. 15, 1839.*

[S. C. 8 L. J. Ch. 187; 3 Jur. 196.]

Will. Construction. Mortgaged Estate.

A., being seised of the equity of redemption of lands in N., and also of the legal estate, as heir to his father, to whom he had mortgaged the lands in fee, devised his estates in N. and elsewhere, to trustees in trust to sell. Held, that the legal estate in the mortgaged property did not pass by the will.

In 1796 R. Marshall made a mortgage of an estate situated in North Killingholme to his father in fee. The father died intestate as to the mortgaged estate, leaving R. Marshall his heir at law, and having appointed his wife and another person his executors. R. Marshall died in 1824, having by his will, dated in 1824, devised his estates in North Killingholme and all other his real estates to trustees in trust to sell. The mortgage was not paid off until after R. Marshall's death.

The question on the hearing of a petition presented under 11 Geo. 4 and 1 Will. 4, c. 60, was whether the legal estate in the mortgaged premises was vested in the son and heir of R. Marshall, or in the devisees under his will.

Mr. Sidebottom and Mr. Dugmore, for the petition, contended that the equity of redemption in the estate in North Killingholme passed by the devise, but that the legal estate did not pass. *Fausset v. Carpenter* (2 Dow & Clark, P. C. 232).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Lord Chancellor was not present when that case was decided in the House of Lords.(1)

[556] A will is a mere voluntary instrument; and it appears to me to be plain enough in this case that R. Marshall could not intend to have a sale made of that estate which he could not have sold without committing a breach of trust; (2) therefore I shall declare that, according to the true construction of the will, the legal estate did not pass to the trustees, but descended to the testator's son and heir at law; and that he is a trustee of it within the Act.

(1) The Vice-Chancellor, on the case of *Fausset v. Carpenter* being cited, said that some important words which he had added in his copy of the report were omitted in the statement of the conveyance to Fausset. Those words were: "They and each of them granted the lands, and all the estate, right, title, trust, inheritance, property, claim and demand, either at law or in equity, of them and each and every of them, of, in, or to the said lands," &c.

(2) R. Marshall being, as it seems, a trustee of the mortgaged estate for the executors of his father.

[556] STAINBANK v. FERNLEY. Feb. 13, 1839.

[S. C. 8 L. J. Ch. 142; 3 Jur. 262.]

Joint Stock Company. Fraud. Parties.

The directors of a joint stock company, in order to sell their shares to advantage, represented in their reports and by their agents, that the affairs of the company were in a very prosperous state, and declared large dividends at a time when the affairs of the company were greatly embarrassed. A person who had been induced by those means to purchase shares of one of the directors, filed a bill against that director, praying to be repaid his purchase-money, and offering to retransfer the shares; a demurrer for want of equity, and because all the other partners ought to have been made parties, was overruled.

In 1834 a joint stock banking company, called the Northern and Central Bank of England was established at Manchester, and the Defendant Fernley was appointed one of the directors. By the deed of settlement it was provided (amongst other things) that the capital of the company should be divided into 50,000 shares of £10 each: that no subscriber should be con-[557]-sidered as a proprietor until he had executed the deed; and that no transfer of shares should be made without the consent of the directors being first obtained, nor until all calls thereon had been paid up, and all debts and engagements from the proprietors thereof to the company had been paid and satisfied.

At a general meeting of the company, held in April 1836, the directors produced their accounts up to the 31st of December preceding, and made a report, in which they represented that the affairs of the company were in a most flourishing state, and that a dividend of £7 per cent. could then be paid out of the clear profits; and a dividend to that amount was accordingly declared. In the early part of August 1836, Mr. Johnston, a sharebroker at Manchester, strongly recommended the Plaintiff to purchase shares in the bank, and, in order to overcome the disinclination which the Plaintiff felt to become a purchaser of shares at that particular period, assured the Plaintiff that he had private information upon which he could depend, and which proceeded from the fountain head (meaning, as the Plaintiff understood, the directors or their agents), that the bank was one of the most prosperous concerns in England, that a most favourable report of its affairs was then in preparation, and that a half-yearly dividend of £8 per cent. on each share would be declared at the next general meeting, to be held at the end of the month, and that the shares would soon be at a premium of between £6 and £7. The Plaintiff, confiding in these representations, which he was the more readily induced to believe in consequence of the previous favourable report of the directors and the declaration of the previous dividend, purchased of Johnston 25 shares at a premium of £5, 7s. 6d. each. When the deed of transfer of these [558] shares was brought to the Plaintiff, he observed that the name inserted in it, as that of the vendor, was W. Robinson, upon which he asked Johnston who W. Robinson was; to which Johnston replied that he did not know, but that it was of no consequence as the bank had accepted the transfer. At a meeting held on the 25th of Aug. 1836, a half-yearly dividend of £8 per cent. on each share was declared; and a report by the directors was printed and circulated, containing a still more favourable account than the prior one of the state of the company's affairs. The Plaintiff received the dividend and executed the deed of settlement. In November 1836 the directors were under the necessity of applying for a large loan to the Bank of England; and, upon the investigation which took place on that occasion, it appeared that the company's affairs, owing, principally, to the misconduct of the directors, were in a very embarrassed state, and that they had never been in such a state as to justify the directors in making the reports and declaring the dividends before mentioned; those reports and dividends having been made, and other fraudulent practices resorted to by the directors, in order to raise and keep up the price of shares in the market, so as to enable them to sell their own to advantage, which the

Defendant Fernley and many of the other directors (to each of whom 1000 shares were originally allotted) had done; and, in order to conceal such sales from the public, they, acting in concert together, effected the sales in the names of other persons as the owners.

The bill, to which W. Robinson as well as Fernley was made a Defendant, alleged, after stating as above, that the Plaintiff had discovered that the shares which he had purchased were not placed in Johnston's hands for sale by the owner thereof, but in the hands of T. Tessey-[559]-man, another sharebroker at Manchester, for that purpose; that Fernley employed Tesseyman as his broker for the sale of shares, and *that the shares sold to the Plaintiff, together with many other shares belonging to Fernley, were placed in Tesseyman's hands for sale by Fernley, or by W. Robinson on his behalf; that Fernley and Robinson, acting in privity and concert together, or one of them, gave instructions to Tesseyman to conceal from the purchaser the name of the real owner thereof, and, for that purpose, to cause the name of Robinson or some other person to be inserted as the vendor in the deed of transfer; that, for better effectuating such concealment, Tesseyman, with the privity and at the instigation of Fernley and Robinson, or one of them, employed other brokers to effectuate sales of such shares without communicating to them the name of the real owner thereof; that the 25 shares sold to the Plaintiff were part of the shares in the bank belonging to Fernley, which Tesseyman was instructed to sell as aforesaid in the name of Robinson, and Johnston and Tesseyman divided the usual commission on the sale thereof; that Johnston paid the purchase-money for the 25 shares to Tesseyman, and Tesseyman paid it over to Fernley, and Fernley, or someone on his behalf, caused the deed of transfer to be prepared and the name of Robinson to be inserted therein as the vendor; that Johnston was induced to recommend the Plaintiff to purchase the 25 shares in consequence of the representations made by Fernley and the other directors as before mentioned, and also by reason of the manager of the bank having, at the instigation of Fernley, informed Johnston that the affairs of the bank were very prosperous, and advised him to purchase and to recommend his customers to purchase shares, stating that they would shortly be at a premium of £6 or £7; that, if the Plaintiff had known that the 25 shares belonged to Fernley or to any other director [560] of the company, he would not have purchased them without further inquiry, and, if he had found that Fernley and other directors had disposed of their shares to any great extent, his confidence in the prosperity and stability of the bank would have been shaken, and he would not have purchased shares therein; that Fernley and the other directors were privy to and approved of the reports and dividends made in April and August 1836; that those reports and dividends were made by Fernley and the other directors for the fraudulent purpose of serving their own private interest, and that they then well knew that the affairs of the bank were not in a condition to justify the making of them.*

The bill prayed that it might be declared that the Plaintiff was induced to purchase his shares by the aforesaid fraudulent representations and practices of the Defendants; and that such purchase, as between him and the Defendants, might be declared void, and that the Defendants might repay to him the purchase-money and the expenses of the transfer of his shares, with interest; the Plaintiff being willing to pay or allow to the Defendants the dividend which he had received, and to retransfer the shares; and that the Defendants might indemnify the Plaintiff from any losses that might arise to him in consequence of his having purchased the shares.

Fernley demurred for want of equity, and because all the partners in the bank ought to have been made parties to the bill.

Mr. Knight Bruce and Mr. Koe, in support of the demurrer. No fraud on which this Court can act is alleged by this bill; and, if it were, it is not alleged with sufficient certainty with respect to the party for whom we appear. It is not stated that any communication passed between the Plaintiff and Fernley, at the time of the sale. What took place after the sale cannot be of any importance. The representations as to the prosperity of the bank were vague, and were made, not to the Plaintiff individually, but to the public at large; and even if those representations had been made by Fernley to the Plaintiff, the Plaintiff would not be entitled to any relief on that account; for every vendor is at liberty to praise the article which he offers for

sale, and it is the duty of the purchaser not to trust to the vendor's representations, but to ascertain, from other quarters, whether those representations are correct.

The Plaintiff has no right to complain on account of Robinson's name having been used instead of Fernley's; for he never inquired who was the seller of the shares until the deed of transfer was brought to him for signature, which was some time after he had purchased the shares; and if he had been told at the first that Fernley was the seller, that information would not have put him on his guard, as the 25 shares were a very small proportion only of the shares held by Fernley, and the Plaintiff would not have known that any of the other directors were disposing of their shares. *Fellowes v. Lord Gwydyr* (ante, vol. i. p. 63 and 1 Russ. & Myl. 83). Supposing, however, that any fraud has been practised on the Plaintiff, he is not without remedy, as a Court of law may give him damages. *Dobell v. Stevens* (3 Barn. & Cress. 623).

This case is one of a joint stock company allowing [562] the transfer of shares under certain restrictions. The Plaintiff, on his own shewing, has become a partner in the bank: for he states in his bill, that he has purchased shares, executed the deed of settlement, and received a dividend; and he asks that his purchase may be declared void, and offers to retransfer his shares to the Defendants. But the retirement of one partner from a concern, and the introduction of a new partner, are, both of them, transactions in which all the other partners are interested. The deed of settlement, too, in this case, expressly stipulates that no transfer of shares shall take place, without notice having been given to the directors and their consent obtained; but there is no allegation in this bill that any such consent has been obtained. A party who seeks to rescind a transaction in a Court of Equity must be able to restore the party with whom he has dealt to his original position; but the property which the Plaintiff has acquired is so circumstanced that it is not in his power, in the absence of the other partners, to relinquish it, nor is it in his power to vest it in either of the Defendants; for, in no case can a partner, without the concurrence of his co-partners, withdraw from a partnership and admit another person into it. The Plaintiff, therefore, cannot, in the absence of the other shareholders in this company, rescind the purchase which he has made; for he cannot place the party from whom he purchased in the situation in which he originally was.

The case of *Blain v. Agar* (ante, vol. i. p. 37) also shews that, in a case like the present, the other partners are necessary parties.

[563] Mr. Jacob and Mr. Geldart appeared in support of the bill: but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, delivered judgment as follows. Although the statements in this bill are not very methodically arranged, yet the different portions of it, when taken together, are quite sufficient to make a very clear case against the Defendant Fernley.

First, the bill represents that, at a general meeting of the company, held at Manchester, on the 28th of April 1836, a report of the directors was read, giving an account of the affairs of the company, for the year ending the 31st of December 1835, and representing them to be in so flourishing a state that a dividend of £7 per cent. could properly be paid out of the clear profits, and that such dividend was accordingly declared by the directors, on the amount of capital subscribed, being £10 on each share. Then Mr. Johnston is introduced into the narrative, as the agent of Mr. Fernley, for the purpose of selling some of his shares; and the bill alleges that, in the early part of August 1836, Mr. Johnston, who was a respectable share-broker at Manchester, strongly recommended the Plaintiff to purchase shares in the company, and, in order to overcome the disinclination which the Plaintiff expressed to become a purchaser of any shares at that particular period, he assured the Plaintiff that he had private information, upon which he could depend, and which proceeded from the fountain-head (meaning, as the Plaintiff then understood, either the directors of the bank or their agents), that the bank was one of the most prosperous concerns in England; that a most [564] favourable report of its affairs was then in preparation, and that a half-yearly dividend would be declared, of £8 per cent. per annum, at the general meeting to be held at the end of that month, and that, after payment thereof, there would be a large surplus arising from the profits of the bank, and that the shares thereof would soon be at a premium of between £6 and £7: that, confiding in the representations of Johnston, the truth whereof the Plaintiff was more readily induced

to believe by reason of the previous favourable report of the directors and the declaration of the previous dividend, the Plaintiff was induced by reason of such representations and the aforesaid previous report, and the dividend thereby declared, to purchase, and, accordingly, agreed with Mr. Johnston, to purchase 25 shares in the company, at the price of £15, 7s. 6d. each, being a premium of £5, 7s. 6d. on every share beyond the amount of capital paid up. Then follows the report of the 25th of August 1836, which verifies the predictions of Mr. Johnston. Then it is stated that, notwithstanding the allegation in that report respecting the steady and increasing prosperity of the bank, to the great surprise and disappointment of the Plaintiff and the other purchasers of shares, the affairs of the bank became, shortly afterwards, so embarrassed that the directors found it impossible to meet the engagements of the company without large pecuniary assistance, and they, accordingly, in November 1836, applied to the Governor and Company of the Bank of England to make them large advances for that purpose, which the Governor and Company of the Bank of England agreed to do, and have since accordingly done, to a large amount, upon certain terms, one of which was that the affairs and all the books and accounts of the said joint stock banking company should be submitted to the investigation of certain directors of the Bank of [565] England and their solicitor and such persons as they should think fit to appoint, as inspectors, to investigate the same; that the affairs of the joint stock banking company were accordingly investigated by the persons appointed by the Bank of England, and that, by means of such investigation, it was discovered, as the fact is, that the embarrassments of the bank had been occasioned, principally, by the misconduct of the directors; that the affairs thereof were never in such a condition as to justify the directors in making the reports and declaring the dividends aforesaid, and that such reports were made and such dividends declared, and various other fraudulent practices were adopted by them, to raise the price of shares in the market, in order that they might benefit themselves by the sale of those allotted to them, at high premiums, and in other ways, to benefit themselves individually. Then there is a distinct statement that, at the time when the report of April 1836 was made, the clear profits of the bank, as was well known to the Defendant Fernley, were not sufficient for the payment of a dividend of £7 per cent. upon the subscribed capital, and, in order to make up the apparent profits sufficient for that purpose, the Defendant Fernley and the other directors estimated the value of 29,000 reserved shares of the bank then in hand at £11 each, or £1 premium each, and accordingly included the sum of £29,000 in the apparent profits of the year, although, in fact, none of those reserved shares had then been sold, and about 20,000 thereof still remain on hand. Then there is a charge as to the report of August 1836, similar to the one before made respecting the report of April 1836; and then there is a distinct charge that 1000 shares were originally allotted to the Defendant Fernley and each of the other directors, and that the shares which were [566] sold were part of those shares. Then it is alleged that, at the time when Johnston recommended to the Plaintiff the purchase of the shares aforesaid, he had, in fact, been informed by Thomas Evans, the manager of the bank at Manchester, that the affairs thereof were in a very prosperous state, and that a most favourable report of its affairs, which was then in preparation, would be made at the general meeting in August 1836; and that Mr. Evans strongly advised Mr. Johnston to purchase and to advise his customers to purchase shares in the bank at the then current price, stating that they would soon be at a premium of between £6 and £7; that such representations were made to Mr. Johnston and also to other brokers and persons at Manchester, by Mr. Evans, as the agent and with the privity and at the instigation of the said John Fernley and other directors of the said bank, for the purpose of raising the price of the shares in the market; that by means of such fraudulent contrivances the said John Fernley has been enabled to effect sales of, and has, in fact, sold at a high premium, nearly the whole of the shares allotted to him, and has thereby realized profits to the amount of many thousand pounds.

Now, putting all these statements together, it appears to me to be distinctly alleged that false representations were made by the directors and their agents, to induce the public to purchase their shares at a price which they were not justified to ask, having regard to the foundation on which that price was asked. Therefore,

in my opinion, quite a sufficient case is stated on this bill to induce the Court to relieve as against the Defendant Fernley.

Next, with respect to the objection for want of [567] parties. The bill asks that the transaction between Fernley and the Plaintiff may be rescinded, and that Fernley may be ordered to repay to the Plaintiff the purchase-money for the shares, that the Plaintiff may retransfer the shares to him, and that he may indemnify the Plaintiff against any losses that he may sustain by reason of his having become the purchaser of the shares. Now, what any of the other partners has to do with this I confess that I am at a loss to understand.

My opinion, therefore, is that the demurrer must be overruled.

[567] SHEPPARD v. DUKE. Feb. 19, 1839.

[S. C. 8 L. J. Ch. 228 ; 3 Jur. 168.]

Legacy. Statute of Limitations.

The 40th sect. of the Statute of Limitations, 3 & 4 Will. 4, c. 27, applies to legacies payable out of personal estate as well as to legacies charged on real estates.

The bill was filed against the executors of a testator whose will had been proved more than 20 years before the commencement of the suit, to compel payment of pecuniary legacies given to the Plaintiffs, and payable out of the testator's personal estate only. The Defendants pleaded the 3 & 4 Will. 4, c. 27, s. 40.

That Act is intituled, "An Act for the Limitation of Actions and Suits *Relating to Real Property*, and for Simplifying the Remedies for Trying the Rights Thereto." It enacts, amongst other things, that, after the 31st day of December 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to [568] some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case, no such action or suit or proceeding shall be brought but within twenty years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given. Sect. 40. That, after the said 31st day of December 1833, no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover, in such action or suit, the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years. Sect. 42. That after the said 31st day of December 1833, no person claiming any tithes, legacy, or other property for [569] the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any Spiritual Court to recover the same, but within the period during which he might bring such action or suit at law or in equity. Sect. 43.

Mr. Lowndes, in support of the plea. Although the title of the Act relates to

real estate, and the general tendency of the Act is to real estate, yet, in the 40th sect., are introduced these words, "or any legacy," on which this plea depends. The Act does not say that it shall be a legacy charged on real estate, nor is there anything to restrict it to a legacy charged on real estate.

Mr. Wakefield and Mr. Jemmett, in support of the bill. The title of the Act shews that it was meant to apply to real estate only; and, until we come to the 42d sect., we find nothing but what relates to real estate. *Phillipo v. Munnings* (2 Myl. & Craig, 309), *Paget v. Foley* (2 Bin. N. C. 679).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 40th sect. of the Act introduces the words, "or any legacy," after it has enumerated those things which are charged on land. Therefore those words come in quite separately from those things which are charged on land.

Is not the use of the word "legacy" in the 43d sect. evidence that, when the Legislature uses that word, it must mean a legacy capable of being sued for in the Ecclesiastical Court, that is, a legacy payable out of personal estate only? It seems to me impossible to get [570] over the inference that arises on that section. For it would be absurd to say that when that section limits the time for instituting a suit in the Ecclesiastical Court for a legacy, it means a suit for payment of a legacy charged on land; when, if an attempt were made to enforce, by a suit in the Ecclesiastical Court, the payment of a legacy charged on land, a prohibition would issue as a matter of course.

Plea allowed.

[570] DEARMAN v. WYCHE.(1) Feb. 19, July 24, 1839.

[S. C. 9 L. J. Ch. 76. See *Wrixon v. Vize*, 1842, 3 Dr. & War. 104; 5 Ir. Eq. R. 173; *Badeley v. Consolidated Bank*, 1886, 34 Ch. D. 549; *Dingle v. Coppin* [1899], 1 Ch. 741; *In re Lloyd* [1903], 1 Ch. 398.]

Statute of Limitations. Plea and Pleading.

The Statute of Limitations (3 & 4 Will. 4, c. 27, sect. 40) may be pleaded to a bill of foreclosure. A foreclosure suit being, in fact, a suit for the recovery of the money secured by the mortgage.

A plea of the Statute of Limitations (3 & 4 Will. 4, c. 27) ought not to deny, by answer, statements in the bill which are in direct contradiction to the averments necessary to support the plea; but an answer in support of the plea ought to be confined to those statements in the bill which allege facts ancillary to or as affording evidence of statements which are directly negatived by the requisite averments in the plea.

The bill stated indentures of lease and release by way of mortgage, dated the 19th and 20th of July 1811, whereby certain freehold premises were conveyed by Andrews to Gore, redeemable on payment of £3000 and interest at the end of 12 months from the date of the indenture of release: that £1000, part of the £3000, having been paid off, the above mortgage was, on the 2d of April 1812, at the request and by the direction of Andrews, assigned to Reeve, his heirs and assigns, redeemable on payment of £2000 and interest at [571] the end of 12 months from the 2d of April 1812: that the sum of £2000 was not paid at the time lastly specified; that upon the marriage of Andrews, the mortgagor, the equity of redemption of the premises was, by an indenture dated the 23d of April 1812, conveyed to trustees, of whom Reeve, the mortgagee, became the survivor, upon certain trusts for securing £6000 to the trustees, for the benefit of Andrews, his intended wife and the issue of the marriage, subject nevertheless to the mortgage debt of £2000: that Reeve died in September 1829, having by his will appointed the Plaintiffs Dearman and Hancock his executors, but without having devised the legal estate in the mortgaged premises. The bill then

(1) The reporter is indebted to his friend Mr. Nicholl for the above report.

stated that the legal estate in the mortgaged premises had become vested, by devise from Reeve's heir, in the Plaintiffs Hancock and Chipchase : that in October 1829 the Plaintiffs Dearman and Hancock proved the will of Reeve in the proper Ecclesiastical Court : that in September 1834 a fiat in bankruptcy was issued against Andrews, under which he was declared a bankrupt, and all his estates and effects were, by the usual bargain and sale, vested in the Defendants Wyche and Graham : that Andrews, after the date and execution of the indentures of mortgage, and up to the time of his bankruptcy, was, as mortgagor, in the possession and receipt of the rents and profits of the mortgaged estates, save only *that Reeve was, for a short time after the year 1820, in the possession and receipt of such rents and profits* : that the Defendants Wyche and Graham had, ever since the bankruptcy, been in the possession and receipt of the rents and profits : that Andrews was in the possession of the premises up to the 24th of July 1833, and his possession was not adverse to the right or title of Reeve or of the [572] Plaintiffs. The bill then charged, in detail, that the sum of £2000 had been duly and *bonâ fide* advanced by Reeve ; that the same had never been repaid or in any manner acknowledged to have been repaid to him, and that, if any part had been repaid, the same had been so repaid within 20 years of the filing of the bill : that, previously to and on the 24th of July 1833 and subsequently thereto, negotiations were going on between the Plaintiffs and Andrews as to payment by him of what was due on the mortgage, and, in such negotiations, he treated himself as mortgagor and the Plaintiffs as mortgagees, and admitted that he held the premises as mortgagor, subject to their right : that, previously to and on the 24th of July 1833, an agreement in writing had been drawn up, to which Andrews was a party, and, therein, the title of Reeve, as mortgagee, and of the Plaintiffs, as representing him, was admitted by Andrews : *that the Defendants had formerly and have now in their possession, custody, or power, &c., divers deeds, &c., whereby, if produced, the truth of the several matters aforesaid would appear, and they ought to set forth a list thereof* : that Andrews, in 1834, before he became bankrupt, and at various other times within 20 years before his bankruptcy and the time of filing this bill, admitted, in writing, the right of Reeve to the sum of £2000 : that Andrews, shortly before the year 1834 and in the years 1830, 1831, 1832, 1833, and within 20 years before he became bankrupt and the time of filing this bill, paid interest upon the sum of £2000 to Reeve, or Reeve was allowed such interest in account between them. The bill prayed the usual decree of foreclosure, and that all title-deeds, &c., in the hands of the Defendants might be delivered up to the Plaintiffs, and for further relief.

[573] To this bill the Defendants, Wyche and Graham, put in the following plea :—

These Defendants, by protestation, &c., to all the discovery and relief sought by the bill, do plead, and for plea say, "That by an Act of Parliament made and passed in the 3d and 4th years of the reign of His late Majesty King William the Fourth, intituled An Act for the Limitation of Actions and Suits Relating to Real Property, and for Simplifying the Remedies for Trying the Rights Thereto, it is enacted that, after the 31st day of December 1833, no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, or any legacy, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given, in writing, signed by the person by whom the same shall be payable or his agent, to the person entitled thereto or his agent, and in such case no such action or suit or proceeding shall be brought but within 20 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one was given. And these Defendants further say that the principal sum of £2000 and the interest thereof, secured by the indentures of lease and release of 1st and 2d April 1812, were, by the same indenture of release, made payable to Reeve on the 2d day of April 1813 ; and that a present right to receive the same principal and interest did accrue to Reeve, being a person capable of giving a discharge for or release of the same, more than 20 years before the filing of the [574] original bill in this suit ; but these Defendants aver that no part of the principal sum of £2000, or the interest thereof, nor any sum

of money in respect of principal and interest or of either of them, was ever paid by these Defendants or either of them, or by any person as their or his agent or on their or his behalf, or by Andrews, or by any person as his agent or on his behalf, or by any person or persons whomsoever by or from whom the principal sum of £2000, or the interest thereof or any part thereof, was payable unto Reeve, or unto any person as his agent or on his behalf, or unto the Plaintiffs or either of them, or unto any person or persons as the agent or agents, or on behalf of the Plaintiffs or any or either of them, or at any time within 20 years next before the filing of the bill of complaint; and these Defendants do further aver that no acknowledgment of the right of the Plaintiffs or of any or either of them, or of Reeve, to the principal sum of £2000 secured by the last-mentioned indentures, or the interest thereon or to any part thereof respectively, has ever been given in writing signed by these Defendants or either of them, or by any agent of them or either of them, or by Andrews or his agent, or by any person or persons interested in the hereditaments and premises comprised in the last-mentioned indentures or in any part thereof, to the Plaintiffs or any or either of them, or any agent of them or of any or either of them, or to Reeve or any agent of his, at any time within 20 years next before the filing of the original bill of complaint in this suit. All which," &c.

The above plea now came on to be argued.

Mr. Jacob and Mr. Bethell, in support of the plea.

Mr. Knight Bruce and Mr. Richards, for the bill.

[575] THE VICE-CHANCELLOR [Sir L. Shadwell]. It seems to me, although I am sorry to be obliged to do so, that I must allow this plea. For although it has been said that a bill of foreclosure only seeks the exclusion of an equity, yet it is, in substance, a suit in equity for the recovery of money. If the opinion of any counsel were asked how money due upon mortgage could be recovered or got in, he would at once advise a bill of foreclosure. It is a suit to recover money; and notwithstanding all the objections which have been made to this plea in point of form, I think that the plea is good; but I think that, upon the case itself, the Plaintiffs should have leave to amend; and it also seems to me that I ought not to give costs. It is a new question upon the statute. There is a further reason for this (of course, I am influenced by what appears on the face of the bill), and according to the case there stated, this is no plea of merits; but as the case stands on the face of the bill, there is nothing whatever to prevent the Plaintiffs from bringing an ejectment. Then the assignees of the mortgagor would be driven to file a bill to redeem, and would be obliged to offer to pay the money really due as the terms of ransoming their estate.

It certainly appears to me that the framers of this statute did not sufficiently consider what they were about; for, although there is this restriction upon a suit to recover the money, yet, if the decision in *Doe v. Williams* (5 Adol. & Ell. 291) as to adverse possession be correct, and I confess it appears to me to be so, there is no commensurate restriction upon a corresponding suit for recovery of the land.

Plea allowed without costs. Leave to amend.

[576] The bill was amended in March 1839. The amendments stated:—That the right to receive the mortgage money did not accrue to any person until the end of 12 months after the date of the indenture of assignment of the mortgage; that within four months after the date and execution of that indenture, Reeve became and was incapable of giving a discharge for or a release of the mortgage money, and so continued until after the year 1820; that Andrews did not, at the execution of the indenture of assignment of the mortgage, deliver to Reeve all the title-deeds to the premises, but retained divers of them in his own possession; that the Plaintiffs intended to bring an action of ejectment to recover possession of the premises, but they were and would be unable to proceed effectually therein, partly from want of the said title-deeds, and partly from their having lately discovered that, at and before the execution of the indenture of mortgage, there were certain outstanding satisfied terms and legal estates vested in other persons, but on trust to attend the inheritance of the premises; that Andrews concealed from Reeve the existence of such outstanding terms; and that the Defendants had, within the last six years, fraudulently procured the same to be conveyed to them, and intended to set up the same in bar to

any proceedings at law which might be taken by the Plaintiffs, to recover possession of the premises; that Andrews promised to sign and execute an agreement of reference; and on that promise the Plaintiffs abstained from instituting proceedings touching the mortgage, and delivered over to Andrews such of the title-deeds of the premises as were in their possession; but Andrews afterwards fraudulently evaded signing the agreement; that, subject to the mortgage in which Reeve was beneficially interested, he was a trustee of the premises and of the charges [577] thereon, created by the before-mentioned indenture of the 23d of April 1812, for Andrews, his wife and children: *that Reeve was for a short time after the year 1820 in the receipt of the rents and profits of part of the mortgaged premises, and he applied part of the rents and profits in satisfaction of part of the interest then due to him on the first-mentioned mortgage, and other part thereof, in satisfaction of interest due on the said second charge: that, afterwards, Andrews was permitted to enter into the possession and receipt of the rents and profits of the premises, and he continued in such possession or receipt by an arrangement with Reeve; and, in consideration of his being permitted to receive the rents and profits, Andrews promised to account for the same to Reeve; but he fraudulently omitted to do so: that between 1820 and 1830 various payments were made, by or on behalf of Andrews, to Reeve, in respect of the interest on the mortgage and of the interest on the charge created by the indenture of the 23d of April 1812, but the precise amount of the sums to be applied towards the satisfaction of the interest due on each of those incumbrances was not fixed; and disputes had arisen between the parties to the two incumbrances as to the proportions of the sums which were to be created as against each of the incumbrances: that one Green had many dealings with Andrews; and that Green was in partnership with and had many dealings with Reeve; and it was arranged between Andrews, Green and Reeve, that Green should give, and he accordingly, at divers times after the year 1820, did give credit to Reeve, in the accounts between Reeve and Green, for certain sums in respect of the interest due to Reeve on the mortgage, and Green afterwards debited Andrews with those sums; that after 1820 accounts were settled between Green and Reeve, in which [578] Reeve had credit for sums due to him for interest on the mortgage, and the balances of the accounts were paid to Reeve, and thereby, part of the interest due on the mortgage was satisfied: that Green was the agent of Andrews touching the mortgage: that in 1820 and subsequently, a part of the interest due on the mortgage to Reeve was paid and satisfied to Reeve by Andrews: that in 1820 and subsequently, part of the interest due on the mortgage was paid and satisfied to Reeve, by or on behalf of other parties interested in the equity of redemption: that subsequently to the year 1820 acknowledgments, in writing, of Reeve's right to the principal money were signed by Andrews and the other parties interested in the equity of redemption, and also by the agents of Andrews and the said other parties, and, particularly, by Green, and were given to Reeve; but Andrews, afterwards, got such acknowledgments into his possession, fraudulently, whilst the negotiations for the agreement of reference were going on; and he had since destroyed divers of the same: that the Defendants had frequently admitted that such written acknowledgments were so signed and given: that in the deeds and documents of title relating to the premises which were in possession of the Defendants, there were indorsements and memoranda which evidenced and shewed the title of the Plaintiffs to the premises, and their right to the principal money secured thereon; and the truth of the several matters therein alleged, and which shewed in particular that the principal sum of £2000, with a large arrear of interest, was still due and owing to the Plaintiffs on the security of the premises: that after 1820 arrangements were made between Reeve, Andrews and Green, by which it was agreed between them that part of the interest due on the mortgage should be considered and treated as paid and [579] satisfied; and the same was accordingly so considered and treated: that there formerly had been, and then were, books of account in which entries were made touching the mortgage and the dealings and transactions connected with the same, and such entries established and made out the matters and things therein alleged; and the said books then were in the possession of the Defendants: that a full and true discovery by each and every of the Defendants, of the the matters therein alleged, would make out and establish the divers matters and things therein alleged.*

The prayer of the bill was amended by praying, in addition to the original relief sought, that the Defendants might be restrained from setting up any outstanding term or legal estate as a defence to any proceedings at law which the Plaintiffs had

instituted, or should thereafter institute, in order to obtain possession of the premises.

To the bill thus amended, the Defendants, Wyche and Graham, put in a second plea and answer as follows:—

The plea of, &c., to part, and the answer of the same Defendants to the residue of the amended bill of complaint. These Defendants, &c., to all the relief sought by the bill, and also to all the discovery thereby sought, except the discovery sought by or in respect of so much of the bill as prays that these Defendants may answer and set forth. [The plea then excepted all the passages in the original and amended bills which are marked in italics, following, in such exception, the language of the interrogating part of the bill.] These [580] Defendants do plead in bar, and for plea say, &c. The plea of the Statute of Limitations was then set forth in the same language as that used in the first plea. The Defendants then, by answer, denied all the excepted passages.

Mr. Jacob and Mr. Bethell, in support of the second plea.

Mr. Knight Bruce, Mr. Richards, and Mr. James Russell for the bill. When this case was before the Court, on a former occasion, your Honor was of opinion that no impediment was shewn preventing the Plaintiffs from proceeding in a Court of law; and you decided that a bill of foreclosure is, in substance, a bill to recover the mortgage money, and is not, as was then contended, a proceeding ancillary to the recovery of the money by excluding an equity attendant on the recovery of it at law. The bill, as now amended, states grounds for equitable interference, namely, that the Plaintiffs cannot proceed at law by reason of outstanding terms; and it seeks relief in that respect. There are also allegations of fraud, which exclude the operation of the statute; fraud being, in equity, an exception to a legal bar.

The statute 3d & 4th Will. 4, c. 27, received the Royal assent on the 24th of July 1833. The original bill was filed on the 2d of June 1837, within the period limited by the 15th section. *Doe v. Williams*.(1) This case is peculiarly circumstanced. Reeve was first mort-[581]-gagee; and he was also, as surviving trustee of the marriage settlement of the mortgagor, a second mortgagee of these premises. The possession of Andrews was the possession of a *cestui que trust*, and, therefore, was not adverse to his trustee. There are various particular charges of dates and sums which would avoid the plea, which are neither traversed nor denied.

Mr. Jacob, in reply. This is a plea of a statute creating a bar to a claim, and is in the nature of a negative plea. Such a plea requires averments to support it, and a denial by answer of statements in the bill directly negatived by the averments in the plea would overrule the plea. A plea of this kind must deny by answer facts stated as ancillary to, or as affording collateral evidence of those statements in the bill which, being in direct contradiction to the requisite averments of the plea, are met by those averments: but must not deny the averments themselves. *Denys v. Locock* (3 Myl. & Cr. 205). It is said that this bill can now be sustained as seeking to restrain the setting up of outstanding terms. The discovery of those terms is first stated in the amended bill, which is dated in March 1839. At that time the five years allowed by the 15th section of the Act had passed, and all proceedings at law were completely barred. The [582] Plaintiffs have shewn no impediment preventing them, previously to such discovery, from proceeding at law. Amendments of this nature cannot have reference back, in point of date, to the time of filing the original bill.

The bill prays a delivery up of title-deeds. That is only relief ancillary to the

(1) 5 Adol. & Ell. 291. The 15th section of the Act enacts: "That when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not, at the time of the passing of this Act, have been adverse to the right or title of the person claiming to be entitled thereto, then such person or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such bond, or interest, at any time within five years next after the passing of this Act."

real and substantial relief sought, which is the recovery of the mortgage money. The Court, seeing that the substantial relief is gone, will not grant ancillary relief, which would be useless.

July. 24. THE VICE-CHANCELLOR [Sir L. Shadwell]. When the objections which have been urged against the validity of this plea were first brought to my attention I own that I considered them forcible and valid objections; they have, however, been removed by Mr. Jacob in his reply.

Where it is evident that the only claim which a party has to the assistance of a Court of Equity is this, namely, that, as a mortgagee, he is entitled to require the interference of the Court to remove legal impediments to his recovering what he is entitled to in a Court of law, and the Court sees that his remedy at law is barred, it will not interfere to assist him, as it would to assist a Plaintiff who, no legal bar existing, was bringing an action of ejectment and asking the Court to restrain the setting up of legal obstacles to that action. If the plea is right, the Plaintiffs are precluded from recovering the mortgage money in a Court of law; and this Court will not assist them to recover what it sees they have no right to recover.

I certainly think that this plea has very properly denied, by answer, those matters, and those matters [583] only, which, had they not been so denied, would have avoided the plea. And I am only surprised, considering the various statements which have been introduced into the bill for that purpose, that the pleader has succeeded in answering only those passages of the bill which, in my opinion, he was alone bound to answer, leaving those which, if answered, would have overruled his plea to be met by the averments of the plea.

I think the plea is right, and that it must be allowed.

Plea allowed.

[583] ALLISON v. HERRING. Feb. 25, 26, 1839.

Account. Solicitor and Client. Jurisdiction.

A committee appointed by the inhabitants of M., employed the Plaintiffs, as their solicitors, to apply to Parliament for an Act for constructing a dock. The Plaintiffs, in the course of their employment, paid considerable sums to engineers, witnesses, Parliamentary agents, and various other persons; and a large sum became due to them for their own costs, and several liabilities were existing against them. The Plaintiffs at different times received, through bankers and others, various sums on account of what was due to them, but were unable to obtain payment of the balance: upon which they filed a bill against some of the other members of the committee, alleging that, of the other members, some were out of the jurisdiction, and others were dead and their personal representatives unknown, and praying that the Defendants might come to an account with them, and pay to them the balance (which was stated to be £3232, 1s. 4d.), or such balance as, on taking the account, should be found due, and also to indemnify them against the existing liabilities. A demurrer to the bill was allowed.

At a meeting of inhabitants of Monkwearmouth, held in November 1831, a committee was formed, consisting of certain persons, some of whom were the Defendants to the bill, for the purpose of constructing a dock on the north side of Sunderland Harbour; and the Plaintiffs, Messrs. Allison & Abbs, were appointed by and [584] as the solicitors of the committee, to take the preliminary steps and to conduct an application to Parliament, during the then ensuing session, for obtaining an Act for carrying the undertaking into effect; and they were also instructed by the committee to take the requisite measures for opposing a bill which had been introduced into the House of Commons by other parties for constructing a dock on the south side of the harbour. The Plaintiffs succeeded in procuring that bill to be rejected by a Committee of the House of Commons, and also in getting their own bill passed by that House; but it was rejected by the House of Lords on the 16th of July 1832.

The bill, which was filed against 25 members of the committee, alleged, after

stating as above, that the Plaintiffs, in the progress of such proceedings, up to, and after that day, incurred considerable costs, charges and expenses, and laid out divers sums of money, and became entitled to considerable sums for their fair and just charges, and remuneration for their pains, trouble and professional services as such solicitors of the committee, amounting to £7088, 13s. 5d., besides existing liabilities to the amount of £293, 1s. 5d., against which the committee ought to indemnify the Plaintiffs: that the committee had paid the Plaintiffs in respect thereof divers sums of money, amounting in the whole to £3856, 12s. 1d., and there still remained due to the Plaintiffs the balance of £3232, 1s. 4d., besides the said existing liabilities: that the Plaintiffs, on the 25th and 26th days of June 1838, caused a statement of account, signed by them (a true and correct copy whereof was annexed to the bill), to be delivered to each of the Defendants. The bill charged that the Defendants and the other members of the committee alone [585] employed the Plaintiffs on their own account; and that the committee obtained certain voluntary subscriptions of specific amounts in aid of their own liability towards the general expenses of the said proceedings, and not merely the expenses of the Plaintiffs, in respect of which subscriptions they had received more than they had paid to the Plaintiffs, and some of which subscriptions they had neglected to recover, and that such subscriptions were obtained by and as liabilities incurred to the committee and not the Plaintiffs, and the Plaintiffs never had any remedy for the recovery thereof: that of the other members of the committee some were dead, and their personal representatives were unknown to the Plaintiffs, and the others were residing out of the jurisdiction of the Court in places unknown to the Plaintiffs, and such representatives and other members were too numerous to be made parties to the suit. The bill contained the usual charge as to the Defendants having in their possession books, &c., relating to the matters aforesaid: and it prayed that they might be decreed to come to a just and fair account with, and to pay to the Plaintiffs, the balance of £3232, 1s. 4d., or such balance as should, on taking such account, be found due to the Plaintiffs, and also to indemnify them against the liabilities, amounting to £293, 1s. 5d.

The copy of the account which was annexed by way of schedule to the bill contained, on the debit side, sums paid to engineers, surveyors and witnesses, and to different persons for printing and advertisements, boring for foundations, coach hire, tavern expenses, &c. The largest items were the Parliamentary agent's bill, bill of costs, charges and expenses including counsels' fees [586] and bill of costs exclusive of agency. On the credit side were entered sums remitted to the Plaintiffs through different bankers and received by them from different individuals, not parties to the suit. The largest item on this side of the account was "By cash for subscriptions paid to Wm. Allison, £650, 14s." The items in the list of liabilities were of the same description as those contained on the debit side of the account.

Twenty-three of the Defendants demurred to the bill for want of equity, and because the personal representatives of such of the late members of the committee as were stated in the bill to be dead were not made parties to the suit.

Mr. Jacob and Mr. Stevens, in support of the demurrer. There is nothing in this case which affords any ground for coming into equity. The object of the Plaintiffs is merely to obtain payment of their bill of costs, but there is no privilege which entitles a solicitor or a Parliamentary agent to sue in this Court for that purpose. The Plaintiffs ought to have brought an action, selecting two or three of the most wealthy members of the committee as Defendants. There is no pretence of any disputed account, or that there is any impediment to the Plaintiffs proceeding at law, nor are there any cross-demands. It is laid down in *Dinwiddie v. Bailey* (6 Ves. 136), that, in order to sustain a bill for an account, there must be mutual demands. The allegation that some of the members of the committee are dead and that their personal representatives are unknown to the Plaintiffs is not sufficient to dispense with their being made parties. [587] The Plaintiffs ought to have added that the Defendants knew, but refused to discover who the personal representatives were. Besides, the allegation is in the conjunctive, and is quite consistent with the Plaintiffs knowing who are the representatives of all the deceased members except one.

Mr. Knight Bruce and Mr. Willecock, in support of the bill. The subject of the demand is a bill of costs not taxable. In a case between principal and agent, the

mere statement of a bill of such magnitude as is due to these Plaintiffs is quite sufficient; and, moreover, there have been receipts and payments on both sides. The schedule annexed to the bill shews that various payments have been made by the Plaintiffs, and that sums have been received by them from different individuals: and also that there are several liabilities outstanding against them; so that it is not the common case of a bill of costs, but it is a fit subject for a bill for an account. Besides, an order for taxation is equivalent to a decree for an account: and, as the Plaintiffs are precluded from taxation, they are entitled to a decree for an account; more especially as the case is of such a nature that no jury could do the Plaintiffs justice. *Cockburn v. Thompson* (16 Ves. 321), *Cullen v. The Duke of Queensberry* (1 Bro. C. C. 101, and 1 Bro. P. C. 396). This latter case shews that, when there is a great number of persons liable to be sued, a Court of Equity, in order to prevent the remedy from being lost, will act against some of them. *Horsley v. Bell* (1 Bro. C. C. 101, note; and Amb. 770), *Meriel v. Wymondsold* (Hard. 205), *Douglas v. Horsfall* (2 Sim. & Stu. 184), [588] *Meux v. Maltby* (2 Swanst. 277; see 283), *Eaton v. Bell* (5 Barn. & Ald. 34). *Horsley v. Bell* is this very case; and, if the Court allows this demurrer, it will overrule that case.

The allegation that some of the members of the committee are dead and their personal representatives unknown to the Plaintiffs, and that others are resident out of the jurisdiction, is in the ordinary language, and effectually disposes of all the members except the Defendants.

On the case of *Meriel v. Wymondsold* being cited, His Honor said he doubted whether that case would be followed at the present day.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not see how this case differs from the common case of an attorney suing for the amount of his bill of costs; and it is quite new to say that, because part of the amount has been paid, the attorney is at liberty to file a bill for an account. The relief asked is, in fact, nothing more than taxation and payment.

The bill merely represents that business has been done by the Plaintiffs, as solicitors to the committee, in soliciting one bill in Parliament and opposing another, which involves the necessity of procuring evidence to be laid before the two Houses of Parliament; and I see nothing that carries this case beyond that of an attorney acting for his client. There is no representation that the Plaintiffs received any monies as agents for or on the account of the committee, but only on account of their bill of costs.

[589] In the case in *Hardres*, the bill was filed not only against the two undertakers for the parish in respect of their liability under the agreement which they had entered into with the Plaintiff, but also against other parties who had agreed with the undertakers to pay their own shares of the expenses of the work; and one ground upon which the Court seems to have entertained the suit was that the Plaintiff required a discovery of the agreement between them and the undertakers.(1) This, however, is not a case of discovery.

In the case of *Cullen v. The Duke of Queensberry* the principal point, certainly, was whether those noblemen and gentlemen who instituted the club could be made liable in the absence of the other members of it. The subject-matter of that suit was of so complicated a nature, that it was fitter for a Court of Equity than a Court of law; and the relief that was asked as to the sale of the house, the payment of the mortgage and other matters, could not have been had at law. That case, however, stands as an insulated case.

In *Horsley v. Bell* it is admitted that the Defendants employed the Plaintiff to make the cuts and do the works in prosecution of the scheme at certain prices; and gave orders for that purpose at their several meet-[590]-ings: and it is stated that

(1) The report of the case alluded to in the text concludes thus: "And, *per curiam*, the Plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the Defendants; and the undertakers must have their remedy against the rest of the parish." The Court, therefore, seems to have decided that the bill was not sustainable against any of the Defendants, except the undertakers for the parish.

the sums which had been paid to the Plaintiff being upon account generally, it would be difficult to proceed at law. According to the report in Ambler, the Judges and the Lord Chancellor were of opinion that the commissioners who acted under the trust were personally liable to all the contracts, as well those that were made at the meetings when they were not present, as at the meetings when they were present. Whether that could be done at law was a very nice question. It appears then that both in *Cullen v. The Duke of Queensberry*, and in *Horsley v. Bell*, relief was asked which could not have been had at law. Neither of those cases at all approaches this: and if I were to allow this bill, the consequence would be that, whenever a dispute arose between a solicitor and his client respecting the amount of his bill of costs, a bill would be filed for an account, for the purpose of annoying the client.

My opinion is that the authorities which have been cited in support of this bill do not apply; and that the demurrer ought to be allowed.

[591] GRIMSHAW v. PICKUP. March 1, 1839.

[S. C. 3 Jur. 286.]

Will. Construction. "Or" read "And."

Testator devised his estates to his son, if he should attain the age of 23 years or should be married with the consent of his trustees, which should first happen, and to his heirs and assigns, absolutely, for ever. And in case his son should die without attaining such age, *or*, being married with such consent as aforesaid, should die without lawful issue, or such issue should die under the age of 21 years, then to the testator's daughters, as tenants in common, and the heirs of their bodies. The son married under the age of 23 with the consent of the trustees, and afterwards attained that age. Held, that the son was seised of an absolute estate in fee; or if not that, under the words of the gift over, "shall die without lawful issue," he was seised of an estate tail, those words not being confined by the words, "or such issue shall depart this life under the age of 21 years," to dying without issue living at his death; and consequently, that he could make a good title to the devised estates.

Nicholas Grimshawe, the Plaintiff's father, by his will, dated the 11th of January 1830, devised his real estates unto Thomas Brooks and Richard Eastwood, their heirs and assigns, to the use of the said Thomas Brooks and Richard Eastwood, their executors, administrators and assigns, for the term of 1000 years, to be computed from the day of his decease without impeachment of waste, upon and for the trusts, intents and purposes thereafter expressed and declared of and concerning the same; and after the expiration or other sooner determination of the said term of 1000 years, and, in the meantime, subject thereto and to the trusts thereof, to the use of the Plaintiff, *if he should attain the age of 23 years or should be married with the consent in writing of the trustees for the time being of the will (which should first happen), and to his heirs and assigns absolutely for ever: and in case the Plaintiff should depart this life without attaining such age, or, being married with such consent as aforesaid, should die without lawful issue, or such issue should depart this life under the age of 21 years,* [592] then to the use of the testator's daughters, Jane, Elizabeth and Ann, equally to be divided between and among them, share and share alike, and they to take as tenants in common and not as joint-tenants, and the heirs of the body and bodies of all and every the said daughters issuing; with cross-remainders amongst them upon failure of issue of any or either of them; and if there should be but one such daughter, to the use of such remaining or only daughter and the heirs of her body; and for default of such issue, to the use of the said T. Brooks and R. Eastwood and their heirs, in trust for the only benefit of Wm. Heap, the natural son of the testator, during his life, without impeachment of waste; and from and after the determination of that estate, in trust for such person and persons, and to and for such estates or interests and ends, intents

and purposes as the said Wm. Heap should, in manner therein mentioned, appoint, and, in default of such appointment, in trust for the right heirs of the said Wm. Heap for ever.

The testator died in 1830, leaving the Plaintiff, who was then under age, his heir at law. The term of 1000 years was afterwards merged, the trusts of it having been performed. The Plaintiff attained 23 in 1838; but previously thereto he had married with the consent in writing of Eastwood, who had survived his co-trustee, Brooks.

The bill was filed to compel the specific performance of an agreement between the parties for the sale of part of the estates devised to the Plaintiff. It prayed (amongst other things) that it might be declared that the Plaintiff, upon his attaining 23, became and was entitled under the will to an absolute and indefeasible [593] estate of inheritance in the property agreed to be sold.

The answer objected that the devise in the will was not sufficient to vest in the Plaintiff an absolute estate of inheritance in fee-simple in the premises: for, as he had married with the consent of the surviving trustee of the will, his estate, in case he should die without lawful issue, or such issue should depart this life under the age of 21 years, would be defeated by the limitation or executory devise over in favour of his sisters, and, failing such sisters and their issue, then in favour of Wm. Heap.

Mr. Knight Bruce and Mr. Wilbraham, for the Plaintiff. The testator first devises his estates to the Plaintiff and his heirs, absolutely for ever, if he should attain 23 or should be married with the consent in writing of the trustees: therefore, in either of those events, the Plaintiff takes the fee. The testator then proceeds to give the estates over, in case the Plaintiff should die without attaining 23, *or*, being married with such consent as aforesaid, should die without lawful issue or such issue should die under 21: and the question is whether the word *or*, which precedes the words "being married," must not be read *and*? If it is taken literally, the issue would be excluded if the Plaintiff married, with consent, and died under 23; and he would be placed in a worse situation by marrying with consent than if he had married without consent; for, on attaining 23, he takes the fee although he may have married without consent. It cannot be supposed that the testator intended anything so irrational. All that the testator meant was to postpone the absolute power of disposition [594] until his son attained 23; and, when his son attains that age, the contingency ends, and he takes an absolute interest. *Fairfield v. Morgan* (2 New Rep. 38).

If the Plaintiff does not take a fee-simple absolute under the first words, he takes an estate tail under the words of the gift over: and, therefore, he can acquire the fee if he has not got it already.

Mr. Jacob and Mr. Lewin, for the Defendant. If the words "die without lawful issue" had stood by themselves, then they might have had the effect of giving the Plaintiff an estate tail; but they are followed by the words "or such issue shall depart this life under the age of 21 years;" and, as the latter event is included in the former, the testator must be held to have meant to limit the estates over in the event of the Plaintiff not leaving any issue *living at his death* who should attain 21, that is, to give the Plaintiff an estate in fee, with an executory devise over in that event. *Merest v. James* (1 Brod. & Bing. 484).

It is true that there are many cases in which the word *or* may be read *and*: but that cannot be done in a case like the present, where it would have the effect of making the language of the will less grammatical or less sensible. In which ever way that word is read, it leads to consequences which the testator, if he was a sensible man, could not have intended.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case stands in this situation.

The testator has, in the first instance, given his estates "To the use of my son Thomas Grimshawe, if he shall [595] attain the age of 23 years or shall be married with the consent in writing of the trustees for the time being of this my will, which shall first happen, and to his heirs and assigns absolutely for ever." There he has made, if I may use the expression, two devises in fee-simple by one sentence. He has used the words, "his heirs and assigns for ever," once only; but he has spoken of two contingencies in one sentence. Then the difficulty seems to me to arise from

his having given the estate, absolutely, to his son, in the event of his attaining 23, or in the event of his marrying before that age with the consent of the trustees. He then proceeds to consider, in the first instance, the case of his son not attaining 23, that is, to consider what shall be done in the event of the son not taking at all under the first contingency; considering, therefore, the negative of the case in which he had made the first gift. The second part of the sentence, if it be taken as it stands, would go to shew that the testator was not considering the negative of the second contingency; but that he was considering what should happen in case that contingency should take place (in which he had expressed that his son should have an interest, absolutely), and something additional should happen: and it seems to me a very singular thing that, after having given the estate to his son, in fee absolutely, in the event of his marrying with consent, he should give it over (according to the construction contended for), in the event of his son being married with consent, but dying without leaving lawful issue living at his death.

Now I cannot but think that the Court would rather struggle to make the word *or* be read there as *and*. I admit that there would be some awkwardness in the phrase, but it would certainly be English. It would be an [596] allusion, if I may use the expression, to a double death; because there would be an allusion, to a departing this life without attaining the age of 23, and to being married with consent and dying without leaving issue. But still I think that that construction might be supported.

Then, as to the other construction, that is, taking the words, literally, as they stand. The testator says: "I give, in case my son shall be married with the consent in writing of the trustees for the time being of this my will, all my estates to him, his heirs and assigns absolutely for ever; and, if he died without leaving lawful issue, then over." That would create an estate tail. But it was said that, by using the words that follow, the testator has necessarily shewn that he is speaking of a failure of issue at the death of his son: but I do not think that that necessarily follows. He says: "Or, being married with such consent as aforesaid, shall die without leaving lawful issue, or such issue shall depart this life under the age of 21 years." That does not necessarily shew that he is speaking of a failure of issue at the death of his son. He is speaking of a general failure of issue: and then he alludes to the case of there being issue and their dying under the age of 21, which is a limited portion of the contingency which is expressed, generally, by the preceding words. But it is not by any means necessary that, because he has used words which have very little meaning, therefore the words, "dying without leaving lawful issue," which signify a general failure of issue, must signify a leaving of lawful issue living at his death.

Upon the whole, I cannot but think that, supposing the first construction is not adopted, then the son is tenant in tail and can make a good title.

[597] If the parties wish that I should send the case to law, I will do it.

On the 26th of April 1839 a case was sent, on the application of the Defendant, for the opinion of the Court of Common Pleas.

[597] COSTER v. COSTER. March 1, 13, 16, 1839

[S. C. 8 L. J. Ch. 230.]

Husband and Wife.

A husband having, without sufficient cause, separated from his wife, leaving her unprovided for, three-fourths of a fund in Court, arising from property bequeathed to the wife, was ordered to be settled on her and her issue, generally, and the remaining fourth to be paid to her husband.

A petition was presented by a married lady, one of the parties to the suit, praying that the Accountant-General might be ordered to pay to the Petitioner, for her

maintenance, the dividends of £4560 three and a half per cent. stock and £1834 three per cent. consols, and the sum of £45 cash, standing to the account of the share of the residuary estate of the testatrix in the cause, bequeathed to the Petitioner.

The grounds on which the petition was supported were that the husband had run away with the lady and married her when she was only fourteen years and ten months old; that, after having lived with her for about five years, during which time he treated her with great violence, he deserted her without having made any settlement or provision either for her or for a child he had had by her, and was living in adultery with another woman.

Shortly before the lady's elopement the bill in this cause was prepared for the purpose of making her a ward of Court; but the marriage took place in Guernsey about four days before the bill was filed.

[598] The husband also presented a petition, in which he alleged that he had separated from his wife on account of her improper conduct; and prayed that one moiety of the before-mentioned funds might be transferred to him, and that the other moiety might be settled on his wife and the issue of the marriage.

Mr. Knight Bruce and Mr. Stuart, in support of the wife's petition, cited *Aguilar v. Aguilar* (5 Madd. 414), *Oxenden v. Oxenden* (2 Vern. 493), *Ball v. Coutts* (1 V. & B. 292; see 303), and 1 Roper, Hus. and Wife, Jacob's edit. 277, 278.

Mr. Jacob and Mr. Willcock, in support of the husband's petition, cited *Steinmetz v. Halthin* (1 Glyn & Jam. 64), *Beresford v. Hobson* (1 Madd. 362), *Wright v. Morley* (11 Ves. 12), *Green v. Otte* (1 Sim. & Stu. 250).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Before I decide the question as to whether the whole or a certain portion only of the funds ought to be settled on the wife, I should like to have an opportunity of looking into the cases.

The facts of the case appear to be these: The marriage took place when the young lady was between 14 and 15 years of age. The bill in this suit was then about to be filed, for the purpose of making her a ward of Court; but I cannot, in deciding as to what shall be settled on her, take into consideration that the husband married her, as has been stated, in order to prevent her being made a ward of Court. She was not, in fact, a ward of the Court, and, therefore, the case must be [599] considered as that of a person who was not a ward of Court.

The parties lived together for about five years; and then the husband, owing to some circumstances, the particulars of which are not very fully disclosed, thought proper to abandon his wife. I cannot but suppose that there were some circumstances which were deserving of inquiry, because an inquiry was made; but the result of it was that the husband was satisfied that there was no ground for imputing improper conduct to his wife. He states, however, in one of his affidavits, that circumstances afterwards came to his knowledge which confirmed his opinion of the guilt of his wife. But it is to be observed that he does not mention one of those circumstances. The statement which he makes is vague and general, incapable, therefore, of being met by any counter statement.

In the letter which he wrote to his wife, after the inquiry which I before alluded to had taken place, he says that, after the fullest investigation, he thinks it but an act of justice to declare that he attributes the calumnies which had been circulated respecting her to the invention of some mischievous and malicious person in the neighbourhood; and adds, "I am aware that circumstances, not under our control, oblige us to live apart;" but what those circumstances were, it is impossible to conjecture. There is nothing whatever to explain them. But when we see how he conducted himself immediately after he had freed himself from his wife, that he immediately took another woman to cohabit with him, and after living with her for some time sent her back to her parents, and that he is now living in adultery with another woman, I cannot but [600] think that there were some other motives than those with respect to which he wrote that letter, which induced him to separate himself from his wife.

With respect to his violent behaviour, there is, certainly, some variation of testimony. Certain acts of violence are stated; but it is said that they were owing to the sudden irritation produced on his mind by the communication made to him of the circumstances to which the letter relates. Now he has produced no fewer than eleven affidavits relating to this part of the case, some made by members of his family,

and others by persons who were only acquainted with him; and it is very remarkable that, in those affidavits which are made by the former, no allusion is made to the fact of his having a mild and easy temper and a peaceable demeanour. Those who, necessarily, must have known him best, made no allusion to the subject. It is his acquaintance only who speak of his mild and amiable disposition.

[His Honor here observed upon an admission which the husband had made in one of his letters, which confirmed the statements as to the violence of his temper and disposition, and then continued as follows:—]

It is manifest that, very soon after the separation from his wife, he lived with one woman and then with another, and that his conduct has been of the foulest kind; and, where I find these marks of character, I must be very strongly disposed to think that the separation, on his part, was not well grounded, and that I shall have to consider this as a case in which the husband has separated himself from his wife, not on any clear or assignable grounds, but has so separated himself and has so conducted himself since the separation, [601] that it is almost impossible to suppose that they can ever live together again.

Therefore the question is whether, under such circumstances, the husband having made no provision for his wife, it will be right for this Court, in the first place, to refer it to the Master generally, or to make some specific declaration now as to what shall be done with the whole income or the whole capital. And I cannot but think that it would be most convenient to all parties (considering the length of these affidavits and the expense of them) that the Court should, in the first instance, declare what should be done, unless there is any reason to suppose that there are circumstances which may be developed before the Master which would cause some other line of proceeding to be adopted by the Court than that which would appear right to be adopted on the evidence now before the Court.

I shall, however, take some time for consideration before I declare what will be my final decision on these petitions.

March 16. THE VICE-CHANCELLOR. In this case the husband has presented a petition, in effect, asking for one moiety of the fund for himself; and he asks that there should be a settlement made of the other moiety on his wife and the issue of the marriage. The wife's petition asks, in effect, to have the whole income of the funds in Court standing to her account paid to her; and she submits, if the Court thinks it right, that there should also be a reference to approve of a settlement: and the real question is what, under the circumstances of the case, the Court ought to do.

[602] I apprehend, from the cases on the subject, that the Court has a discretion in cases like the present. But, at the same time, I am of opinion that that proposition which Sir Thomas Plumer laid down in the case of *Beresford v. Hobson* is true, with a slight limitation. That learned Judge says: "In no case has the whole of the property been settled on the wife and children." And in a subsequent part of his judgment he says: "In no case has the Court given the whole to the wife." Now it is not exactly true that in no case that has been done; for certainly it was done in the case of *Jacobs v. Amyatt* (1 Madd. 376, note); with respect to which case, however, Sir T. Plumer infers, though it does not appear on the face of the report itself, that the order that was there made was an order by consent. It certainly was a peculiar case; and the order might have been made, not strictly with consent, but without opposition on the part of the assignees; and, with that exception, I take it to be generally true that the Court never gives the whole of the property to the wife in a case where the husband has deserted the wife, and no means of subsistence for her can be obtained from him. The Court has, when there has not been a question before it as to the settlement of the wife's chose in action, certainly ordered the whole of the income of the fund to be paid to the wife till further order; and many such orders have been made from time to time; and I have made some in the course of this very year; but in this case I have both parties applying, and I do not think that the discretion, which it is clear from the cases the Court has, would be a discretion much worth having if, in fact, in every case, the discretion was to be exercised by giving a [603] moiety to the husband and a moiety to the wife: and it does appear, from what has actually been done, that the system (which is pretty general, I admit) of giving a moiety to the husband and placing the other moiety in settlement for the

wife and children has not always been pursued; because, in the case of *Wright v. Morley* (which is alluded to by Sir T. Plumer, and in which he states what Sir William Grant did), it appears, on looking at the case, that what Sir W. Grant is stated to have done was not exactly the thing that he did; but he would have done it, provided only a certain fact had been made out in evidence. He says, in page 23, "there is no difficulty in giving her the remainder for her separate use during the absence of the husband:" and in a prior part of the case, in page 21, he says, "I should think they (*i.e.*, the assignees) dealt fairly and even favourably towards her if, out of £260, the produce of this fund, they allowed her to retain £160." The husband had previously assigned £100; and what, therefore, was that but giving to the wife eight-thirteenths of the whole fund, in a case where the husband had previously made an assignment, for valuable consideration, of five-thirteenths?

Now, in this case, I do not wish to repeat the circumstances which are contained in the affidavits; but though there has been certainly something of misconduct on the part of the wife, yet I cannot but think that this case is a case to which the observation, made by Lord Eldon in the case of *Ball v. Coutts* (1 Ves. & Bea. 304), is applicable. His Lordship says: "As to the conduct of this lady herself, it would require much more attention if it was not to be urged, in her favour, that the trans-[604]-actions which took place in the circumstances of her marriage might have led her into that misconduct which is now made the subject of complaint." I mean that the spirit of the observation applies, and not the circumstances to which Lord Eldon alludes; because, in this case, we have these circumstances unquestioned, namely, that the husband obtained the hand of his wife under circumstances which certainly shew that he had contributed to weaken the moral principle in her before marriage: and, if he had not induced his wife to desert her mother and go to Guernsey, there is reason to suppose the marriage would not have taken place: and I do not think that the consent which the mother gave, on application made by him to her for that purpose, can at all be considered as weakening the effect of the general observation; because the daughter was placed in such a situation that, morally speaking, the mother had no choice; and, unless she had consented to the marriage, it is pretty obvious that a much worse fate would have awaited her daughter. I think, therefore, that in a case where the marriage begins under such inauspicious circumstances with regard to the conduct of the husband, less weight ought to be attributed to anything like subsequent levity or indiscretion in the wife, or something perhaps deserving a worse name, though it must be observed that there is no evidence in this case to shew that anything more than levity or indiscretion did take place on the part of the wife.

I cannot but think that, having a due regard to the general proposition that the Court never gives the whole to the wife, and having a due regard to the exercise of the discretion which this Court unquestionably has, it will be right to make this order now: and I say to make it now, because I really think that, after the very ample [605] discussion which the case has met with, both in statement of circumstances and affidavits and a lengthened discussion at the Bar, there is no reason to hope that a better conclusion would be arrived at, by sending the matter to the Master, than the Court can now make for itself.

I think, therefore, the right order to make will be that the husband should have one-fourth of the whole fund paid to him, and he must pay the costs of his petition; and the wife shall have the remaining three-fourths settled on her and her issue, generally; but, out of those three-fourths, the costs of her petition and her costs to be incurred by the reference as to the settlement must be paid: and it appears to me that it would be most convenient to make one order on each petition: which will prevent any question as to who shall have the carriage of the order.

[606] MILES v. THOMAS. Feb. 26, 27, 1839.

Demurrer. Joint Stock Company. Partnership. Jurisdiction.

After a demurrer had been filed, two of the Plaintiffs procured their names to be struck out of the bill. Held that, as that act was not done by the remaining Plaintiffs, the bill must be considered, on the argument of the demurrer, as if the names of the two remained on the record.

Certain persons entered into an agreement, in writing, for forming themselves into a joint stock company, to be called the Medway Commercial Shipping Company: and, by one of their rules, the affairs and concerns of the company were to be under the management of a committee; but no time was fixed for the duration of the company. Four of the members of the company took upon themselves the exclusive management of a ship belonging to the company, and, being about to send her on a voyage which some of the members disapproved of, those members filed a bill, praying that the four might be restrained from interfering with the ship, or causing her to sail on the intended voyage, and from laying in or agreeing for any cargo or freight, otherwise than under the direction of the committee, and that they might deliver up to the committee all books, &c., in their possession, belonging to the ship or to the company.

A demurrer for want of equity was allowed.

Semle, that the Court will interfere between co-partners to prevent the destruction of the partnership property, although a dissolution of the partnership may not be prayed.

By an agreement, dated in April 1838, it was declared and agreed that the parties thereto should, from thenceforth, be and continue bound to each other, in co-partnership, under the title or denomination of the Medway Commercial Company, subject to the rules and regulations thereafter declared; one of which was that the affairs of the company should be managed and conducted by a committee consisting of five trustees and 15 shareholders. But no time was fixed for the duration of the partnership.

The company built a ship, in the port of Rochester, for the purpose of trading for coals, grain, timber and [607] other articles as might be deemed advantageous to the company: and the committee appointed E. Ridge, one of the shareholders, the captain of the ship.

The bill was filed by nine of the shareholders (some of whom were members of the committee) on behalf of themselves and all the other shareholders (except the Defendants *qu.*) against C. Thomas, T. Scrimes and T. Beaumont, three of the five shareholders in whose names the ship was registered (see 3 & 4 Will. 4, c. 55, s. 33), and against E. Ridge, the captain, alleging that, after the ship had made six voyages under the direction of the committee, the Defendants, in violation of the rules and regulations of the company, took upon themselves the exclusive management and control of it: that the ship had recently returned with a cargo of coals from a voyage performed under the orders of the Defendants; and they threatened and intended, as soon as she should have discharged her cargo, to send her in ballast on another voyage, but where or to what port, or for what cargo she was to sail, or by whom such cargo was to be laid in, or what freight she was to earn, the Defendants refused to divulge: that the company had sustained a loss of £77, 10s. on the last voyage of the ship, and, if she were allowed to sail again under the direction of the Defendants, the injury done to the company would be irreparable. The bill prayed that the Defendants Thomas, Scrimes and Beaumont might be restrained from interfering or intermeddling with the ship or her intended cargo, and from taking any measures for the purpose of causing her to sail from the port of Rochester, or for laying in or contracting or agreeing for any cargo or freight otherwise than under the direction of the com-[608]-mittee; and that the Defendant Ridge might also be restrained from sailing from the said port on board the ship, or doing any act or entering into any agreement or arrangement respecting her or her cargo, otherwise than under the

direction of the committee; and that the Defendants might be ordered to deliver up to the committee all books and papers in their hands belonging to the ship and to the company.

The Defendant Ridge demurred to the bill for want of equity.

After the demurrer was filed, two of the Plaintiffs procured their names to be struck out of the bill. On the demurrer coming on to be argued, the Vice-Chancellor ruled that as the striking out of the names of the two Plaintiffs was not the act of the remaining seven, they ought not to be prejudiced thereby; but that on the argument of the demurrer the bill must be considered as if the names of the two still remained on the record.

Mr. Jacob, Mr. Stuart and Mr. Palmer appeared in support of the demurrer.

One of the grounds on which they relied was that the bill did not pray for a dissolution of the partnership, and, therefore, it would be contrary to the established practice of the Court to grant any relief.

Mr. Knight Bruce and Mr. Stinton, in support of the bill, contended that the Court would interfere between co-partners, in order to preserve the property of the partnership, although a dissolution was not prayed.

THE VICE-CHANCELLOR [Sir L. Shadwell] having observed in the [609] course of the argument that the company was a mere voluntary society: and, as no time was fixed for the continuance of it, it was dissoluble at the pleasure of any of the members, delivered judgment as follows:—

I am of opinion that the Court ought to interfere between co-partners, wherever the act complained of is one that tends to the destruction of the partnership property, notwithstanding a dissolution of the partnership may not be prayed. In this case, however, I am not asked to interfere because the ship, which is the subject of dispute, is in danger of being lost, but because she is about to be sent on a voyage which some of the members of the company disapprove. So that, in effect, I am asked to enforce the evanescent authority of a certain number of persons, which authority ceased as soon as any one of the members chose to rebel. That act was in itself a dissolution; and, *rebus sic stantibus*, I have no sort of jurisdiction to interfere.

The demurrer must, therefore, be allowed.

[610] THE CORPORATION OF THE SONS OF THE CLERGY v. MOSE. March 7, 1839.

Attorney-General. Parties. Charity.

Testatrix gave £6000 stock to the Governors of the Charity for the Relief of Poor Widows and Children of Clergymen, the dividends to be from time to time applied for the benefit of poor widows and maiden daughters of clergymen of the Church of England who should have attained the age of 30 years, in such shares and proportions as the governors of the said charity should in their discretion think fit. A bill claiming the legacy was filed against the executors by "The Governors of the Corporation of the Society for the Relief of Poor Widows and Children of Clergymen, commonly called The Corporation of the Sons of the Clergy." Held, that the Attorney-General was a necessary party to the suit, the legacy not being given upon trusts corresponding with the trusts upon which the Corporation held their general property.

The Plaintiffs were described in the bill as "The Governors of the Corporation of the Society for the Relief of Poor Widows and Children of Clergymen, commonly called The Corporation of the Sons of the Clergy," and they sued on behalf of themselves and all other members of the Corporation. The bill stated that Hannah Phelp, by her will, dated the 8th of June 1821, gave £6000 consols and also her residuary personal estate to the Defendants Mose and Holmes, in trust for her three sisters during their lives, and, after the death of the survivor of them, to the Governors of the Charity for the Relief of Poor Widows and Children of Clergymen, to be continued in the said funds, and the dividends to be from time to time applied for the benefit of *poor widows and maiden daughters of clergymen of the Church of England who should have*

attained the age of 30 years, in such shares and proportions as the governors of the said charity should in their discretion think fit: that the testatrix died in the year 1822, and that two of her sisters had since died: that, subject to the life-estate therein of the Defendant Charlotte Williams, the testatrix's surviving sister, the Plaintiffs were entitled absolutely to the £6000 consols, and [611] the sums of stock in which the testatrix's residuary estate had been invested: that Mose and Holmes had on several occasions stated to the Plaintiffs and their agents that they did not intend to transfer the sums of stock to the Plaintiffs, and that they threatened to transfer the same to persons not named in the will, and not entitled thereto: that they pretended that the Plaintiffs were not the persons intended in the will under the description of "The Governors of the Charity for the Relief of Poor Widows and Children of Clergymen," and that some other society or some other persons were intended by the testatrix under that description: that the Plaintiffs were the governors of a charity or society for the relief of poor widows and children of clergymen, and that that society was incorporated under the title and description of "The Corporation for the Relief of Poor Widows and Children of Clergymen, and was commonly called The Corporation of the Sons of the Clergy;" and that the testatrix, under the title and description of "The Governors of the Charity for the Relief of Poor Widows and Children of Clergymen," intended and expressly pointed out the Plaintiffs as the persons to take the benefit of the bequest of the £6000 stock and of her residuary estate, after the decease of the survivor of her three sisters; and that no other corporation or society other than that of which the Plaintiffs were the governors in any manner answered to or corresponded with the title or description of the society mentioned and described in the will; and that, in fact, no other corporation or society had ever made application to the Defendants Mose and Holmes, or claimed any benefit under the will.

The bill prayed that the usual accounts might be taken of the testatrix's estate, funeral and testamentary [612] expenses, debts and legacies, and that the clear residue of the personal estate might be ascertained, and that the Plaintiffs might be declared to be entitled, absolutely, on the decease of the Defendant Charlotte Williams, to the £6000 stock and other funds in which the residuary estate had been invested, and that those funds might be transferred into the name of the Accountant-General, and secured for the benefit of the Plaintiffs.

The Defendant, Charlotte Williams, demurred to the bill, because the Attorney-General was not made a party to it, and on other grounds.

Mr. Wigram and Mr. Bird, in support of the demurrer, said that the Plaintiffs had not stated facts from which the Court could infer that they were, necessarily, the society to whom the £6000 stock and the residue were bequeathed: that it was not enough to say that they were the society who might possibly be entitled to the benefit of the bequests; that, in fact, there were other charities founded for the benefit of widows and children of clergymen, and who also might claim the benefit of the bequests: that the charity created by the will was intended for the benefit of the daughters, and not the sons of clergymen: and that, the question being which of several societies was entitled to the property in question, the Attorney-General was a necessary party; and that he was also a necessary party in order to see the accounts prayed by the bill properly taken.

Mr. Knight Bruce and Mr. N. Wetherell contended that there was no necessity for making the Attorney-General a party where, as in the present case, the property was given to the officers of a charity, and was to be applied [613] by them for the benefit of a certain class of persons, as the officers of the charity should think fit.

Mr. Wigram, in reply, referred to *Wellbeloved v. Jones* (1 Sim. & Stu. 40).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I confess it appears to me that the Attorney-General is a necessary party.

I do not understand that the testatrix meant to give the £6000 stock and her residuary estate to the Corporation of the Sons of the Clergy, so as to form part of the general funds of that corporation. There is nothing to identify the trusts of the will with the trusts upon which the general funds of that corporation are held.

The demurrer must, therefore, be allowed; but I shall, of course, give the Plaintiffs leave to amend their bill by making the Attorney-General a party to it.

[614] *KEBEL v. PHILPOT. March 11, 1839.**Practice. Trial. Issue.*

Where a decree directs an issue to be tried at the next Assizes, an application to postpone the trial on account of the illness of a material witness, must be made to the Court which directed the trial.

The decree in this cause had directed an issue to be tried at the next Spring Assizes for the county of Kent.

Mr. Barber now moved to postpone the trial on account of the illness of a material witness. He said that the decree peremptorily directed his client to try the issue at the next Spring Assizes.

Mr. Jacob appeared in opposition to the motion.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As the decree expressly directs the issue to be tried at the next Assizes, I do not see how it could be tried, under the authority of those words, otherwise than at the next Assizes. As the decree is in that form, this Court must interfere.

Motion granted.

[615] *RISHTON v. COBB. March 19, April 16, 1839.*

[Affirmed, 5 My. & Cr. 145 ; 41 E. R. 326 (with note).]

Will. Construction.

Testator gave £2000 to trustees, in trust to invest the same in Government securities, and to empower Lady C., the widow of Sir N. C., to receive the dividends so long as she should continue single and unmarried ; but, in case she should sell, assign, dispose of or anticipate such dividends, the testator revoked the bequest, and directed that the £2000 should become part of the residue of his estate, which he gave to J. C. At the date of the will and at the testator's death, Lady C. was married to one R.; but he had deserted her and gone abroad ; and she always called herself Lady C., and represented herself to be a single woman and the widow of Sir N. C.; and the testator and others always considered her so to be. Held, that she and her husband in her right were absolutely entitled to the £2000.

Thomas Cobb made his will, dated the 1st of March 1834, and which was partly as follows :—"I give and bequeath to William Cobb, William Edmunds and Charles Cook, the sum of £2000 sterling, upon trust to invest the same in Government securities, upon trust to authorize and empower Lady Fanny Campbell, *widow of the late Major-General Sir Neil Campbell*, to receive the dividends as they become due thereon, so long as she shall continue single and unmarried ; but, in case she sells, assigns, disposes of or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and thereupon do will and direct that the said sum of £2000 shall become part of the residue of my estate. I also give and bequeath to the said Lady Fanny Campbell the sum of £500 sterling, to be paid to her within two months after my decease ; but in case there is any debt then due from her on a warrant of attorney lately given to Messrs. Rice & Goodyer, I direct my executors, out of the legacy, to pay such debt, and to pay the residue of such £500 to Lady Campbell only : I also give her back the diamond ring she gave me, and request her to have the diamond reset in a mourning ring, and wear it for my sake." The testator gave the residue of his personal estate and effects to J. M. Cobb and William Cobb, and appointed them and William Edmunds his executors.

[616] The testator died in February 1836. The Plaintiff was the person mentioned

in the will as Lady Fanny Campbell, widow of the late Major-General Sir Neil Campbell: but, on the 20th of October 1829, which was about two years after the death of Sir Neil Campbell, she married the Defendant Henry Rishton, who, shortly after, deserted her and went to reside in Africa. The Plaintiff, however, concealed her second marriage, and always called herself Lady Campbell, and represented herself to be a single woman and the widow of Sir Neil Campbell; and she was considered so to be by the testator (who had repeatedly offered her marriage), and by all other persons who had any acquaintance or dealings with her.

The bill was filed by the Plaintiff by her next friend, against the executors and trustees of the will, and against her husband: and, after stating that, at the testator's death, nothing was due on the warrant of attorney; and that the Plaintiff had requested the executors to invest the legacies of £2000 and £500, and to transfer the funds to some proper person or persons, in trust for her separate use, or to pay to her or to authorize her to receive the dividends thereof, or otherwise to carry the will into effect, it prayed that the usual accounts might be taken of the testator's personal estate, funeral and testamentary expenses, debts and legacies; that the personal estate might be applied in a due course of administration; that the rights and interests of the Plaintiff in and to the legacies of £2000 and £500 might be ascertained and declared, and that the same might be raised, applied and secured according to such rights and interests; and, if necessary, that a sufficient settlement might be made thereof, regard being had to the facts and circumstances aforesaid.

[617] The executors, in their answer, said that they had been advised that inasmuch as the testator was, as they believed, induced to make the bequests in the Plaintiff's favour, under the impression and belief from her representations and conduct, that she was the widow of Sir Neil Campbell, and in ignorance that she was the wife of the Defendant Rishton, and as it appeared that the Plaintiff did not, at the date of the will or at the testator's death, fill the character which she assumed and led the testator to believe she filled, she was not nor was her husband entitled to claim the benefit of the bequests: that, inasmuch as the dividends to arise from the investment of the £2000 were payable to the Plaintiff so long only as she continued single and unmarried, and she was then under coverture, she was not, under any circumstances, entitled to the said dividends; but that the £2000 had sunk into the testator's residuary personal estate.

Mr. Wakefield and Mr. Randall, for the Plaintiff, said that, as the will contained an unlimited gift of the dividends of the £2000 to the Plaintiff, she was entitled to the capital absolutely; and, consequently, the words which were added for the purpose of preventing her from alienating that sum, were repugnant and void: that, as the £2000 was not given over in the event of the Plaintiff marrying again, the words "so long as she shall continue single and unmarried," were used *in terrorem* merely. *Bird v. Hunsdon* (2 Swanst. 342); *Marples v. Bainbridge* (1 Madd. 590); *Elton v. Elton* (1 Wils. 159); *Rhenish v. Martin* (*Ibid.* 130); *Bellasis v. Ermine* (1 Ca. Ch. 22); *Brown v. Peck* (1 Eden, 140); *Poor v. Mial* (Madd. & Geld. 32).

[618] Mr. Rudall, for the Defendants the executors. It is plain from the evidence, and even from the will itself, that the testator believed the Plaintiff to be a single woman; and the bequest is made to her as filling that character. The testator says, "so long as she shall continue single and unmarried." The witnesses state that he had a great affection for her, and made her repeated offers of marriage, which she declined, not because she was a married woman, but because, as she alleged, the testator was of a violent and overbearing disposition. It is plain, therefore, that if he had known that she was married he would not have given her anything. [THE VICE-CHANCELLOR. It is not the law that, where a testator makes a gift and assigns a reason for it, the gift fails if the reason does not exist. It does not appear that there was any fraudulent assumption of character on the part of the Plaintiff.] Whether she committed a fraud or not, she is not entitled, under the language of the will, to the provision intended for her.

This case is distinguishable from those that have been cited; for there is no gift of the £2000 to the Plaintiff in the first instance. The first gift is to the trustees; and they are to pay the dividends to her so long as she shall continue single and unmarried. She was married both at the date of the will and at the death of the testator, and,

consequently, the trust never has and never can come into operation. *Giles v. Giles* (1 Keen, 685; see 692).

THE VICE-CHANCELLOR. The question that has been argued in this case is one of some difficulty; and I shall take time to consider it.

[619] April 16. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case it is plain that the Plaintiff must take the legacy of £500, deducting from it such sums as would legally have been due on the warrant of attorney, provided she had been *sui juris*, and not a married woman when she gave the warrant of attorney.

Then, with respect to the sum of £2000, the case stands in this manner. I must first remark that no case of fraudulent representation has been established against the Plaintiff; but it is clear on the evidence that the testator supposed that she was not a married lady at the time when he made his will: and it seems to me that the right way is to construe the will on that supposition. Then the bequest is this: "I also give and bequeath to the said Wm. Cobb, Wm. Edmunds and Chas. Cook, the further sum of £2000 sterling, upon trust to invest the same in Government securities, upon trust to authorize and empower Lady Fanny Campbell, widow of the late Major-General Sir Neil Campbell, to receive the dividends as they become due thereon, so long as she shall continue single and unmarried. But, in case she sells, assigns, disposes of or anticipates such dividends, I do hereby revoke the bequest so made for her benefit, and, thereupon, do will and direct that the said sum of £2000 shall become part of the residue of my estate."

Now that, as far as it goes, is a mere attempt to make a condition in restraint of marriage; and I conceive that it is void. I conceive, also, that, on the true construction of this will, the gift of the £2000 is not a gift to this lady's separate use; but it is a gift to her simply as a woman supposed not to be married; and, therefore, the testator supposed that she would have power to sell, assign, dispose of or anticipate the sub-[620]-ject of the gift. I must, therefore, take it that the Plaintiff and her husband in her right are entitled to the legacy of £2000. The consequence is that it must be brought into Court and laid out: and, the situation of the legatee being that of a married woman whose husband has deserted her, the Court may direct the dividends to be paid to her until further order. Any application which may be made for dealing with the capital of the fund will be disposed of according to the usual course of the Court.(1)

Declare that the Plaintiff is absolutely entitled to the legacies of £500 and £2000: and the Defendants, the executors, having admitted assets, let them pay those sums into the bank in the name of the Accountant-General, in trust in this cause; and let the same, when so paid in, be invested by the Accountant-General, in three per cent. annuities, to be carried to an account intituled, "The Plaintiff's Account:" and let the Accountant-General pay the dividends, as the same shall be received, on such three per cent. annuities, to the Plaintiff until the further order of the Court: refer it to the Master to compute interest at £4 per cent. on the £500, from the end of two months after the testator's death, and on the £2000, from the end of one year after the testator's death until those sums shall be paid into the bank: let the Master inquire whether there is any debt due from the Plaintiff on the warrant of attorney in the will of the testator mentioned: and let him deduct what (if anything) he shall find due thereon, from the interest so to be computed as aforesaid; and let the Defendants, the executors, pay the residue of such interest to the Plaintiff. The Plaintiff's costs to be taxed and paid by the executors. Liberty to apply.

(1) Affirmed by the Lord Chancellor. [5 My. & Cr. 145.]

[621] STONE v. THE COMMERCIAL RAILWAY COMPANY. *March 20, 1839.*

[See S. C. 4 My. & Cr. 122 ; 41 E. R. 48 (with note).]

Railway Act. Construction. Yard.

By a Railway Act it was enacted that, if the railway company should be desirous of purchasing part of any house, garden, *yard*, warehouse, building or manufactory, and the owner should signify his inclination to sell the whole of such house, garden, *yard*, &c., he should not be compelled to sell to the company part only or less than the whole of such house, garden, *yard*, &c. Held, that a *yard* for bonding foreign timber, in which there were a deal shed and two buildings containing saw-pits, was not a *yard* within the meaning of the enactment.

An Act was passed in the 6th & 7th Will. 4, intituled, "An Act for Making a Railway from the Minories to Blackwall, with Branches, to be called The Commercial Railway."

The Plaintiffs were the proprietors and occupiers of an extensive timber-yard, situate in the parish of St. Anne, Limehouse, in the county of Middlesex. The Defendants gave the Plaintiffs notice of their intention to take a part of the *yard* for the purposes of their Act. The *yard* was used for bonding foreign timber and wood, and was surrounded and inclosed, partly by high and substantial brick walls, partly by the back of a shed situate within the *yard*, and partly by a high wooden fence: and, within the *yard*, there were several deal sheds for stowing timber, and two buildings containing saw-pits.

By the 50th section of the Act it was enacted that, if any person or corporation by the Act authorized to sell and convey any lands should be applied to, by or on behalf of the company, to treat for, sell, dispose of or convey any part of any house, garden, *yard*, warehouse, building or manufactory in the actual occupation of one person or several persons jointly, and should signify his inclination or desire to treat for, sell, dispose of and convey the whole of such house, garden, *yard*, warehouse, building or manufactory, and, if it should happen that the said company should not think proper or be willing to purchase the whole of such house, garden, *yard*, warehouse, building or manufactory, then [622] and in every such case, nothing in the said Act contained should extend or be construed to extend to compel such person or corporation interested therein to treat for, sell, dispose of or convey, or to authorize the said company to take or use part only or less than the whole of such house, garden, *yard*, warehouse, building or manufactory.

The Defendants having given the Plaintiffs notice of their intention to take a certain part only of the *yard*, the bill was filed, praying, amongst other things, that it might be declared that, according to the true construction of the Act, the Plaintiffs were not bound or compellable to treat for, sell, dispose of or convey, and that the Defendants were not authorized to take or use, under the provisions of the Act, part only or less than the whole of the said timber or bonding *yard*; and, if necessary, that an action or issue, or a case might be brought, or directed to a Court of law, for the purpose of ascertaining the true construction of the Act; and that the Defendants, their agents, servants and workmen might be restrained from entering upon or taking possession of the *yard* or any part thereof, and from cutting up and removing the soil thereof, and from abating and destroying any part of the walls of the *yard*, and from committing or doing any other waste, spoil or damage into or upon the same, or any part thereof.

Upon the hearing of a motion for the injunction prayed by the bill, one question was whether the *yard*, of which the Plaintiffs were the proprietors and occupiers, was a *yard* within the meaning of the 50th section of the Act.

Mr. Knight Bruce, Mr. Wigram and Mr. Walker, for the Plaintiffs, in support of the motion.

[623] Mr. Jacob, Mr. G. Richards and Mr. Bigg, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The important question in this case

is that which relates to the yard, that is, whether the Defendants, under the powers of their Act of Parliament, can compel the Plaintiffs to sell to them that portion only of the yard which is described in their notice, or whether the Plaintiffs are not at liberty to say that they will not sell, to the Defendants, less than the whole of the yard.

The true way of construing this Act of Parliament is to look at the different sections in which the word 'yard' is used, either alone or in connexion with any other word which is meant to give it a particular qualification, and then to see whether it is not pretty plain, on the face of the Act, that the word must have different significations in different parts of the Act.

The second section says, "that, where the word 'railway' is used, the same shall be understood to include the branch railways, yards, stations, wharfs, and other works hereby authorized to be made." There, it is observable that the Legislature is speaking prospectively of non-existing things; and a yard might be such a yard as the company might choose to construct, of any description whatever; and there is nothing there to restrain the character of the yard except that opinion which the company's engineers might entertain about the usefulness or the mode of making any particular yard. The eighth section is the first section that alludes to the schedule, which describes the property through which the company were authorized to make their railway: [624] and, when you look at the schedule, you find not only a very great number of instances in which the word "yard" is used, but you find, besides that word, the following expressions, namely, timber yard, stone yard, chapel yard, livery-stable yard, open yard, feeding yard for cattle, cattle yard, dung yard, yard to workshops, yard or vacant ground, covered yard, mill yard. I cannot but think that the persons who framed this schedule, must have meant to make a distinction between the term "yard" used *simpliciter*, and the term "yard" adjoined as it is to certain other words which are found in the schedule. Then, in the ninth section, you find that, for the purposes and subject to the provisions of the Act, the company are empowered to enter into and upon the land of any person whatsoever, and to survey and take levels of the same, and to set out and appropriate for the purposes of the Act such parts thereof as they are by the Act empowered to take or use; and, in or upon such lands or any lands adjoining thereto, not being houses, buildings, yards or gardens, to bore, dig, cut, embank and sough, and to remove or lay, and also to use, work and manufacture any earth, stone, rubbish, trees, gravel or sand, or any other materials or things which may be dug or obtained therein or otherwise in the execution of any of the powers of the Act, and which may be proper or necessary for making, maintaining, altering, repairing or using the railway and other works by the Act authorized, or which may obstruct the making, maintaining, altering, repairing or using the same respectively, according to the true intent and meaning of the Act. Now, in my opinion, the word "yards," accompanied, as it there is, with the terms "houses, buildings and gardens," has a reference to houses and buildings. By that section the company are not empowered to enter upon lands generally, but [625] only upon those lands which are not houses, buildings, yards or gardens; and it seems to me that the Legislature meant to pay that respect to the houses and buildings of Her Majesty's subjects, which the law of this country always does pay to the inhabited buildings of man. Then the 43d sect. recites that, in making and executing the railway and the several other works authorised by the Act, it might be necessary for the company, their agents and workmen, to enter upon and take temporary possession of some parts of the lands, not being houses, buildings, yards or gardens: and it proceeds to direct that there shall be compensation made for that temporary damage which may be done under the 9th section. It is evident, therefore, that, where the Legislature speaks of lands, it has, as a matter of caution, introduced parenthetically the same expression, "not being houses, buildings, yards or gardens," as it had introduced in the 9th sect.: because, if those words had not been introduced, it might have been said that there was a variance between the two sections, and that the true effect of both together was to allow the company to do temporary damage on lands generally; which clearly was not the meaning of the Legislature. It seems to me, therefore, that, whatever is the meaning of the word "yard" in the 9th sect., the same meaning must be attributed to it in the 43d sect. Then the 45th section enacts: "That nothing

herein contained shall authorize the said company, or any person acting under their authority, to take, injure or damage, for the purposes of this Act, any house or other building which was erected or built on or before the 30th of November 1835, or any ground which was then set apart and used as and for a garden, orchard, yard, park, paddock, plantation, planted walk or avenue to a house, or any inclosed ground planted as [626] an ornament or shelter to a house, or planted and set apart as a nursery for trees, other than and except such as are specified in the schedule to this Act annexed, without the consent in writing of the owner or occupier thereof." There also the term "yard" must be taken with reference to a house; because all the other things which are mentioned in that section have reference to a house, except a nursery for trees, which is a thing of a very precise and determined character, and is so described in the Act as that there can be no mistake about it; nor can there be any doubt as to the reason why the Legislature thought fit to accept it, namely, because of its value, and of the great injury that would be done by making the railway through it. I do not, however, think that that section very materially helps us in deciding the meaning of the word "yard" as it is found in the 50th section.

That 50th section enacts: "That if any person by the Act authorised to sell and convey any lands, shall be applied to, by or on behalf of the said company, to treat for, sell, dispose of, or convey any part of any house, garden, yard, warehouse, building or manufactory, in the actual occupation of one person or of several persons jointly, and shall, by notice in writing, to be left with the secretary or clerk of the said company, signify his inclination or desire to treat for, sell, dispose of and convey the whole of such house, garden, yard, warehouse, building or manufactory, and if it shall happen that the said company shall not think proper or be willing to purchase the whole of such house, garden, yard, warehouse, building or manufactory, then and in every such case, nothing in this Act contained shall extend, or be construed to extend to compel such person to treat for, sell, dispose of or convey, or to authorize [627] the said company to take or use part only, or less than the whole of such house, garden, yard, warehouse, building or manufactory."

Now the question is, what does the word "yard" there mean? In the first place, with what words is it connected? The words "house and garden," come before it; and the words "warehouse, building or manufactory," come after it: and, in my opinion, the mere collocation of the words does shew that the terms, "yard" and "garden," are to be taken in connexion with a house. The Legislature must be presumed to preserve a unity of idea: but that unity of idea would be broken, if you, first of all, were to take the house, and next take a garden and a yard as disconnected from a house, and then return again to the original idea with a modification of it, namely a warehouse, a building, or a manufactory: and I cannot but think that the mere position of the words here does shew that the garden and the yard were intended to be taken in connexion with the house.

These Acts of Parliament are drawn by persons who are conversant with the law; and it is not immaterial to consider what is the notion attached by law to a house. Lord Coke, in his 1st Institute, 5 b., says: "By the grant of a messuage or house, *messuagium*, the orchard, garden and curtilage (that is the yard) do pass; and so an acre or more may pass by the name of a house." And it is remarkable that where Sheppard's Touchstone gives an account of the words which are used in a fine and the order in which the words so used are to be placed, it mentions the messuage, the toft, the mill, the dove-house and then comes the garden; and if you look into Wilson on Fines, you will see that for [628] about 100 pages there are instances given of fines; and I think that there is but one (which seems to have been a fine of a very small property) in which the word "curtilage" is mentioned; although in all of them I believe messuages are mentioned without express mention of the curtilage. The word messuage would comprehend the house and all that belonged to it. The toft, in the law, signifies the site of a messuage. Then follows the dove-house, and next the garden; and though the garden is expressly named in a fine, yet Lord Coke tells us that, by the term "messuage," the garden will pass without any express mention of it.

It seems to me, therefore, that when the Legislature in this Act of Parliament used the word "house" it intended it to be taken in its proper, legal signification;

but, for the purpose of excluding any doubt upon that subject, it added the words "garden and yard." And it appears to me to be perfectly plain that the Legislature, when it so added the word "yard," did not mean that which may be in some sense a yard, but that which, in a precise sense, is a yard, namely, that which is connected with a message, and capable of passing under the word "message."

The framers of the schedule, too, have repeatedly introduced the word "yard." If they had meant that everything which comes within the description of a yard should be included in the general term "yard," what was the use of annexing the words of qualification or description to which I have before adverted? It would have been quite enough to have called the yard which any particular individual might have by the general name of a yard, without prefixing any qualifying term, or entering into the lengthened description of "feeding yard for cattle."

[629] My opinion is, upon looking at the whole of this Act, that this extensive piece of ground, which is in no way connected with a house or building (any other-wise than as a deal shed may be called a building, which, for the present purpose, I think it cannot), or with a warehouse or a manufactory, cannot be said to be a yard within the meaning of the 50th section of this Act of Parliament: and I therefore think that the company lawfully might take possession under the Act of part of the yard without being bound to take the whole of it: and, consequently, I shall refuse the motion for the injunction.

[629] WATERMAN v. SMITH. Jan. 28, 1840.

[S. C. 4 Jur. 672.]

Appointment. Power.

A power given to a husband and wife was required to be exercised by them by any deed or writing under their hands and seals, to be by them executed in the presence of and attested by two witnesses. Held, that a deed which was signed as well as sealed and delivered by the husband and wife in the presence of two witnesses was not a good exercise of the power, because the attestation clause did not extend to the signature, as well as to the sealing and delivery.

By the settlement made previously to the marriage of Isaac Baugh with Charlotte, his wife, and dated the 31st August 1785, Isaac Baugh covenanted that his heirs, executors or administrators should, within three months after his death, pay to trustees the sum of £20,000 in trust, in case Charlotte Baugh should survive him and there should be issue of the marriage living at his decease, to invest the £20,000 on the usual securities, and to pay the interest thereof to Charlotte Baugh for her life, and, after her decease, in trust to assign, pay, apply and dispose of the sum of £6000, part of the £20,000, and the interest and proceeds thereof, to and for the use and benefit of all or any one or more of the children of the marriage, and in such proportions, parts [630] or shares, and payable in such manner and at such respective times as I. Baugh and Charlotte, his wife, by any deed or writing *under their respective hands and seals, to be by them executed in the presence of and attested by two or more credible witnesses*, should direct or appoint; and, for want of such joint direction or appointment, then as Charlotte Baugh (she surviving the said I. Baugh) by any deed or writing under her hand and seal, to be by her executed in the presence of and attested by two or more credible witnesses, should in like manner direct or appoint.

[630] There was issue of the marriage two children, Edmund and Charlotte, the latter of whom intermarried with Wm. Hare.

I. Baugh and Charlotte, his wife, by a deed-poll, *under their hands and seals*, dated the 2d February 1819, directed and appointed, in exercise of the powers given to them by the settlement, that, in case Edmund Baugh should die unmarried and without issue, then the trustees should stand possessed of the £6000, in trust for Mrs. Hare, her executors and administrators, in such manner however as that the interest thereof should be for her separate use during her life, and that the principal

should be subject to her disposal *by will*. This instrument was attested as follows: "Sealed and delivered in the presence of H. T. Hodgson; Samuel Hodgson."

Isaac Baugh died in March 1823; and Edmund Baugh died in April 1838, without having been married.

By a deed-poll, dated the 3d of August 1839, under the hand and seal of Mrs. Baugh, and by her executed [631] in the presence of and attested by two credible witnesses, (1) she, in execution of the power given to her by the settlement, directed and appointed that, after her decease, the trustees should assign and pay the £6000, and the annual income thereof, unto her daughter Mrs. Hare, for her separate use, or unto such person or persons as Mrs. Hare, notwithstanding her coverture, by any deed or by her last will, should appoint.

By an indenture, dated the 20th of August 1839, Mrs. Hare, in exercise of the power given to her by the deed-poll of the 3d of August 1839, appointed, and, also, according to her interest under the said deeds-poll or either of them, assigned the £6000 (subject to Mrs. Baugh's life interest therein) to the Plaintiff, to the intent that he should thereout, after Mrs. Baugh's decease, repay himself a sum of money which he had lent to Mrs. Hare; provided that, if the money lent should not be repaid on or before the 20th of October then next, then it should be lawful for the Plaintiff to sell a competent part of the £6000, and, out of the proceeds, to retain the money lent.

The Plaintiff, under the power of sale, agreed to sell to the Defendant £1500, part of the £6000. The Defendant refused to complete his purchase, alleging that the Plaintiff could not make a good title to the £1500, on the ground that the deed-poll of the 2d of February 1819 was a valid appointment and a full [632] exercise of the power contained in the settlement. Upon which the bill was filed; and, after charging that the deed-poll of the 2d of February was not a valid appointment or an exercise of the power contained in the settlement, for that it was not duly attested as required by the settlement, it prayed for a specific performance of the agreement.

The Defendant demurred to the bill for want of equity.

Mr. Wigram and Mr. Stone, in support of the demurrer, contended that the deed-poll of February 1819 was a valid execution of the power of appointment given to Mr. and Mrs. Baugh by the settlement, notwithstanding the word "signed" was omitted in the attestation clause: that that deed-poll was, in fact, signed as well as sealed by Mr. and Mrs. Baugh, and, consequently, was an instrument under their hands and seals; that it was their *execution* only that was required to be attested, the words, "under their hands and seals," being used parenthetically. *Mackinley v. Sison* (*ante*, vol. viii. p. 561), *Doe v. Burdett* (4 Adol. & Ell. 1, and 1 Perry & Dav. 670), *Stanhope v. Keir* (2 Sim. & Stu. 37), *Macqueen v. Farquhar* (11 Ves. 467), *Hougham v. Sandys* (*ante*, vol. ii. p. 95). The case of *Wright v. Barlow* (3 M. & S. 512), which will be cited on the other side, was very different from the present case; for there the power was required to be exercised by a deed under the hand and seal (of the donee) attested by the witnesses. In this case the instrument is to be *executed* in the presence of and attested by the witnesses; and, therefore, it is the *execution* only that is required to be attested.

[633] Mr. Knight Bruce and Mr. Willcock appeared in support of the bill; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: This case does not differ from *Wright v. Barlow*. There the power was to be exercised by Elizabeth Barlow, by any deeds or deed, writing or writings, under her hand and seal, attested by two or more witnesses; but the attestation did not extend to the signature. Here the words are, "by any deed or writing under their respective hands and seals, to be by them executed in the presence of and attested by two or more credible witnesses." Consequently, the deed or writing was to be signed, as well as sealed and delivered by Mr. and Mrs. Baugh, and their signature, as well as their sealing and delivery, was to be attested. Moreover, an instrument which is to be executed by a married woman must be precisely in the form prescribed. The consequence is that,

(1) The brief did not state that the signing as well as the sealing and delivery of this deed was attested; but it is presumed that that was the case.

as the attestation clause to the deed of February 1819 omits the word "signed," the power was not well exercised by that deed.

The question in this case is quite different from the question as to publication, which arose in some of the cases that have been cited.

Demurrer overruled.

[634] BULLOCK v. THOMAS. *April 12, 1839.*

[S. C. 3 Jur. 312.]

Will. Construction. Costs.

Testatrix bequeathed £10,000 three per cent. stock, in trust for E. S. for her life, and, after her decease, in trust for such one or more, exclusively of the others of her residuary legatees, as E. S. should appoint; and she empowered E. S. to appoint £150 a year to be paid to J. S., out of the interest of the stock, during his life. E. S., by her will, appointed £150 a year, part of the interest of the £10,000 stock or of the stocks, funds and securities, into or upon which the same should be changed or secured at the time of her death, to be paid to J. S. during his life, and, after his death, she appointed so much of the £10,000 stock, or of the stocks, funds or securities into or upon which the same should be then changed or secured, from which the £150 a year should have arisen, to A. B., one of the residuary legatees named in the original will: and, as to so much of the £10,000 stock, or the stocks, funds or securities into or upon which the same might be changed or transferred at her death, which should not be necessary to answer the annuity of £150, she appointed the same to J. B., another of the residuary legatees. After E. S. had made her will the trustees, at her request, sold the stock and invested the proceeds, amounting to £6600, on a mortgage at five per cent. After E. S.'s death the mortgage was paid off, and the money was invested, under a decree, in the purchase of £7143 consols. Held, that A. B. was entitled to £5000 consols, as being the capital of the £150 a year, and that J. B. was entitled to the remainder only of the £7143 consols.

Elizabeth Legh, by her will, dated the 17th of May 1806, gave to trustees the sum of £10,000 three per cent. Reduced Bank annuities, upon trust to continue the same in that state, or convert the same into money, and lay out and invest such money, in their or his names or name, in the purchase of Parliamentary stocks or funds of Great Britain, or at interest upon Government or real securities in England; and, during the life of Elizabeth, the wife of Jean Jacques Schenck, to pay the interest and dividends to arise therefrom to the said Elizabeth Schenck for her separate use for her life, and, after her decease, upon trust to pay, assign [635] and transfer such last-mentioned trust monies, stocks, funds and securities unto such one or more, exclusively of the others, of the persons to whom the residue of the testatrix's personal estate was thereafter bequeathed, or of the issue born of any such person or persons in the lifetime of Elizabeth Schenck, to be divided between them, in such shares, and to be vested at such times, and with such limitations over, between and among them, and with such provisions for maintenance, and in such manner as Elizabeth Schenck should, notwithstanding her coverture, by her last will or any codicil thereto appoint; and, in default of such appointment, the testatrix directed that the trustees should stand possessed of the same trust monies, stocks, funds and securities, upon the trusts thereafter expressed concerning the residue of her personal estate; and the testatrix thereby empowered Elizabeth Schenck, by her will or codicil, to appoint to her husband, Jean Jacques Schenck, any annual sum or sums of money not exceeding in the whole the annual sum of £150, to be paid to him during his life, *out of* the interest of the last-mentioned trust monies, by equal half-yearly payments; and the testatrix bequeathed the residue of her personal estate to certain persons named in her will, or such of them as should be living at her decease.

The testatrix died shortly after the date of her will: and the trustees retained and

held the sum of £10,000 Reduced three per cents. upon the trusts declared of the same by the will. In January 1815 the trustees, at Mrs. Schenck's request, sold out the £10,000 three per cents. and invested the proceeds, which amounted to £6600, on a mortgage of a freehold estate, bearing interest at five per cent.

On the 23d of September 1813 Mrs. Schenck, in [636] exercise of the power reserved to her by the will of Elizabeth Legh, made her will, and thereby, after reciting the before-mentioned bequest of the £10,000 three per cents., she appointed the annual sum of £150, *part of the interest, dividends and annual produce of the said sum of £10,000 three per cent. Reduced annuities, or of the stocks, funds and securities into or upon which the same should be changed or secured at the time of her decease, to her husband, Jean Jacques Schenck, to be paid to him or his assigns during his life, by equal half-yearly payments, and, after his death, she appointed so much of the said sum of £10,000 three per cent. Reduced annuities, or of the stocks, funds or securities into or upon which the same should be then changed or secured, from which the said annual sum of £150 should have arisen, unto Arabella Bullock, one of the residuary legatees named in the will of Elizabeth Legh, her executors, administrators and assigns : and, as to so much and such part of the said sum of £10,000 three per cent. Reduced annuities, or the stocks, funds or securities into or upon which the same might be changed or transferred at the time of her decease, which should not be necessary to be set apart in pursuance of her will and the appointment therein contained for the benefit of Jean Jacques Schenck for his life, she appointed the same to John Rowlls Brown, another of the residuary legatees named in Elizabeth Legh's will, his executors, administrators and assigns.*

In January 1835 Mrs. Schenck made a codicil to her will ; and thereby, after reciting the death of Arabella Bullock leaving several children, she, in exercise of the power reserved to her by Elizabeth Legh's will, appointed, after the decease of her husband, Jean Jacques Schenck, so much and such part of the said sum of [637] £10,000 three per cent. Reduced annuities, or of the stocks, funds and securities into or upon which the same should be *then* changed or secured, from which the said annual sum of £150 should have arisen as aforesaid, amongst such of the daughters of Arabella Bullock as should be living and unmarried at the time of her death.

Mrs. Schenck died on the 4th of August 1836, leaving her husband her surviving.

In September 1836 the person entitled to the equity of redemption of the hereditaments on which the £6600 was secured gave notice of his intention to pay off that sum. In June 1837 the bill was filed by the unmarried daughters of Arabella Bullock who were living at Mrs. Schenck's death ; and, after stating that the Plaintiffs were desirous that the £6600 should be paid into the bank, in the name and with the privity of the Accountant-General in trust in the cause, in order that so much of that sum as should be required for that purpose might be invested in the purchase of £5000 consols, and that the dividends of the sum so invested might be applied in payment of the annual sum of £150 to Jean Jacques Schenck ; and that the Plaintiffs were advised that, upon his death, they would be entitled to have the £5000 consols divided amongst them in equal shares ; but that John Rowlls Brown objected to such investment being made ; the bill prayed that it might be declared that so much of the £6600 as should be required for that purpose ought to be invested in the purchase of £5000 consols, in order that the dividends thereof might be applied in payment of the annual sum of £150 to the Defendant, John Jacques Schenck, during his life, and that the Plaintiffs [638] would be entitled to have the £5000 consols divided amongst them, in equal shares, after his death ; and that directions might be given accordingly for the purchase and investment of the £5000 consols out of the £6600, and for the payment of the dividends thereof to the Defendant Jean Jacques Schenck during his life, and that the residue of the £6600 after payment, thereout, of the costs of the suit, might be ordered to be paid to the Defendant, John Rowlls Brown.

By the decree made on the hearing of the cause, liberty was given, to the person entitled to the equity of redemption of the mortgaged premises, to pay the £6600 into Court ; and it was ordered that that sum, when paid in, should be laid out in the purchase of Bank £3 per cent. annuities in the usual manner.

In pursuance of the decree the £6600 was paid into Court, and laid out in the purchase of consols ; but, owing to the high price of the funds, it did not purchase

more than £7143 of that stock. At Mrs. Schenck's death £3000 was the portion of the £6600 which produced the annual sum of £150; and, on the cause coming on for further directions, the question was whether the Plaintiffs were entitled to have £5000 consols, the amount claimed by their bill, set apart for them out of the fund in Court, or such portion only of that fund as was equivalent to £3000 at the time when the £6600 was laid out under the decree.

Mr. Knight Bruce and Mr. Wilbraham, for the Plaintiffs, and Mr. Nicholl, for the Defendant Jean Jacques Schenck. Mrs. Schenck in her will recites the power given to her by the will of Elizabeth Legh, and exhibits a clear [639] intention to exercise it to its full extent; and, by that will, she was empowered to appoint, to her husband, the annual sum of £150, out of the income of the trust fund, whatever it might be. The only difficulty in this case arises from her having used the word "part" when she exercised the power; but that word must be read "out," for that is the word used by the original testatrix in creating the power. Mrs. Schenck then directs the £150 a year to be paid to her husband *during his life*; and, after his death, she appoints that part of the capital of the trust fund, whatever it might be, from which the £150 should have arisen, to the mother of the Plaintiffs. The consequence is that Mr. Schenck is entitled to be paid £150 a year, without diminution, during his life, out of the dividends of the trust fund; and the Plaintiffs, who, by the codicil, are substituted for their mother, will be entitled, on his death, to have that portion of the capital which produces the £150 a year divided amongst them. *Trevor v. Trevor* (5 Russ. 24), *May v. Bennett* (1 Russ. 370).

Mr. Jacob and Mr. Shadwell, for John Rowlls Brown. The power given by the original will, to change the securities on which the trust fund was invested, ceased on the death of Mrs. Schenck. Consequently the rights of the parties are fixed as they stood at Mrs. Schenck's death; and the sum which, at that time, produced the £150 a year, is the sum which the Court ought to direct to be set apart, to answer both the annuity and the legacy given to the Plaintiffs.

The cases cited have no application: for there the questions arose between particular legatees and general [640] residuary legatees. Here, John Rowlls Brown is as much a legatee of a specific portion of an ascertained fund as the Plaintiffs are.

The whole, or a fair proportion at least, of the costs of the suit must be paid out of that part of the fund to which the Plaintiffs are entitled. *Jenour v. Jenour* (10 Ves. 562).

Mr. Knight Bruce, in reply. The language of Mrs. Legh's will gave, to Mrs. Schenck, power to charge the whole fund; and it clearly appears, from Mrs. Schenck's will, that she was aware of the extent of her power and intended to exercise it fully; and [also that she was aware that she was dealing with a fund which, under the original will, was susceptible of variation; for, after the death of her husband, she appoints, to Mrs. Bullock, so much of the £10,000 Reduced annuities, or of the stocks, funds or securities into or upon which the same should be *then* changed or secured, from which the £150 a year should have arisen; and, in her codicil, she repeats those words. The consequence is that Mr. Schenck is entitled to be paid the full sum of £150 a year during his life; and, at his death, the Plaintiffs will be entitled to the fund which produces that sum.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The difficulty in this case has arisen in this way. Mrs. Schenck, meaning to make a division of the fund into two parts, has not used the same language in disposing of one part of it as she has in disposing of the other part. The language of the latter gift is not correlative to that of the former. But it is plain that she intended [641] that her husband should have £150 a year arising from the interest of a portion of the fund, and that the sum which Mrs. Bullock was to take should be that portion of the whole fund out of which the £150 was to be payable. Having given that, all the rest was to go to Mr. John Rowlls Brown. But, after having given a certain part of the fund, she has, by a plain blunder in language, so given the remainder as if she meant to trench on that part which she had before given. Now what would this Court have done if it had not found the fund invested in 3 per cent. stock? This Court would, on the death of Mrs. Schenck, have ordered the fund to be paid into Court and laid out in consols. Then, out of that fund, Mr. Schenck would be entitled to receive £150 a year, which

would be represented, in capital, by £5000 consols, and only the remainder of the capital would go to Mr. Brown.

Next, with respect to the costs of the suit. As the question which has arisen in this case relates to the division of the whole fund, the costs of the suit must be paid, rateably, out of the two portions of the fund.

[642] In the Matter of WILLIAMS, Deceased. *Ex parte* BIRD. August 7, 1840.

Mortgagee. Construction of 11 Geo. 4 and 1 Will. 4, c. 60, s. 8.

The case of a mortgagee leaving an heir, but who is not known, is within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, as expounded by 4 & 5 Will. 4, c. 23.

This case came before the Court on the 26th and 27th of June 1840. (See *ante*, p. 426.) It was mentioned again on a subsequent day, when the Vice-Chancellor said that he must take time to consider the Acts of Parliament which had been referred to. (See *ante*, p. 494.)

On this day, HIS HONOR delivered judgment as follows:—

I do not find that there is any decision which is at all at variance with the opinions expressed by Lord Langdale, M.R., in *Ex parte Whitton* (1 Keen, 278); and by myself *In re Stanley* (*ante*, vol. vii. p. 170), when that case came before me the second time. The case *In re Dearden* (3 Myl. & Keen, 508) came before the present Lord Chancellor when Master of the Rolls; and it appears that his Lordship's opinion was formed solely on the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, and that no reference was made to the 4 & 5 Will. 4, c. 23. My opinion, therefore, is that this case comes within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 8, coupled with the legislative exposition of that enactment given by the 4 & 5 Will. 4, c. 23: and, therefore, you may take your order.

[643] BRYDGES v. BRANFILL. Nov. 16, 1840.

Practice. Publication.

Before a Defendant can move to enlarge publication, he must serve his Co-defendants, as well as the Plaintiff, with notice of the motion.

Mr. Knight Bruce, for the Defendant Brooks, moved to enlarge publication.

Mr. Bethell, for the Plaintiff, objected that the Co-defendants had not been served with the notice of motion; and cited 1 Smith's Practice, 388.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Co-defendants might be delayed by the order sought to be obtained, and, therefore, they were interested in the application and ought to be served with notice of it. And His Honor ordered the motion to stand over in order that the Co-defendants might be served with notice of the motion.

[643] *In re* CHRISTIE. Nov. 20, 1840.

Practice. Infant. Maintenance.

Order made on petition without suit, for the allowance of £450 a year for the maintenance of an infant, the income of whose property exceeded £1500 a year.

Petition for maintenance out of the income of an infant's personal estate.

The income exceeded £1500 a year; and the Master's report approved of an allowance for maintenance of £450 a year.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he thought the distinction, as to making orders on petitions without suit, between cases where the income was

above or below £300 per annum, was without any foundation in principle; and he made the order.

Mr. Loftus Wigram appeared for the Petitioner.

[644] HULME v. HULME. April 19, 1839.

[See *Lassence v. Tierney*, 1849, 1 Mac. & G. 563; 41 E. R. 1384; *Bishop v. Wise*, 1872, 26 L. T. 531.]

Will. Construction.

Testator directed his trustees and executors to apply the income of his residuary estate, for the maintenance, &c., of all his children, and to accumulate the surplus for their benefit, until the youngest should attain 21, and then to divide the capital into as many equal shares as the number of his children who should be then living should amount to, an equal share being allotted to each of them and to the issue of such of them as should be then dead, such issue taking their parents' share, the shares of such of his children as should be sons, to be paid to them or their issue, on his youngest child attaining 21, and, the shares of such of them as should be daughters, and, of the issue of such his daughters as should be then dead, he directed to remain in the hands of his trustees, upon trust to pay the interest to each of his said children, being daughters, during their lives for their separate use; and, on the decease of each of his said daughters, or in case any of them should be dead leaving issue when his youngest child should attain 21, then he directed his trustees to pay the share of each such daughter to her issue. One of the daughters, who was living when the youngest child attained 21, died a spinster. Held, that she took an absolute interest in a share of the residue.

Jonathan Hulme made his will, dated the 26th of May 1824, which, after containing various specific and other bequests, proceeded as follows:—

"I give and devise my estate and interest of and in my leasehold close of land situate in Stefford aforesaid, unto Thomas Gaskell and James Sothern, their heirs, executors and administrators, nevertheless upon trust, during the respective minorities of my children, to receive and take the rents, issues and profits of the said hereditaments and premises, and apply and dispose of the same in such manner as the interest and proceeds of my residuary estate is hereinafter directed to be applied and disposed of, during the respective minorities of my said children; and, from and after the attaining of the youngest for the time being of my said children to the age of 21 years, in trust for all my children begotten on the body of my wife, Betty, their [645] respective heirs, executors and administrators: and I give and bequeath unto each of my sons, on their respective attainment to the age of 21 years, the sum of £200, and, to each of my daughters begotten on the body of my said wife Betty, on their respective attainment to the age of 21 years or day or days of marriage, which shall first happen, the sum of £300: and I give and bequeath unto my daughter Ann, by my first wife, the sum of £50, to be paid on the attainment of the youngest of my said children to the age of 21 years; but, in case my said daughter Ann shall be then dead without leaving lawful issue, then the said legacy of £50 shall be added to the residue of my estate and effects and be disposed of accordingly. And as concerning the monies to arise from the sale of my hereditaments and premises hereinbefore directed to be made, and also as for and concerning all the residue and remainder of my estate and effects of what nature or kind, soever and wheresoever situate, subject nevertheless to the payment of my debts, funeral and testamentary expenses and the several legacies by me hereinbefore bequeathed, I give and bequeath the same unto the said Thomas Gaskell and James Sothern, their executors, administrators and assigns, upon trust that they, my said trustees, shall and do place the same out at interest on real security, or invest the same in the public funds, and shall and do pay and apply the dividends, interest and proceeds thereof, or so much thereof as shall be necessary in the discharge of the said yearly sums of £100 or £50, as the case may be, to my said wife, at or on the days

and times and in the portions hereinbefore apportioned for payment thereof, and also in the maintenance, education and support of *all my children* begotten on the body of my said wife Betty, until the youngest for the time being of the said children shall attain the age [646] of 21 years: and I do hereby authorize and empower my said trustees to lay out and advance any sum or sums of money for the placing out apprentice any of my children to any trade or profession, as they in their discretion shall judge proper, such sum or sums of money to be laid out or advanced as aforesaid to be paid out of the share or shares of my estate and effects to which such child on whose behalf the same shall have been advanced, or his, her or their issue may become entitled under or by virtue of this my will; and, in case of any surplus of the dividends, interest and proceeds of my said residuary estate, after satisfying the purposes aforesaid, shall and do permit the same to accumulate to and for the benefit of *all my children* begotten on the body of my said wife, until the youngest of them for the time being shall attain the age of 21 years: and, from and after the attainment of the youngest for the time being of my said children to the age of 21 years, upon trust that they, my said trustees, shall and do continue out at interest or invest in the public funds so much of the said principal trust monies as shall be sufficient to produce and raise the said yearly sum of £100 or £50 (as the case may be) so as aforesaid given and bequeathed unto my said wife; and, subject thereto and to the payment of the several legacies aforesaid, shall, and do *divide and assign the said trust monies* and all the dividends, interest and proceeds thereof, and all accumulations in respect of the same, and also so much of the said trust monies as shall be reserved and continued out at interest or invested as aforesaid for producing and raising the said yearly sum of £100 or £50, as the case may be, from and after the decease of my said wife, *into as many equal parts and shares as the number of my children begotten on the body of my said wife Betty shall amount to, an* [647] *equal part or share being allotted to or in trust for each of my children* by my said wife Betty who shall be living on the attainment of the youngest for the time being of my said children to the age of 21 years, and to or in trust for the issue of such of them as shall be then dead leaving issue, such issue, nevertheless, to have and take the part and share only which his, her or their parent or parents would, if living, have been entitled to; the share or shares of such of my said children, being a son or sons, to be paid to such son or sons or his or their issue on the attainment of the youngest for the time being of my said children to the age of 21 years, and the share or shares of such of my said children as, being a daughter or daughters, shall be living on the attainment of the youngest for the time being of my said children to the age of 21 years, and of the issue or issues of such of my said daughters as shall be then dead leaving issue, I direct shall remain in the hands of my said trustees, upon trust that they, my said trustees, shall and do place the same respectively out at interest or invest the same in the public funds, and shall and do pay the dividends, interest and proceeds of each share respectively *unto each of my said children, being daughters, during her or their life or lives*, to and for her and their own separate and independent use and benefit, and not subject to the control, debts or engagements of any husband or husbands they or any of them may hereafter happen to marry; and on the decease of each of my said daughters, or in case any of my said daughters shall be dead leaving issue at the time of the attainment of the youngest for the time being of my said children to the age of 21 years, upon trust that they, my said trustees, shall and do pay the share of such daughter so dying or dead as aforesaid leaving issue, unto and amongst all [648] and every the children of such daughter so dying or dead as aforesaid who shall be then living, and to the issue of such of them as shall be then dead leaving issue, equally share and share alike, such issue, nevertheless, to have and take the part and share only which his, her or their parent or parents would have been entitled to if living; and my will and mind is, and I do hereby direct that the said Thomas Gaskell and James Sothern shall and do, from time to time, during the respective minorities of the child or children of such daughter so dying or dead as aforesaid, pay and apply the dividends, interest and proceeds of her or their respective share or shares, to and for the maintenance, education and support of such children, or otherwise for their benefit and advantage, or lay out and invest the same or any surplus thereof on such and the like securities

as hereinbefore mentioned, there to accumulate to and for the use and benefit of such children respectively."

The testator died some time after the date of his will, leaving Betty Hulme, his widow, and seven children by her, and Ann Hulme his only child by his first wife.

Henry Hulme was the youngest child, and had long since attained the age of 21 years.

Emily Hulme, one of the testator's daughters, died a spinster, having, after she had attained the age of 21 years, made her will, dated the 30th of September 1837, and thereby appointed her sister, Mary Hulme, executrix thereof.

The bill, which was filed by the testator's widow and surviving children except Mary Hulme against Mary Hulme and James Sothern, stated that Mary Hulme, as [649] the executrix of Emily Hulme, alleged that, according to the true construction of the testator's will, Emily Hulme was entitled, at the time of her death, to a share of the residuary estate of the testator; but the Plaintiffs charged that, in the events that had happened, the testator died intestate as to such share, and that such share was then divisible among the next of kin of the testator, and therefore the Plaintiffs were, together with Mary Hulme in her own right and as the representative of Emily Hulme, entitled to such share.

The bill prayed that it might be declared that, upon the death of Emily Hulme without having been married, her share of the testator's residuary personal estate became divisible among his next of kin; and that it might be also declared that the Plaintiffs and the Defendant, Mary Hulme, in her own right and as representative of Emily Hulme, were entitled to such share.

Mr. Jacob and Mr. Koe, for the Plaintiffs. The will does not contain any words of gift under which the daughters could claim any interest in any part of their father's residuary estate, except for their lives. The whole of the residue, except the shares given to the sons, is placed under the control of the trustees, and there is no absolute gift to the daughters. [THE VICE-CHANCELLOR. In the first instance there is an absolute gift to all the children who should be living at the time when the youngest should attain the age of 21 years. The testator directs his trustees to divide and assign the trust monies into as many equal parts and shares as the number of his children begotten on the body of his second wife should amount to, an equal part or share being allotted to or in trust for each of his children by his said wife who should be living on the [650] attainment of the youngest, for the time being, to the age of 21 years.] The testator did not mean by those words to give absolute interests; for then the subsequent direction to pay the shares of his sons to them, on the youngest child attaining 21, would be superfluous; and, moreover, there is an express direction to pay the dividends and interest of the shares of the daughters to them for their lives.

Mr. Knight Bruce and Mr. Shadwell appeared for the Defendants; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: By the first operative words the testator makes an absolute gift to all his children by his second wife, who should be living when the youngest child should attain 21. He then superadds a direction for settling the shares of his daughters. The absolute gift remains, except so far as the direction for settling the shares of his daughters has taken it away; and it is not taken away in the case of a daughter dying without having children. (See *Whittell v. Dulin*, 2 Jac. & Walk. 279; and *Billing v. Billing*, ante, vol. v. p. 232.)

Declare that Emily Hulme took an absolute interest in the share of the testator's residuary estate provided for her by the will.

[651] LUSHINGTON v. PRICE. April 25, 1839.

[S. C. 8 L. J. Ch. 254.]

Mortgage. Foreclosure. Redemption.

A decretal order in a foreclosure suit under 7 Geo. 2, c. 20, s. 2, cannot be made unless all the Defendants who are interested in the equity of redemption join in the application and admit the Plaintiff's title: and, consequently, the order cannot be made where one of those Defendants is an infant.

Motion by one of the Defendants in a foreclosure suit, who was tenant for life of the equity of redemption, for a decretal order under 7 Geo. 2, c. 20, s. 2.(1)

THE VICE-CHANCELLOR said that the Act required all the Defendants who had a right to redeem the mortgaged premises to join in the application and to admit the Plaintiff's title; but, in this case, the application was made by only one of them, and, if they had all [652] joined, they could not have admitted the Plaintiff's title, as one of them was an infant, and, therefore, the motion must be refused.(2)

Mr. Knight Bruce, Mr. G. Richards, Mr. Lloyd, Mr. Dixon and Mr. Stone appeared on the application.

[652] WELFORD v. DANIELL. May 8, 1839.

Contempt. Process. Pro Confesso.

Where the Master has reported that a Defendant is unable, by reason of poverty, to employ a solicitor to put in his answer, the Court will, by one and the same order, direct counsel and a solicitor to be assigned to the Defendant, for the purpose of putting in his answer, and that a *habeas corpus* do issue against him, and that the Plaintiff's Clerk in Court do attend with the record, on the return of the

(1) This section is as follows:—"And be it further enacted, by the authority aforesaid, that, from and after the said first day of Easter term 1734, where any bill or bills, suit or suits, shall be filed, commenced or brought in any of His Majesty's Courts of Equity, in that part of Great Britain called England, by any person or persons having or claiming any estate, right or interest in any lands, tenements or hereditaments, under or by virtue of any mortgage or mortgages thereof, to compel the Defendant or Defendants in such suit or suits (having or claiming a right to redeem the same) to pay the Plaintiff or Plaintiffs in such suit or suits the principal money and interest due on any such mortgage, or the principal money and interest due on such mortgage, together with any sum or sums of money due on any incumbrance or specialty charged or chargeable on the equity of redemption thereof; and, in default of payment thereof, to foreclose such Defendant or Defendants of his, her or their right or equity of redeeming such mortgaged lands, tenements or hereditaments; such Court or Courts of Equity wherein such suit or suits shall be depending, upon application made to such Court by the Defendant or Defendants in such suit having a right to redeem such mortgaged lands, tenements or hereditaments, and upon his or their admitting the right and title of the Plaintiff or Plaintiffs in such suit, may and shall, at any time or times before such suit or cause shall be brought to hearing, make such order or decree therein as such Court or Courts might or could have made therein, in case such suit or cause had then been regularly brought to hearing before such Court or Courts; and all parties to such suit or suits shall be bound by such order or decree so made, to all intents and purposes, as if such order or decree had been made by such Court at or subsequent to the hearing of such cause or suit; any usage to the contrary thereof in anywise notwithstanding."

(2) See *Garth v. Thomas*, 2 Sim. & Stu. 188. For forms of the order, see 2 Eq. Draftsman, 390, and 2 Fowl. Excheq. Prac. 399.

writ, in order that the bill may be taken *pro confesso* against the Defendant, unless he shall in the meantime put in his answer.

The Master having reported, upon a reference made to him under 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, rule 6, that the Defendant was unable, by reason of poverty, to employ a solicitor to put in his answer,

Mr. Stinton, for the Plaintiff, now moved, under the same rule, that the Defendant might have counsel and a solicitor assigned to him, in order that he might be enabled to put in his answer; and, under rule 2, that a *habeas corpus* might issue against the Defendant, returnable on the first day of the following term (which would [653] give him 28 days between the time when he was committed to the Fleet and the return of the writ); and that, on the return of the writ, the Plaintiff's Clerk in Court might attend with the record, in order that the bill might be taken *pro confesso* against the Defendant, unless, in the meantime, he should put in his answer.

THE VICE-CHANCELLOR [Sir L. Shadwell] made the order, observing that it was a combination of the 2d and 6th rules.

[653] HAWES v. BAMFORD. May 8, 1839.

Affidavit. Injunction.

An affidavit was filed and intituled in a cause in which there were three Defendants. Afterwards the Plaintiff struck out the name of one of the Defendants: and then obtained the injunction on the affidavit as it was originally intituled. Held, that the injunction was regularly obtained.

Motion to discharge an order for an injunction, on the ground that the affidavit on which it was obtained was intituled in a cause in which there were three Defendants; whereas, at the time when the injunction was obtained, the names of two only of those Defendants appeared upon the record.

The facts of the case were these. At the time when the affidavit was filed there were three Defendants to the suit. Afterwards the Plaintiff amended his bill by striking out the name of one of the Defendants, and then moved for and obtained the injunction on the affidavit as it was originally intituled.

In support of the motion it was contended that an indictment for perjury would not lie on the affidavit.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the perjury, if any, was committed at the moment when the affidavit was filed; and refused the motion with costs.

[654] WINTERBOTTOM v. INGHAM. May 22, 1839.

Specific Performance. Title.

An order, made *on motion*, for a reference as to title ought to contain directions for the production of deeds, &c., and for the examination of the parties on oath.

In this suit (which was a suit for the specific performance of an agreement for the sale of an estate) a question arose as to the form of an order made, *on motion*, for a reference to the Master to inquire whether a good title could be made to the estate comprised in the agreement.

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that the directions usual in decrees for the production of deeds, &c., and for the examination of the parties on oath, ought to be inserted in the order; and that further directions and costs ought to be reserved. (See Seton on Decrees, pp. 11 and 109.)

Mr. Knight Bruce and Mr. Koe were counsel in the cause.

Reports of CASES DECIDED in the HIGH COURT
OF CHANCERY by the Right Honorable Sir
LANCELOT SHADWELL, Vice-Chancellor of
England. Containing Cases in 1839 and 1840,
with a few in 1841 and 1842. By NICHOLAS
SIMONS, of Lincoln's Inn, Esqr., Barrister-at-Law.
Vol. X. 1842.

[1] POPE v. POPE. May 24, 1839.

Will. Construction. Trust by Implication.

Testator gave whatsoever property or effects he might die possessed of, after his debts were paid, or might become entitled to, to his wife, and appointed her sole executrix of his will: "And my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be, for their good; and should she marry again, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide;" and, at the conclusion of his will, he gave the capital of his business to his wife, trusting that she would deal justly and properly to and by all their children. Held, that no trust was created for the children.

Samuel Pope, a coal merchant, made his will in the following words:—

"Whatsoever property or effects I may die possessed of after my just debts are paid, or become entitled to at or after my decease, whether of houses, lands, money, stock-in-trade, furniture, shares in business, of whatever kind and to whatsoever amount, I do give and [2] bequeath the whole and every of them (excepting only such sum or sums as shall be hereinafter distinctly named and otherwised disposed of) to my dear and beloved wife, Angelina Pope; and I do hereby nominate, constitute and appoint her my sole executrix of this my last will and testament; and my reason for so doing is the constant abuse of trustees which I daily witness among men; at the same time trusting she will, from the love she bears to me and our dear children, so husband and take care of what property there may be for their good; and, should she marry again, and, but for the welfare of the dear children, I have not an objection, then I wish she may convey to trustees, in the most secure manner possible, what property she may then possess, for the benefit of the children as they may severally need or deserve, taking justice and affection for her guide. My will further is that each child shall receive, within six months after my decease, as a token of my affection, if above 20 years of age, £50 clear of every deduction whatsoever; and my will further is that, as the articles of partnership now subsisting between me and my brothers has a clause stating that, at the death of either, the widow shall retain the husband's share, on her appointing a proper person to manage on her behalf; it is my wish that she may consult with them, my brothers, as to whom that management shall be consigned, that care may be taken the business be not injured: that, on my dear son Samuel Richard attaining his 21st year of age,

he may take his father's place in the management of the said business, and a moiety of the said profits shall be his own property from that time, and the other moiety to be his mother's. The whole of the profits, from my decease to his 21st year, to be his mother's entirely, and the capital also, *trusting that she will act justly and properly to and by all our children.*"

[3] The testator left his widow and several children, all of whom were infants, him surviving. The bill, which was filed by the children against their mother, alleged that the Defendant insisted that she was absolutely entitled to the whole of the testator's personal estate, except the moiety of the business bequeathed to the Plaintiff, Samuel Richard Pope, upon his attaining the age of 21 years, or that she was, at all events, entitled to a life interest in the whole of the personal estate, with such exception as aforesaid; but the Plaintiffs submitted that the Defendant was only entitled to a beneficial interest in the testator's share in the business until the Plaintiff, S. R. Pope, should attain the age of 21 years, and that, after that event, she was only entitled, under the terms of the will, to a life interest in one moiety of the profits of the business, and that, as to the residue of the testator's personal estate, she was a trustee for the Plaintiffs in equal shares, and that they were entitled to have the interest and profits thereof applied in and towards their respective maintenance and education.

The bill prayed that the rights and interests of the Plaintiffs and of the Defendant, in the testator's personal estate under his will, might be ascertained and declared; and that the usual accounts might be taken of the testator's personal estate, funeral expenses and debts; and that the personal estate might be applied in a due course of administration, and that the residue thereof might be ascertained and secured for the benefit of the Plaintiffs and of the Defendant, according to their respective rights and interests therein; and that maintenance might be allowed and a guardian be appointed for the Plaintiffs.

[4] Mr. G. Richards and Mr. Abraham, for the Plaintiffs, said that the testator clearly intended that his wife should be a trustee of the residue of his personal estate for his children; that the subject and objects of the trust were plainly pointed out; the subject being whatever property the testator might be possessed of at his death, after his debts should be paid, or which might accrue to his estate after his death; that the objection, which the testator stated to trustees, was to *men* being trustees; that, in a subsequent part of his will, he expressed a wish that, if his wife should marry again, she would convey, *to trustees*, what property she might then possess, meaning, thereby, the property which should constitute his estate after payment of his debts and legacies, including the eldest son's share of the profits of the business.

Mr. Jacob and Mr. Romilly, for the Defendant, said that the testator, throughout his will, shewed an intention not to create a trust, but to leave his wife to deal with his property according to her discretion; that, by the word "*men*," the testator meant "*mankind*," and intended to express his dislike to trustees generally; that he thought he could confide in his wife's good feeling, and meant to leave the disposition of his property to her uncontrolled discretion; that the words, "*what property there may be*," were not confined to the property which the testator might leave; and the direction to husband and take care of it for the good of the children implied a future, undefined period; not that, immediately on the testator's death, his property should be held in trust for his children; and the expression, "*what property she may then possess*," referred to any property that the wife might then have from whatever [5] source; besides, in what manner would the Court perform a trust which could be exercised only by a parent; how could it appreciate the wants or deserts of a child, taking justice and affection for its guide? *Ewle v. Eade* (5 Madd. 118); *Lechmere v. Larie* (2 Myl. & Keen, 197); *Hoy v. Master* (*ante*, vol. vi. p. 568).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The will in this case is untechnical and obscure; but I think that there is not such a trust created as this Court can act upon. One thing is clear with respect to the testator's interest in his business: the widow is entitled to the capital absolutely, and to the whole of the profits until the eldest son attains 21; and then he will take a moiety of the profits from that time. I think that the words, "*trusting that she will act justly and properly to and by all our children*," are a general expression of a wish, and do not create a trust.

In the preceding part of his will the testator says, "*whatever property or effects*

I may die possessed of after my just debts are paid, or become entitled to at or after my decease;" so that he is speaking not only of the property which he might have at his death, but also of what might accrue to his estate afterwards. Then he says: "I do give and bequeath the whole and every of them, excepting only such sum or sums as shall be hereafter distinctly named and otherwise disposed of, to my dear and beloved wife; and I do hereby nominate, constitute and appoint her my sole executrix of this my last will and testament: and my reason for so doing is the constant abuse of trustees which I daily witness among men: at the same time trusting she will, from the love she [6] bears to me and our dear children, so husband and take care of what property there may be for their good." It was said by the counsel for the Plaintiffs that those words would create an absolute trust for the children. But it seems to me that the expression, "what property there may be," means such property as might happen to exist, having regard to the fact that the wife might sell or alien a part of it. Besides, if by this first part of the will a trust is created for the children, they must all take jointly and equally. But then comes the clause which directs that the wife, if she should marry a second husband, should convey to trustees what property she might then possess for the benefit of the children as they might severally need or deserve, taking justice and affection for her guide. This clause is inconsistent with the Plaintiffs' construction of the prior part of the will; for, if the widow marries again, she is to have a power of distribution amongst the children according to her estimate of their wants and deserts.

My opinion, therefore, is, taking the whole of this will together, that there is not enough in it to create a clear definite trust which this Court will execute for the benefit of the children.

[7] CARTER v. BEARD. May 25, 1839.

[S. C. 3 Jur. 532. Doubted, *In re Rhodes*, 1890, 44 Ch. D. 94.]

Lunatic. Debt. 3 & 4 W. 4, c. 104.

A person who was a lunatic, but had not been found to be so by inquisition, died seised of a small freehold estate, but not possessed of any personal property. His step-father had received the rents of the estate, and had expended more than the amount of them in maintaining the lunatic; he also paid the lunatic's funeral expenses. Held, that he was not entitled, under 3 & 4 W. 4, c. 104, to be paid either the surplus expenditure, or the amount of the funeral expenses, out of the lunatic's freehold estate.

In 1835 Enoch Beard died intestate and a lunatic, but he had not been found so by inquisition. He left a small freehold estate, but no personal estate whatever. The Defendant was his eldest brother and heir, and also his administrator. The Plaintiff was the second husband of the widow of the lunatic's late father, and had received the rents of the lunatic's estate, and applied them in maintaining the lunatic in an asylum, and had expended more than the rents in so doing. The Plaintiff also paid the lunatic's funeral expenses.

The question was whether the amount of the funeral expenses and the sums expended in the maintenance of the lunatic, over and above the rents of his estate, constituted a debt which the Plaintiff was entitled to be paid out of the lunatic's freehold estate under 3 & 4 Will. 4, c. 104.

It was argued for the Plaintiff that if a person became lunatic, and, some time afterwards, a commission was issued against him, the Master would be directed to take an account of what the party who had maintained the lunatic before the issuing of the commission had properly expended in his maintenance; and that the amount would be ordered to be paid to him out of the lunatic's property. *Rogers v. Price* (3 Youn. & Jerv. 28).

Mr. Jacob and Mr. Romilly appeared for the Plaintiff.

Mr. Knight Bruce and Mr. Bilton, for the Defendant.

[8] THE VICE-CHANCELLOR said that the funeral expenses could not be said to be a debt contracted by the lunatic: that the executor or administrator, and not the heir, was bound to bury the deceased; and, consequently, the funeral expenses were payable out of the personal, and not out of the real, assets of the deceased. His Honor then read the 3d & 4th Will. 4, cap. 104, and added that the Plaintiff could not claim as a debtor what he had expended beyond the rents in the maintenance of the lunatic, as it was an act of bounty on his part, as the step-father of the lunatic, and not a debt, either by specialty or simple contract, contracted by the lunatic, who was in a situation which incapacitated him from contracting a debt.

[9] SCHREIBER v. CREED. May 30, 31, June 1, 1839.

[S. C. 8 L. J. Ch. (N. S.) 346; 3 Jur. 625; Cf. *Russell v. Watts*, 1885, 10 App. C. 590.]

Covenant. Agreement. Plan.

A deed dated in 1827, and made between J. Pitt of the one part, and the other persons who had executed the deed, of the other part, recited that Pitt, being seized in fee of the lands delineated in the plan thereto annexed (being Pittville), and having it in contemplation to establish a spa at or near the north end of the lands, and to erect a pump-room at or near the spot marked on the plan, and to lay out the rest of the lands for buildings, pleasure-grounds, roads, &c., had caused the plan to be drawn whereby the mode in which the lands were intended to be laid out and the purposes for which they were intended to be converted and used were described, in order that the beauty and regularity of the whole of the design might be, for ever thereafter, preserved, *subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design*, and that each of the other parties to the deed had purchased or agreed to purchase one or more of the pieces of land described in the plan as set out for building. The deed then contained covenants by Pitt, his heirs and assigns, to complete the pleasure-grounds, roads, &c., and to keep them in repair, and other covenants prescribing the manner in which the pleasure-grounds, roads, &c., should be enjoyed and used by the occupiers of the houses to be erected on the building-ground, and that Pitt, his heirs or assigns, would, on every agreement which should be entered into by him or them, for the sale of any part of the building ground, require the purchaser to covenant with him, his heirs and assigns, not to erect any messuage on any part of the ground which might lessen in value any other of the messuages erected or to be erected at Pittville.

In 1833 Pitt agreed to sell Lots 2, 3, 4 and 5, of the building-ground to Stokes; and Stokes agreed with him to erect three houses on those lots, and that each house should stand back 25 feet from the western boundary of the lots, *and that Stokes, his heirs or assigns, would not do or suffer to be done, on the lots or in any building to be erected thereon, any act, deed, &c., which might be deemed a nuisance, injury or annoyance, or which might lessen in value any adjoining or neighbouring lands or property, or any houses to be erected thereon.*

Stokes built two houses on Lots 2 and 3; and in 1833 Pitt conveyed those lots to him: and Stokes, for himself, his heirs and assigns, entered into a covenant with Pitt, his heirs and assigns, with respect to those lots and the houses thereon, similar to the last-mentioned stipulation in the agreement. Stokes subsequently gave up Lots 4 and 5 to Pitt, and abandoned his agreement as to them, and then sold his house on Lot 3 to the Plaintiff. Pitt afterwards agreed to sell Lots 4 and 5 to Creed. The agreement stipulated that the house to be erected on those lots should stand back *ten feet* at the least from the western boundary thereof, and it contained a stipulation for protecting the adjoining property from injury, &c., similar to that in Stoke's agreement. Both Stokes and Creed executed the deed of 1827. Creed began to build a house on his lots, 13 feet distant from the west boundary, which was 12 feet in advance of the Plaintiff's house, and which the

Plaintiff alleged would be a nuisance or annoyance to him, and would lessen the value of his house, and, consequently, would be a violation of the covenant in the deed of 1827, and of the agreement of 1833.

Held, that the plan annexed to the deed of 1827 was merely a general plan, and was not intended to be strictly adhered to, but its details might be varied by Pitt, and with his sanction, by the purchasers from him; and that the Plaintiff was not entitled to avail himself, as against either Creed or Pitt, of the covenants of 1827 or of the agreement of 1833, for the purpose of preventing the completion of Creed's house in the manner intended, or the performance by Pitt of the agreement with Creed.

By an indenture made the first of January 1827, between Joseph Pitt, Esq., of the one part, and the several persons whose names were contained in the schedule thereto, and who had executed the deed, of the other [10] part, after reciting that Pitt, being seized in fee of the lands and hereditaments delineated in the map or plan thereto annexed, and having it in contemplation to establish a spa at or near to the north end of the lands, and to erect a pump-room, with suitable conveniences, at or near the spot marked out for that purpose on the map or plan, and to lay out the residue of such lands for buildings and lawns, pleasure-grounds, plantations, streets, roads, drives, promenades, pond or pool and other ornaments and conveniences, lately caused the plan thereunto annexed to be drawn, whereby the mode in which the whole of the lands was intended to be laid out and formed, and the purposes to or for which the same were to be converted and used, were described in order that the beauty and regularity of the whole of the design might be, for ever thereafter, preserved, *subject only to such alterations as should be made or approved of by Pitt, his heirs or assigns, and as should not destroy [11] the general beauty of the same design*; and that each of the other persons parties thereto had purchased or contracted to purchase one or more pieces of the land described in the map or plan as set out for building; and, in consideration of the covenants of each of the same persons thereafter contained, Pitt had agreed with each of them that he would cause a handsome pump-room to be erected at or near the spot marked in the map or plan, and at his own costs and charges, from, and, for ever after, keep in repair all the roads, drives, promenades, walks and footpaths in the map or plan marked and delineated, and that he would form and plant all the lawns and pleasure-grounds in the map or plan delineated, and dig out and complete an ornamental pool of water, with stone bridges over the same, as specified in the map or plan; and that he, his heirs and assigns would, for ever after, keep the same lawns, pleasure-grounds, pool of water and bridges in good repair and condition, and that he would also complete one or more sewer or sewers for carrying off the water, &c., from the whole of the premises: and, after further reciting that Pitt had nearly finished the pump-room, and had completed most of the roads, drives, walks, promenades, footpaths, lawns, pleasure-grounds, plantations, bridges and sewers, according to the plan, or with such alterations only as were thereinbefore mentioned or referred to: it was witnessed that Pitt, for himself, his heirs, &c., covenanted with each of the other parties thereto, their respective heirs and assigns, that he, his heirs and assigns, would, thenceforth, stand seised of such parts of the said lands as were in the plan set out and delineated as the lines and situations of, and as and for roads, ways, rides, drives, walks, footpaths, promenades, lawns, pleasure-grounds, planta-[12]-tions, pool of water and bridges, upon trust that all the same lands should be laid out and completed, and, from time to time, improved by and at the costs and charges of him, his heirs and assigns, as roads, ways, rides, drives, walks, footpaths, lawns, promenades, pleasure-grounds, plantations, pool of water and bridges, in the manner in the plan delineated, or as near thereto as circumstances should admit; and that the same should be completed within two years from the date of the indenture, and be for ever thereafter kept in good order by him, his heirs and assigns; and that the owners and occupiers for the time being of each part of the land in the plan set out for building, and of the houses which should be erected thereon, should have full liberty to use, either on foot or on horseback, and with carts and carriages, according to the nature thereof respectively, all the said roads, ways, rides, drives, walks,

promenades and footpaths ; save only that none of the roads which, in the plan, were marked with the letter R. should be used for timber carriages, waggons or carts ; but all such like carriages, and all coals, manure and other heavy goods should be taken along one of the back roads marked in the map or plan with the letter T. ; and further, that such owners and occupiers should have full liberty, at all times during the day, to walk in any of the lawns and pleasure-grounds ; and further, that Pitt, his heirs or assigns, should, *on every agreement which should thereafter be entered into by him or them for the sale of any part of the land which had been so as aforesaid laid out for building, require that the purchaser and purchasers should, by covenant or agreement with him, his heirs or assigns, owners for the time being of the pump-room, bind himself and themselves respectively, and his, her and their respective heirs, executors, administrators and as-* [13] *signs, not to erect any messuage or tenement on any part of the ground at Pittrille,*(1) *which should or might lessen or deteriorate in value any other of the messuages then erected or to be thereafter erected at Pittrille aforesaid, and not to carry on any manufactory, or any other trade than that of a librarian, or hotel, or coffee-house keeper, or nurseryman, or florist, in or on the ground set out for building as aforesaid, or the buildings thereon to be erected, except such parts thereof as were marked on the plan, with the letters A, B, C : and that no water should be drawn off from the pool, except for the use of Pitt, his heirs and assigns, or the persons for the time being interested in the land laid out for building. And each of the persons parties to the deed of the second part covenanted with Pitt, his heirs and assigns, to pay the yearly sums set opposite to their respective names in the first schedule to the deed, in order to enable Pitt, his heirs and assigns, to keep the roads, ways, &c., in good order, and not to do any act which might occasion annoyance or inconvenience to any of the persons having a right to use the said lawns and pleasure-grounds, or which might injure, damage or deface the same ; and to concur with Pitt, his heirs or assigns, in obtaining an Act of Parliament for more effectually securing the performance of the covenants contained in the indenture, and for the better regulation, and the continued and uninterrupted enjoyment and maintenance of the property comprised in the plan, according to the same plan, and the terms and provisions of the indenture, and of the contracts entered into or to be entered into, with Pitt, his heirs or assigns, for the purchase of any parts of the same property under the stipu-* [14] *lations thereinbefore contained : and it was thereby agreed, between the parties thereto, that it should be lawful for Pitt, his heirs and assigns, from time to time thereafter, to make wells and lay pipes, in or under any part of the land which had been laid out for lawns, pleasure-grounds, plantations, streets, roads, drives and promenades, for the purpose of procuring medicinal or other water and conveying the same away to any place which he or they might think fit. The indenture then recited that Pitt had entered into contracts with various persons for sale of some parts of the property, the stipulations and agreements contained in which contracts, on his part, differed in many respects from the stipulations and agreements which were therein contained on his part ; and that it was possible that some of those persons might not agree to the terms of the indenture : it was, therefore, declared by the parties thereto, that in the event of any such disagreement, the indenture and the covenants and agreements therein contained on the part of Pitt, his heirs and assigns, should be binding on him and them so far only as the same were capable of being performed consistently with any such contract entered into with any person who should not become a party to the indenture.*

The bill to which Pitt, as well as Creed, was made a Defendant, alleged, after stating the before-mentioned indenture, that the lands described in the plan annexed to the indenture had been laid out, in conformity with the plan, for sites of buildings and in ornamental pleasure-grounds, and that numerous allotments of such lands had been let or granted to divers persons, in conformity with the plan ; and that, in 1832, Pitt caused a public map or plan of the estate, shewing in a more detailed and particular manner the intended sites of [15] the dwelling-houses proposed to be erected thereon, to be prepared, and such plan had been ever since hung up for public inspection in his estate office at Cheltenham, and also in the Pittville pump-room ; and all lettings and contracts made or entered of or respecting such lands had

(1) The name given to the property to which the deed related.

been made according to and on the terms of abiding by such last-mentioned plan, and all persons who had become grantees of any parts of the lands had been required to execute and had executed the before-mentioned indenture; and numerous houses had been erected by divers persons, on the pieces of land so taken; and all such buildings and all other improvements made by persons who had taken parts of the lands had been made on the faith that the said plan would be adhered to, and that the aforesaid covenants and agreements would be performed by all persons becoming lessees or grantees of any part of the lands: that, by an agreement dated the 13th of April 1833, R. Stokes, architect, who had been employed by Pitt in preparing the aforesaid plan, agreed with Pitt to purchase Lots 2, 3, 4, 5, 6 and 16, part of the Pittville estate, and, in the division of that plan, called Segrave Place, with liberty to use such of the pleasure-grounds, sewers, roads, rides, walks and promenades at Pittville, as were specified in the agreement, subject to the stipulations and restrictions contained in the indenture of the 1st of January 1827, being a deed for the general regulation and management of the Pittville estate: and Stokes, for himself, his heirs and assigns, covenanted with Pitt, his heirs and assigns, to build on the six lots, within four years from the date of the agreement, the messuages after mentioned, of such respective elevations as had been approved of by Pitt (that is to say), on each of Lots 2 and 3, a messuage, but adjoining together so as to [16] form a double villa; on Lots 4 and 5 one messuage only; and on each of Lots 6 and 16 a messuage, to form parts of a row or pile of attached dwelling-houses, intended to be called Segrave Place; and that the messuages to be erected on each of Lots 2 and 3, *and the messuage to be erected on Lots 4 and 5, should stand back 25 feet 3 inches from the west boundary of the same lots respectively*, and that the messuage on each of Lots 6 and 16 should stand back, from the west boundary thereof, six feet six inches; and that no erection or building of any kind whatsoever should at any time thereafter be erected in front of any of the messuages thereinbefore agreed to be erected; and that no other erection or building of any kind whatsoever should be erected on any part of the land, besides the said messuages, *except such as should be approved of by Pitt, his heirs or assigns, or his or their surveyors*; and that Stokes, his heirs or assigns, would not at any time thereafter do or commit, or permit or suffer in or on the lots thereby agreed to be sold, or any part thereof respectively, or in any erection or building to be erected thereon, *any act, deed, matter or thing whatsoever which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighbouring lands or property, or any messuages, tenements or dwelling-houses to be erected thereon*. The bill then stated that the plan endorsed on the agreement corresponded with that portion of the public plan, prepared by Stokes, which related to the pieces of land comprised in the agreement, so far as that the houses to be erected on Lots 2, 3, 4 and 5 were to be in the same line of frontage towards the west: that Stokes erected two dwelling-houses on Lots 2 and 3, which were called Segrave Villa and Roden House, and they were conveyed to him by Pitt, by lease and release of the 9th and 10th [17] of December 1833, subject to the stipulations of the deed of arrangement of the 1st of January 1827; and, by the release, Stokes covenanted with Pitt that no erection or building of any kind whatsoever should, at any time thereafter, be erected in front of those houses or either of them, and that no erections or buildings of any kind whatsoever should be erected on any part of the last-mentioned lots, besides the houses already erected thereon, *except such as should be approved of by Pitt, his heirs or assigns, or his or their surveyor for the time being*; and also that Stokes, his heirs, appointees or assignees would not, at any time thereafter, do or commit, or permit or suffer to be done or committed, in or on those lots or either of them, or in or on any messuage or building erected or to be erected thereon, *any act, deed, matter or thing whatsoever which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighbouring land or property, or any messuages erected or to be erected thereon*. The bill further stated that the Plaintiff contracted with Stokes for the purchase of Roden House and the lot on which it was erected, and the same were by indentures, dated the 21st and 22d of March 1836, conveyed to the Plaintiff, his heirs and assigns, but subject to the covenants, stipulations and agreements contained in the indenture of the 10th of December 1833, and in the deed of arrangement of the 1st of January 1827: that Stokes afterwards entered into some

contract with Pitt, by virtue of which he reconveyed all the lots of land comprised in the agreement of April 1833, except Lots 2 and 3, to Pitt, his heirs and assigns: (1) that Pitt had since agreed to sell Lots 4 [18] and 5 to Creed, and that an agreement had been made between them, with respect to those lots, containing a covenant, by Creed with Pitt, that he, Creed, would not do or commit, or permit or suffer, in or on the lots of land thereby agreed to be sold to him, or any part thereof respectively, *any act, deed, matter or thing whatsoever which might be deemed a nuisance, injury or annoyance to, or which might deteriorate or lessen in value any adjoining or neighbouring lands or property, or any messuage or dwelling-house erected or to be erected thereon*; and that Creed had executed the deed of arrangement of the 1st of January 1827: that great part of the value of the Plaintiff's house consisted in the uninterrupted prospect which it possessed of the ornamental pleasure-grounds mentioned in the deed of arrangement, and which lay towards the south-west of his house, which was built with a bow window for the sake of that view; and that the Plaintiff purchased his house upon the faith of the provisions and stipulations contained in the agreement of April 1833 and in the deed of arrangement, and of the assurance which he thereby received that no building would be erected on the land adjoining his house on the south-west (that is to say), on Lots 4 and 5, which should project beyond the line of his house, or in any way obstruct or interfere with the view enjoyed by his house, but that any building which might be erected on Lots 4 and 5 would be erected in conformity with the stipulations of the agreement of April 1833; but that Creed had begun to build on the land forming Lots 4 and 5, which immediately adjoined the Plaintiff's premises on the south-west, and he intended to erect a dwelling-house thereon, immediately adjoining the Plaintiff's premises on the south-west, the front of which would project towards the western boundary of the last-mentioned lots 12 feet and upwards beyond [19] the line of the front of the Plaintiff's house, and would not be removed from the western boundary more than 12 feet or thereabouts, instead of 25 feet, and which would, accordingly, intercept from the Plaintiff's house the air and light and the view of the ornamental grounds towards the south-west which constituted a considerable part of its value, and thereby greatly annoy the Plaintiff, and very materially deteriorate the value of his house: that the manner in which Creed was proceeding to build his house was not in conformity with the aforesaid plan, (2) and was also a breach and violation of the covenants contained in the indenture of January 1827, and particularly of the covenant, that no person purchasing any part of the Pittville estate should erect thereon any messuage or building which might lessen or deteriorate the value of any other of the messuages erected or to be erected at Pittville: that the Plaintiff, and the other persons who had purchased grounds and houses at Pittville had done so on the faith that the said plan and covenants would be adhered to and enforced: that Lots 4 and 5 were comprised in the agreement of April 1833, and were the property of Stokes at the time when the Plaintiff purchased his house; and that no person claiming those lots under Pitt or Stokes was at liberty to build thereon in a manner contrary to the covenants or provisions of that agreement: that Creed claimed to be entitled to the piece of land on which he was building, and which was comprised in the last-mentioned agreement, under the parties thereto or one of them, and that he was bound by the covenants therein contained; and that he had notice of such agreement at the time when the existing agreement between him and Pitt was entered into: that the Defendants [20] alleged that the agreement between Pitt and Creed was different from the agreement of April 1833, and that, by the former, Creed was expressly authorized by Pitt to build on the piece of land adjoining the Plaintiff's house in the manner in which he was proceeding to do; and that Pitt refused to enforce the aforesaid covenant in the deed of arrangement against Creed: that Pitt was not at liberty to enter into any agreement with Creed, authorizing or empowering Creed to build on the piece of land adjoining the Plaintiff's premises in any manner which would be in breach of the stipulations contained in the agreement of April 1833: *that Pitt was, as to Lots 4 and 5, the assignee of Stokes,*

(1) There was, in fact, no reconveyance of these other lots. The benefit of the agreement as to them was relinquished by parol.

(2) The plan which was prepared in 1832.

and that the Defendants claimed the same under Stokes, and were bound by the stipulations of the agreement of April 1833, and that the agreement between Pitt and Creed, if it sanctioned any mode of building on the land adjoining the Plaintiff's house which would be a breach of the stipulations of the agreement of April 1833, was a fraud on the Plaintiff: that no conveyance of the legal estate in Lots 4 and 5 had been made by Pitt to Creed; and that Creed had not yet paid the purchase-money for those lots: that Pitt was a trustee of the aforesaid covenants, contained in the deed of arrangement for the Plaintiff, and ought to enforce the same in his name against Creed.

The bill prayed that it might be declared that the Defendants were not at liberty to erect any house or building on Lots 4 and 5 which should project towards the western boundary thereof beyond the line of the Plaintiff's house, or any building whatsoever which should or might deteriorate or lessen in value the Plaintiff's house; and that it might be declared that the [21] message, which was then in the course of being erected by Creed, would be an annoyance to and deteriorate and lessen in value the Plaintiff's house; and, in case it should appear that Creed was erecting the same pursuant to the provisions of any agreement between himself and Pitt, then that it might be declared that Pitt had no power to authorize any building to be erected on Lots 4 and 5, which was an annoyance to or which deteriorated or lessened the value of the Plaintiff's house; and that Creed might be restrained from further proceeding with the building which he was then erecting on Lots 4 and 5, and also from erecting any building thereon which should project towards the western boundary thereof beyond the line of the front of the Plaintiff's house, and also from erecting any building thereon which should be a nuisance, injury or annoyance to, or which might deteriorate or lessen in value the Plaintiff's house; and that Pitt might be restrained from entering into or performing any contract or agreement which should authorize the erecting on Lots 4 and 5, or either of them, any building which should project towards the western boundary of those lots beyond the front of the Plaintiff's house, or which should be a nuisance or annoyance to or deteriorate or lessen the value of that house.

The Plaintiff now moved for injunctions against the two Defendants according to the prayer of the bill. The material allegations in the bill, except that which charged Creed with notice of the agreement of April 1833, were supported by affidavits, one of which added that, if Creed's house was erected in the manner proposed, the Plaintiff's house would be deteriorated in value to the amount of £300 at the least; and that a [22] person standing at the entrance of Creed's house would be able to overlook the Plaintiff's dining-room.

F. Dodd, who was Pitt's agent in respect of the Pittville estate, and the Defendant Creed made an affidavit, in which they deposed that Dodd, on taking the management of the estate, found the original plan, prepared by Stokes in 1832, in Pitt's estate-office; and, according to that plan, the houses to be built on Lots 2, 3, 4 and 5 were to stand back from six feet to six feet six inches from the western boundaries of those lots; but afterwards some alterations were determined upon, and, amongst others, that the building sites of Lots 2 and 3 and 4 and 5 should be thrown back 18 feet from the western boundaries; and those alterations were adopted in the lithographed copies of the plan which Stokes procured to be made; that neither the original nor the lithographed plan was observed by Stokes in erecting Roden House and Segrave Villa on Lots 2 and 3, those houses having been erected at the distance of 25 feet 6 inches from the west boundary; that, it having been found that the houses to be erected by Creed on Lots 4 and 5 could not be placed further back from the west boundary than 12 feet, so as to leave sufficient space for stables behind them, Pitt, in his contract with Creed, agreed that Creed *should be at liberty to place those houses back from the west boundary any distance not less than 10 feet*; that the lithographed plans had been hung up in Pitt's estate-office and in the pump-room at Pittville merely for the purpose, as the deponents believed, of general information, and in the same way as plans of cities, towns and other places were commonly hung up or placed in public rooms for general information; and that similar plans had been hung up or placed [23] in several other places in Cheltenham, and distributed to solicitors and others, with the view to make the Pittville estate known to visitors and others; that,

during Dodd's agency, neither the plan in the estate-office nor that in the pump-room had been treated or considered by Dodd, nor, as he believed, by any other person, as binding upon Pitt, by way of contract with any person with whom he might treat in regard to any of the Pittville property; that the original plan prepared by Stokes had been departed from to meet the wishes of parties dealing with Pitt in several instances besides that of Stokes; that Dodd always understood that the plan referred to and indorsed upon the deed of January 1827 was the only plan which Pitt was bound to observe; and that plan would not be deviated from, in any respect, by Creed's houses being placed, as then intended, at the distance of 13 feet and 8 inches from the west boundary; that those houses would not, in the least, obstruct the view of the ornamental grounds at Pittville from the Plaintiff's house, or materially obstruct any other view therefrom which constituted a considerable part of its value, or materially intercept the light or air therefrom, nor would Creed's house be, with reason or on any sufficient ground, an annoyance to the Plaintiff, or materially lessen the value of his house; and Creed said that, at the time of entering into his contract with Pitt, he had no knowledge or notice whatever of any agreement having been entered into between Pitt and Stokes whereby the house to be built on Lots 4 and 5 was to be thrown back 25 feet 3 inches from the western boundary of those lots.

Stokes made an affidavit in reply, in which he stated that the plan referred to in the deed of January 1827 [24] did not shew the particular sites or positions of the buildings intended to be erected on the Pittville estate, but described merely the walks, drives and pleasure-grounds; and shewed, in a general way, what part of the estate was intended for building-ground.

Mr. Knight Bruce and Mr. Bethell, in support of the motion. In addition to the plan annexed to the deed of January 1827, which regulated the mode in which the pleasure-grounds, roads, pieces of water, &c., belonging to the Pittville estate were to be used and enjoyed by Pitt and the proprietors of the ground allotted for buildings, there were two other general plans; one of which was prepared by Stokes in 1832, and the other was the lithographed plan. Those two plans differed in some respects from each other. The lithographed plan, however, was the only one that was shewn to the public. Copies of it were hung up in Pitt's estate-office and in the pump-room at Pittville, and were distributed to solicitors and others. According to that plan (which was particularly known to Creed during the whole of the time that the transactions between him and Pitt were going on), the houses to be erected on Lots 2, 3, 4 and 5 were all of them to have the same line of frontage. In 1833 Stokes agreed with Pitt to purchase those lots; and then a more particular plan was prepared and annexed to the agreement, according to which the houses to be erected on those lots were to be placed back 25 feet and 3 inches from the western boundary of the lots. The particularity of that plan is such as to preclude the necessity of deciding the case upon the general lithographed plan; we do not, however, waive the benefit of it, but insist that it amounted to a representation [25] which was binding on Pitt. By the agreement of April 1833 an equitable title to the lots comprised in it was conferred by Pitt on Stokes. Stokes proceeded to erect Roden House and Segrave Villa on two of those lots in accordance with the terms of the agreement and the plan annexed to it. Afterwards Pitt conveyed those two lots to Stokes, subject to the stipulations of the deed of January 1827; and Stokes entered into covenants with Pitt, conformable to the stipulations contained in the agreement of April 1833. Stokes afterwards became embarrassed in his circumstances; and, being unable to complete his agreement as to the remaining lots, he gave them up to Pitt. Pitt therefore derived title from Stokes to the lots so given up; and, consequently, although he was the landlord, he must stand in the same position with respect to them as a mere stranger would have done. The covenants regarding Lots 4 and 5 ran with Lots 2 and 3, and the covenants regarding Lots 2 and 3 ran with Lots 4 and 5. When Stokes relinquished Lots 4 and 5, he did not mean to prejudice any right that he had with respect to Lots 2 and 3; and, when he conveyed Lot 3, on which he had built Roden House, to the Plaintiff, all the incidents belonging to that lot passed with it. The Plaintiff then, being an assign of Stokes, is entitled to enforce the covenants contained in the agreement of April 1833, and, consequently, to prevent Creed from proceeding to build, on Lots 4 and 5, a house which will stand 12 feet in advance of the Plaintiff's

house, and which, it is distinctly sworn, will be an injury and annoyance, and will deteriorate or lessen the value of his house. In *Keppell v. Bailey* (1) the lessees of certain ironworks [26] covenanted, for themselves, their heirs, executors, administrators and assigns, with a railway company, so long as they, their executors, administrators or assigns should occupy the ironworks, to procure all the limestone used in the works from a certain quarry, and to convey it along the railway; and Lord Brougham, Chancellor, held that the covenant did not run with the land. There is, however, a passage in the judgment, to which we are anxious to call the attention of the Court, in which his Lordship says: "Between the estates of the occupiers of the ironworks, and the estates or the persons of their associates in the railway speculation, with whom they covenant, there is no privity; no connexion whatever of which the law can take notice. There was no unity of title in the estates of the contracting parties; the ironworks and the lime-pits or railway did not come to them severally from the same owner; they were not held by them severally under the same landlord." The ingredients which did not exist in that case are found in this. Here, when the agreement of 1833 was entered into, both properties were in the same owners.

The effect of the deed of January 1827 was to bring all the parties to it into one common partnership. Every purchaser who executed that deed became bound to Pitt, and, through him, to the other purchasers. Pitt took the covenants which were entered into with him, by the purchasers of the different portions of his estate, for his own benefit and for the benefit of all those who had dealt or might deal with him: he is therefore a trustee of those covenants. By one of the covenants in the deed of 1827 he bound himself to require every person with whom he should contract for the sale of any portion of the building-ground at Pittville to enter into an agreement not to erect any messuage on any part of the [27] ground which might lessen or deteriorate in value any of the messuages then erected or to be thereafter erected at Pittville: and covenants to that effect were inserted in the agreements with Stokes and Creed. Comyn's Dig. (covenant, B.); *Laurence Pakenham's case* (cited from the Year Books in 2 Myl. & Keen, 539); *The Feoffees of Heriot's Hospital v. Gibson* (2 Dow. 301); *Rankin v. Huskisson* (ante, vol. iv. p. 13); *Squire v. Campbell* (1 Myl. & Craig, 459; see 479).

Mr. Jacob and Mr. Parry, for the Defendant Creed, said that the Plaintiff's counsel seemed to have lost sight of the fact that all the covenants on which they relied were entered into with Pitt; and that he, being the covenantee, might release the covenants or enforce them or not as he pleased: that, when Stokes gave up Lots 4 and 5 to Pitt, all the covenants between them respecting those lots were at an end: that the Plaintiff's counsel were also mistaken in contending that the covenants ran with the different lots; for, in fact, they did not run with the lots, but with the pump-room in which none of the purchasers of lots had any interest: that the plan was clearly intended to be a mere general plan and not to be final; for it was impossible that so extensive an undertaking as the formation of a new town, with public walks, roads and other conveniences, could be carried into execution without alterations being necessary from time to time in some part of the original plan, and that, by the terms of the deed of January 1827, the power of sanctioning such alterations was vested in Pitt: that Pitt himself was not prohibited from building on the estate in any manner he thought fit; and the covenant, which had been relied on in the deed of 1827, applied only to [28] purchasers of lots, not to lessees under a building-lease for 99 years. *Roper v. Williams* (Turn. & Russ. 18); *The Duke of Bedford v. The Trustees of the British Museum* (2 Myl. & Keen, 552; see 563 and 564).

No counsel appeared for the Defendant Pitt.

Mr. Knight Bruce, in reply, said that although the covenant in the deed of 1827 was entered into with Pitt, his heirs and assigns, owners for the time being of the pump-room, yet that covenant would not run with the pump-room, because it was not intended to benefit the owners of it, but the owners of the other lands; and that if Pitt himself had chosen to build on the estate in a manner not sanctioned by the covenant, he would have committed a fraud on the covenant.

(1) 2 Myl. & Keen, 517; see 533 and 544. See the observations on the judgment in 2 Sugd. Vend. & Purch. 471, &c.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case, if the Plaintiff is entitled to the relief which he asks by his motion, it must be on the ground either of the general covenants contained in the deed of 1827, or on the ground of the covenants which are contained in the agreement of April 1833. With respect to the covenants which are contained in the agreement of April 1833, it is necessary to look at the very words of those covenants.

It appears that in April 1833 Mr. Pitt entered into an agreement with Mr. Stokes, by means of which Stokes was to become the purchasers of Lots 2, 3, 4 and 5, and 6 and 16; and the covenants which Stokes entered into were: "That the messuages, tenements or dwelling-houses to be erected on each of the said lots numbered [29] 2 and 3, and the messuage, tenement or dwelling-house to be erected on the said lots numbered 4 and 5, shall be erected so as to stand back 25 feet and 3 inches from the west boundary of the same respective lots; and the messuage, tenement or dwelling-house to be erected on each of the said lots numbered 6 and 16 shall stand back, respectively, from the west boundary thereof, six feet and six inches." Then it was further covenanted that, as soon as the messuages should have been completed and finished on Lots 2, 3, 4 and 5, Stokes should lay out the ground in the front thereof, respectively, as ornamental pleasure-gardens, and should fence the same in with iron palisades; and that no erection or building of any kind whatsoever should, at any time thereafter, be erected in front of the respective messuages, tenements or dwelling-houses, or any or either of them, thereinbefore agreed to be erected and built as aforesaid on the pieces or parcels of land thereby agreed to be sold; and that no other erection or building of any kind whatsoever should be erected on any part of the said pieces or parcels of land, respectively, besides the messuages, tenements or dwelling-houses, out-offices and outbuildings thereinbefore agreed to be erected and built thereon respectively as aforesaid, or any or either of them, except such as should be approved of by the said Joseph Pitt, his heirs or assigns, or his or their surveyor for the time being: and further that he, Stokes, his heirs and assigns, should not nor would, at any time or times thereafter, do or commit or permit or suffer, in or on the same several lots of land thereby agreed to be sold, or any part thereof respectively, or in any erection or building to be erected thereon or on part thereof respectively, any act, deed, matter or thing whatsoever, which could, should or might be deemed a nuisance, injury or annoyance to, or which could, should or might [30] deteriorate or lessen in value any adjoining or neighbouring lands or property, or any messuages, tenements or dwelling-houses erected or to be erected thereon. None of the covenants that Mr. Pitt entered into in that agreement appear to me to have any relation to the question between the Plaintiff and the Defendant. The agreement is, on the face of it, an agreement merely between Mr. Pitt and Mr. Stokes; and the very first thing that struck me on reading it was that it was competent to Mr. Pitt, at any time he pleased, to release Stokes from any of the covenants, and to enter into any other covenants which might be agreed upon between himself and Stokes; and, if Mr. Pitt chose not to enforce the stipulation as to the mode of building the houses at certain distances from the west boundary, it seems to me that he was at liberty so to do. And, in my opinion, that part of the covenant which was most relied upon in favour of the Plaintiff, namely, the latter part which I have read, does not apply to the present case at all: because, when Mr. Stokes, who was going to take Lots 2 and 3, 4 and 5, and 6 and 16, covenanted that he would not do, or permit or suffer to be done, on the lots agreed to be sold, that is, on all those six lots, or on any part thereof, or in any erection or building to be erected thereon, or on any part thereof respectively, any act, deed, matter or thing whatsoever which could or should or might be deemed a nuisance, injury or annoyance to, or which could, should or might deteriorate or lessen in value any adjoining or neighbouring lands or property, it is quite clear that he was not covenanting as to the mode of using Lots 2 and 3 so as to affect Lots 4 and 5, or Lots 4 and 5 so as to affect Lots 2 and 3. That part of the covenant was meant to apply, and does, in terms, apply only to the use which he should make of Lots 2 and 3, 4 and 5, and 6 and 16, so as, by [31] that use of them, not to affect other lands; but there is nothing whatever, either in the terms or in the spirit of that part of the covenant, which can extend to restrict him in the use of a part of the lands agreed to be sold to

him, so as not to injure the enjoyment of other parts of the same lands. If he was the purchaser of the whole, it would be absurd to say that he should be restricted in the use of a part so as not to injure the remainder : for, being the owner of the whole, he would not of course use one part so as to injure the remainder. In my opinion, therefore, no part of this covenant in the agreement of April 1833 is capable of being made to bear on the question.

Stokes proceeded to erect a house on each of Lots 2 and 3 ; and, in the month of December in that year, a conveyance in fee-simple was made by Mr. Pitt to Stokes of the messuages on those two lots. Those two messuages are particularly described in the conveyance ; and in the description of them it is stated that they are bounded on or towards the south by other land purchased by the said Robert Stokes of the said Joseph Pitt, alluding to the land forming Lots 4 and 5 ; and then there follows a description rather more extended of those lands ; and then, before the *habendum*, these words are introduced as part of the very description of the property conveyed, "to be held and enjoyed upon the terms, and under and subject to the payments, stipulations and restrictions mentioned and contained in an indenture bearing date on or about the 1st day of January 1827, being a deed of arrangement for the general management," &c. Therefore, there is an express reference in this deed of December 1833 to the original deed of January 1827. Then there follows nothing more than the usual covenants between a vendor and a purchaser, [32] as far as the covenants of Mr. Pitt with Mr. Stokes are concerned ; and then there come covenants by Stokes, "that he will finish and complete the houses ; and further, that he shall not, nor will at any time or times hereafter, do or commit, or permit or suffer to be done or committed in or on the said lots or pieces of ground or either of them, or in any messuage or building erected or to be erected thereon, any act, deed, matter or thing whatsoever, which can, shall or may be deemed a nuisance, injury or annoyance to, or which can, shall or may deteriorate or lessen in value any adjoining or neighbouring land or property," that is to say, a covenant by him that he will not so use Lots 2 and 3 as to produce an injury to any adjoining land : and, therefore, that covenant would, in terms, operate to prevent Stokes from so using Lots 2 and 3, as to produce an injury to the lands comprised in Lots 4 and 5, or the buildings to be erected on those lands. But it is that covenant and not the converse of it : and the covenant, as it stands, is not a covenant which, in terms or by any construction however forced that can be put upon it can afford to the Plaintiff any sort of relief : though I admit that if it had been the converse, the case would have been totally different.

Then Stokes fell into difficulties : and it is represented that, in the beginning of the year 1835, he gave up Lots 4, 5, 6 and 16 to Mr. Pitt. And that there was a complete relinquishment and abandonment on the part of Stokes of any further benefit of the agreement of April 1833 is perfectly manifest from the fact that, in the year 1839, Mr. Pitt thought himself so entirely released, that he actually entered into the contract which was made between him and Mr. Creed : and it seems to me that it is impossible to say that any right, either at law or in [33] equity, remained in him to have any benefit from the agreement of April 1833, beyond that which he had derived from it by means of the conveyance made in December 1833. Mr. Pitt himself then virtually received back the covenants in the agreement of April 1833 ; he virtually became in the same situation with respect to Stokes as if no portion of those covenants ever had been made with regard to Lots 4 and 5. In the year 1838 Stokes conveyed the house which he had built on Lot 3 to the Plaintiff, Captain Schreiber ; and Captain Schreiber, of course, will have the benefit of all those covenants which, as an assignee in law, he can have under the deed of December 1833.

The next question is whether, by reason of the deed of January 1827, Captain Schreiber has any right to the relief he asks.

With respect to that deed, I have to observe in the first place that it is, on the face of it, drawn in such a manner as purposely to avoid that species of dealing with respect to covenants which, for a great number of years, has been introduced into the profession, and is perfectly familiar to the mind of every lawyer, namely, that mode of drawing a deed so as to make some one person, or some set of persons, covenantees, for the express purpose that they may be trustees of the covenants made

with them, for other persons who are either parties to the deed or strangers to the deed. That mode of dealing with covenants has become very general; and I believe that no one ever looked at any deed for forming a voluntary partnership (I mean one of those companies which are commonly called joint stock companies) without seeing that they are all formed upon the plan of having certain persons named as covenantees for the benefit of persons who, at large, may be [34] interested in the undertaking which is the subject of the deed. That form, however, has been avoided in this case: and it seems to me that it never was the intention of Mr. Pitt that any such form should be adopted. It is not to be taken as a mere matter of observation that the thing has happened to be so; but I cannot but think, on reading over the deed of 1827, that it was expressly intended by Mr. Pitt that it should be so; because the deed begins with reciting: "That Joseph Pitt being seised in fee-simple of the lands delineated in the plan thereunto annexed, and having it in contemplation to establish a spa at, or near the north end of the said lands, and to erect a pump-room with suitable conveniences, at or near the spot marked out for that purpose on the plan, and to lay out the residue of such lands for buildings, and for lawns, pleasure-grounds, &c., lately caused the plan thereunto annexed to be drawn, whereby the mode in which the whole of the land was intended to be laid out and formed, and the purposes to which the same was to be converted, appropriated and used, were pointed out and described, in order that the beauty and regularity of the whole of the design might be, for ever thereafter, duly preserved, subject only to such alterations as should be made and approved of by Pitt, his heirs or assigns, and as should not destroy the general beauty of the same design." It is quite plain from that mere recital that Mr. Pitt never intended to be absolutely bound even by that which did appear on the plan; and it is remarkable that, although the plan did mark out whereabouts the pool should be, and where the rides and the drives should be, and stated what plots of land should be building-ground, yet it did not point out at all what should be the form of the buildings on the pieces of building-ground, nor how much of each piece of ground should be covered with [35] buildings or anything else, except, generally, that there were to be open spaces for drives, walks, plantations, &c., which were made the subject of the covenants in this deed of 1827. It must be taken, therefore, that not only did Mr. Pitt reserve to himself a right to vary, generally, that which was expressed in the deed; but that he kept in his own hands entirely the mode of determining how the pieces of land allotted for buildings should be covered with buildings, and what sort of buildings they should be covered with, and everything else that related to the buildings.

It was said that the whole of this deed is a bubble, if it be allowed to be dealt with in the manner in which it is now proposed by Mr. Pitt to deal with it in respect of Lots 4 and 5. But I cannot say that I exactly agree to that proposition; because, in the first place, this deed covenants, generally, that there shall be plantations, walks, lawns and conveniences of that kind; and Pitt expressly covenants that when he has laid them out he, his heirs and assigns will, from time to time and for ever thereafter, or after the lands should have been so laid out, formed, finished or completed as aforesaid, at his and their own costs and charges, in all things well and effectually repair, and keep in repair, and in good order and condition, the said roads, ways, rides, drives, walks, footpaths, lawns, promenades, pleasure-grounds, plantations, &c. It is quite plain, therefore, that a mode of dealing with the land which would go directly to destroy those lawns, promenades, &c., never could be permitted; because any one of the persons parties to the deed might have a remedy, as well by action of covenant as by bill in equity, to restrain Mr. Pitt, his heirs or assigns, from any general dealing with the land which would have the effect of destroying those prome-[36]-nades and plantations. If, for instance, it were said that Mr. Pitt would be at liberty to erect on some vacant part of this building-ground a manufactory for making alkali; it is quite plain that the process of manufacturing it would destroy the trees and shrubs in the plantations, promenades, and pleasure-grounds; and I apprehend that such a use as that would be prohibited by this Court. It is observable that there is another covenant about the use of the roads, &c. It is expressed that the parties who covenant with Pitt "shall have full liberty, at their free will and pleasure, to use, either on foot or on horseback, and with horses, carts and carriages, according to the nature

thereof respectively, all and every the said roads, ways, rides, drives, &c., save only that none of the said roads, which in the same map or plan are delineated or marked with the letter R, shall be used for timber-carriages, waggons, carts or any such-like carriages, but that such timber carriages, waggons, carts and such-like carriages, and all coals, ashes, manure, rubbish, soil, building materials and other heavy goods and articles shall be taken to and from the said land, along some or one of the back roads set out and delineated in the said map or plan, and therein marked respectively with the letter S, except so far as it may be actually necessary, for want of other access, so to use some part or parts of such carriage roads in respect of any of the said land." So that it is perfectly plain, on the face of this deed, that there is sufficient express stipulation that the land, generally speaking, shall be used for the purpose of pleasure and the personal accommodation and convenience of the inhabitants of the houses, and shall not be allowed to be destroyed by the introduction of manufactories, or the conveyance of heavy goods: and, therefore, I do not think that this deed can be justly characterized as a [37] mere bubble, there being sufficient in the *corpus* of it to enable all those who should have an interest in the land to prevent Mr. Pitt, his heirs and assigns, if they ever should be so foolishly inclined, from perverting this Pittville estate to any other purpose than that to which the mere contemplation of the plan shews it was intended to be appropriated.

Then, after those general covenants about the use to be made of the roads, &c., Mr. Pitt covenants "that he, his heirs and assigns shall and will, in every agreement which should thereafter be entered into by him or them, for the sale of any part of the land or ground which has been so laid out for building, require that the purchasers shall, by covenant or agreement with him, his heirs or assigns, owners for the time being of the intended pump-room, bind themselves, their heirs, executors, administrators and assigns, not to erect any messuage or tenement on any part of the ground at Pittville, which shall or may lessen or deteriorate in value any other of the messuages now erected or hereafter to be erected at Pittville, and not to carry on any manufactory, trade," &c. Now the first observation which strikes me, and which struck me from the time when I first read that covenant, is that it is an extremely difficult one for a Court to deal with (that is to say) in the way of giving relief upon it: because, if a house has once been built upon a plot of ground, it is very difficult to say that building a house on an adjoining plot of ground does not, in some degree, deteriorate the value of the first house. It is perfectly plain, however, that it never was the intention that the covenant should have that construction: because the deed itself sets out with a sufficient manifestation of an intention that all the ground which, on the map, is designated as building-[38]-ground, should, at some time or other, be covered with buildings; and, of course, one house must be built at one time, and another house at a subsequent time; and therefore the mere building of a house which would necessarily deteriorate, in some measure, the value of the house that was first built, never could be considered as a breach of the covenant.

Then it was said that the value of one of the houses which Stokes has built is deteriorated and lessened in value, because, on an adjoining plot of ground, another house is built with its front 12 feet in advance of the front of the first house. I am willing to admit that, *primâ facie*, that is so in some degree; but, possibly, it may produce a benefit; because the house which is advanced so as, in an angular way, to come before the front of another house, may have the effect of sheltering and protecting that other house in a manner beneficial to it. I make that observation with reference to a part of this town which has lately been built upon, where one of the advantages of the houses has been stated to be that they do recede so as to be protected by houses on the east. I allude particularly to the houses in Hyde Park Gardens, where the circumstance that they do so recede is stated to be an advantage to them; because they are materially protected by the buildings which project to the east. I can conceive, therefore, that in many cases the advance in the way in which the house on Lot 4 is intended to be advanced, that is, angularly in respect of the fronts of the houses on Lots 2 and 3, may be an advantage.

But, in judging of the meaning of the parties, you must, to a certain extent, look at what was actually done. Now, first of all, the plan was made which merely represented, generally, what was to be building-[39]-ground; and then another plan was

made which shewed that the houses to be built on Lots 2 and 3 and 4 and 5 were to be in a position with respect to Segrave Place, in which they do not now stand nor are intended to stand. This shews that it was the intention of Mr. Pitt, from time to time, to exercise a discretion about the mode in which any of the buildings might be made to advance or might be made to recede; and I cannot but think that this covenant, standing as it does, can be hardly said to be a covenant which would authorize this Court to interfere in respect of the proposed advance of the house about to be built on Lot 4.

Supposing, however, that it were so, then there is this further to be considered, namely, whether the Plaintiff stands in a situation so as to be able to take advantage of the covenant. Now it is quite plain that, when Mr. Stokes took his conveyance in December 1833, he never intended to bind Mr. Pitt if he, Stokes, did not proceed with the buildings, as it was then intended he should, on Lots 4 and 5, to take care that those lots should be built on in the same manner as Stokes had, by his agreement of April 1833, contracted to build on them. On that subject the deed of December 1833 is totally silent: that deed is constructed, with respect to anything that regarded Lots 4 and 5, just in the same manner as if Stokes had supposed that he was himself to complete the agreement of April 1833. It does not, in any manner, refer to the contingency which did happen, namely, that he might not complete the agreement, and that the dominion over Lots 4 and 5 would revert to Mr. Pitt. When Stokes gave up the land comprised in Lots 4 and 5 he gave it up generally. No stipulation was then made, between him and Mr. Pitt, as to any dealing by Mr. Pitt, his heirs or assigns, with that por-[40]-tion of the estate; but the matter was left to remain, entirely, on the footing on which the conveyance of December 1833 had placed it.

I can easily understand that, when Mr. Stokes was dealing with Captain Schreiber, he might have had, in his mind, the contents of the agreement of April 1833, and might have held out to Captain Schreiber that the intention was to have the houses on Lots 4 and 5 built according to the stipulations of the agreement of April 1833. But then I ask what was there to bind Mr. Pitt to have the houses built according to those stipulations?

It seems to me, therefore, inasmuch as Captain Schreiber can claim only under Stokes, and that Stokes has not taken any stipulation from Mr. Pitt, for enforcing, as against Mr. Pitt that stipulation which Mr. Pitt might have enforced as against Stokes, that the matter is left at large. And I do not see how, by any possibility, Captain Schreiber can avail himself of the benefit of that covenant contained in the deed of January 1827, which his counsel have so much relied on, even supposing that, under that covenant, he had the right which he claims. His rights depend upon the conveyance that was executed to him by Stokes; and, unless it can be made out that Captain Schreiber is, in any sense, an assignee of the benefit of the covenants, or a *cestui que trust* of the covenants contained in the deed of January 1827, it appears to me that it is quite impossible to grant him relief: and I confess that, from the first, it seemed to me that he had an extremely difficult case to maintain: and, upon the best consideration that I can give it, I think that the case is not maintainable in a Court of Equity.

Motion refused without costs.(1)

[41] HULKES v. DAY. HULKES v. NEWTON. Nov. 30, 1840.

[S. C. 10 L. J. Ch. 21; 4 Jur. 1125.]

Construction. 1 & 2 Vict. c. 110 and 3 & 4 Vict. c. 82. *Judgment Creditor.*
Stop-Order. Practice.

Stock standing in the Accountant-General's name to the separate account of a party against whom a judgment debt has been recovered, may be charged, under 1 & 2 Vict. c. 110, with the debt; but the charging order must be made, not by a Judge in

(1) See *Whatman v. Gibson*, ante, vol. ix. p. 196.

equity, but by a Judge at common law ; and although such order, in terms, charges the stock, it affects only the interest of the debtor in the stock, and, therefore, does not interfere with the rights of prior incumbrancers.

A Court of Equity will make a stop-order, as auxiliary to the charging order.

A party intending to apply for a stop-order must give notice of his application to all other persons having like orders on the fund.

The Defendant Charles Day, being entitled, on attaining 23, to several sums of stock standing in the name of the Accountant-General in trust in these causes, to his separate account, mortgaged them, after he had attained 21 but before he had attained 23, to two ladies named Taverner ; and afterwards made a voluntary settlement of them, subject to the mortgage, on himself and any wife and children whom he might thereafter have. The Misses Taverner first obtained an order that the sums of stock should not be transferred or disposed of without notice to them, and then filed a bill to have the benefit of their security. In January 1840 J. Williams, who had recovered judgment in an action against C. Day for £706, obtained an order from the Vice-Chancellor, under 1st & 2d Vict. c. 110, s. 14,(1) directing that the several sums [42] of stock before mentioned should stand charged with the payment to Williams of the £706 and interest. In April 1840 that order was discharged on the application of C. Day, the Lord Chancellor having decided, in another case, that the words, "a Judge of one of the Superior Courts" used in the 14th section of the Act, meant a Judge of one of the Superior Courts of Common Law. Accordingly, in May 1840, Williams obtained, from Mr. Baron Rolfe, first an order *nisi*, and subsequently, an order absolute, charging the sums of stock with the payment to him of the £706 and interest ; and afterwards he presented a petition in the above causes, praying that none of those sums might be transferred, sold out or otherwise disposed of without notice to him.

The Misses Taverner and the trustees of the voluntary settlement, who had obtained similar orders, were served with copies of the petition, the Vice-Chancellor having ruled that, where an application was intended to be made for a stop-order, every person who had obtained a similar order with respect to the same fund must have notice of the application.

[43] Mr. Knight Bruce and Mr. Chapman Barber, in support of the petition. If any doubt could be entertained as to whether the 1 & 2 Vict. c. 110 extended to stock standing in the name of the Accountant-General, it is wholly removed by 3 & 4 Vict. c. 82, which, after reciting the 14th section of 1 & 2 Vict. c. 110, *declares* and enacts that the aforesaid provisions of the said Act *shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, annuities or shares as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares ; and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any such stock, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the Accountant-General of the*

(1) This section is as follows : "That if any person against whom any judgment shall have been entered up in any of Her Majesty's Superior Courts at Westminster, shall have any Government stock, funds and annuities, or any stock or shares of or in any public company in England (whether incorporated or not) standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a Judge of one of the Superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities or shares, or such of them or such part thereof, respectively, as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon ; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made, in his favour, by the judgment debtor ; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

Court of Chancery, or the Accountant-General of the Court of Exchequer, or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor; provided always that no order of any Judge as to any stock, funds, annuities or shares standing in the name of the Accountant-General of the Court of Chancery or the Accountant-General of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stocks, funds, annuities or [44] shares, or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

Mr. Spence and Mr. Rasch appeared for the Misses Taverner.

Mr. Wigram, Mr. Norton and Mr. Shadwell, for the trustees of the settlement.

Mr. Jacob and Mr. Purvis, for C. Day. The question which arises on the 1 & 2 Vict. chap. 110 is whether the provisions of that Act apply to any stock except such as the judgment debtor has the entire interest in. The 14th section speaks merely of stock, &c., standing in the debtor's name in his own right, or in the name of any person in trust for him; and the next section, which it is material to look at with reference to this question contains the same expressions, and enacts that the Judge's order shall restrain the Governor and Company of the Bank from permitting a transfer of such stock; but it does not direct that any persons except the debtor and the Governor and Company of the Bank shall be served with notice of the order *nisi*. It is plain, therefore, that the Act does not contemplate stock in which any person besides the judgment debtor has an interest; for were it otherwise, it would not have spoken as it does of the entirety of the stock, and have directed that the order should restrain the bank from permitting a transfer to be made to any other person. If the Act [45] had been meant to apply to stock in which the debtor had only a partial interest, it would have been unjust to enact that the order should restrain the bank from permitting a transfer to be made to the other persons having an interest in the stock, without their having been served with the order *nisi*. The 10th section of the Statute of Frauds, which is in *pari materia*, has been held to apply only to cases of simple trust. *Doe v. Greenhill* (4 Barn. & Ald. 684).

Secondly, stock standing in the name of the Accountant-General is not within the 1 & 2 Vict. c. 110. Stock so circumstanced was first made subject to the provisions of that Act by 3 & 4 Vict. c. 82. That Act did not receive the Royal assent until the 7th of August 1840; and it has no retrospective operation. It recites the 14th section of the first-mentioned Act, and that doubts had been entertained whether the provisions of that section extended to the cases after mentioned; and then it declares and enacts that those provisions shall be deemed and taken to extend to *the interest* of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent, as well in any such stocks, funds, &c., as aforesaid, as also in the dividends, interest or annual produce of any such stock, funds, &c. So far it is declaratory of the meaning of the former Act. Then it goes on to provide, by a distinct enactment, as to stock standing in the name of the Accountant-General, which had been omitted in the former Act; and it says that whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to or out of any such stocks, funds, &c., as aforesaid, [46] which now are or shall hereafter be standing in the name of the Accountant-General, or the dividends, interest or annual produce thereof, it shall be lawful for such Judge to make any order as to such stock, funds, &c., or the interest, &c., thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. Then it provides that no order of any Judge as to any stock, &c., standing in the name of the Accountant-General, or as to the interest, &c., thereof, shall prevent the bank from permitting any transfer of such stock, &c., or payment of the interest, &c., thereof in such manner as the Court may direct, or shall

have any greater effect than if such debtor had charged such stock, &c., or the interest, &c., thereof, in favour of the judgment creditor, with the sum mentioned in the order. That proviso was introduced into the Act in order to enable the Judge at common law to make an order without interfering with the rights of other parties having an interest in stock standing in the Accountant-General's name. Supposing, therefore, that this Act has a retrospective operation, the order made by Mr. Baron Rolfe is clearly erroneous; for it charges the stock, and not C. Day's interest in the stock, with the judgment debt. [THE VICE-CHANCELLOR. Would not Mr. Baron Rolfe's Order, of itself, prevent a transfer of the stock?] Certainly it would; and, therefore, if we concede that the construction of the Acts which the Petitioner's counsel contend for is correct, the order now sought to be obtained is unnecessary.

Mr. Knight Bruce, in reply, said that the 1 & 2 Vict. c. 6, s. 110, was a remedial Act, and therefore ought to be construed so as to suppress the mischief and advance the remedy (1 Black. Comment. 86); that the object of the Act was to give to [47] creditors a more extensive remedy against the chattels of their debtors than they had at common law; that the words used in the 3 & 4 Vict. c. 82, with reference to the former Act, were "shall be deemed and taken to extend to the *interest* of any judgment creditor," which meant, "shall be so construed as to extend," &c.

THE VICE-CHANCELLOR said in the course of the reply that if the words in the second Act had been "shall be taken to extend," it might have been said that that Act was intended to have a future operation; but that the words were, "*shall be deemed and taken to extend*," which necessarily gave it a retrospective effect.

HIS HONOR [Sir L. Shadwell] delivered judgment as follows:—The first question is whether a stop-order is to be made upon this petition.

Before the second Act passed, I had occasion to speak to the Lord Chancellor on the subject of the first Act; and I distinctly understood from his Lordship that it was the intention of the Legislature that any order which should have the effect of making a charge on stock standing in the name of the Accountant-General should be made, not by a Judge of this Court, but by a Judge of the Courts of law; but the Lord Chancellor never expressed a doubt that the Judges of the Courts of Common Law might make orders which would charge stock standing in the name of the Accountant-General, in which the party sought to be charged had an interest; and it is clear to me that if there was any such doubt, it is removed by the subsequent Act, which does both declare and define what shall be the construction of the former Act.

[48] It appears to me that the case cited from 4 Barn. & Ald. has no application to the present case: because there the question was whether, under the 10th section of the Statute of Frauds, certain lands were liable to a debt due to a judgment creditor. Those lands had been vested in trustees for a term of 99 years, in trust to secure an annuity to a lady for her life, and, subject thereto, in trust to permit the settlor to receive the rents with the ultimate trust for the settlor who was the debtor. Now I can perfectly understand that there the term did interfere with the possession of the settlor, in whose favour the ultimate trust was declared: and, on the plainest construction of the Statute of Frauds, that case was rightly decided by the Judges of the King's Bench.

It seems to me that in a case where the Accountant-General holds a fund in trust for A. and other persons, he is a trustee for A. and those other persons; and, if A.'s interest in the fund is subject to a charge, I see no reason why that circumstance should prevent an order being made under the Act to charge the fund. Then comes the second Act which recites that doubts had arisen. [His Honor here read the first section of the 3 & 4 Vict. c. 82.] Now, whatever length of time may have elapsed between the date of Mr. Baron Rolfe's Order and the raising of this question, if I find a second Act declaring that the first Act shall be deemed and taken to extend to a particular subject, I think it must be deemed and taken to have extended to that subject from the time when the first Act was passed. The second Act is a statutory explanation of the first. The latter part of the first section of the second Act goes on to declare that whenever the judgment debtor shall have [49] any estate, right, title or interest, vested or contingent, in possession, remainder or reversion, in, to or out of any stock standing in the name of the Accountant-General,

or in, to or out of the dividends, interest or annual produce thereof, it shall be lawful for the Judge to make any order as to such stock, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor. So that the true meaning was that whether the interest of the debtor, in stock standing in the name of the Accountant-General, was in possession, remainder or reversion, the first Act should equally apply. Independently, however, of the second statute, the Lord Chancellor was certainly of opinion that the first Act did apply to stock standing in the name of the Accountant-General.

Then it was said that Mr. Baron Rolfe's Order is wrong because it is too extensive. That order declares that the fund in question shall stand charged with the payment of £706 ; and, therefore, it does in terms apply to the whole fund. But, though it is void as to a party who has a prior interest in the fund, it would be harsh to say that, because at the time when it was made C. Day had not the exclusive interest in the fund, it shall not extend to the interest which he then had. It follows, therefore, as a matter of course, that the stop-order must be made ; but the Misses Taverner must be excepted out of it.

A petition, presented by the trustees of the voluntary settlement, praying that what was due to the Misses Taverner might be raised and paid to them out of the [50] stocks and funds in Court, and that the remainder of those stocks and funds might be transferred to the Petitioners, was heard at the same time as Williams's petition, and was dismissed with costs.

[50] ANONYMOUS. Dec. 24, 1840.

Practice. Affidavits.

Where a motion to dissolve an injunction is ordered to stand over at the Plaintiff's request, affidavits filed after 10 o'clock of the day for which the notice was given cannot be read when the motion is made.

THE VICE-CHANCELLOR said that where notice was given of a motion to dissolve an *ex parte* injunction, and, on the motion being mentioned, it was ordered to stand over at the Plaintiff's request, he would not allow any affidavits to be read on the hearing of the motion, unless they were filed before 10 o'clock of the day for which the notice was given. His Honor added that he had informed the Lord Chancellor that such was the course which he meant in future to take, and that his Lordship approved of it as a general rule.

[51] NEWMAN v. NEWMAN. June 1, 1839.

[S. C. 8 L. J. Ch. (N. S.) 354. See *Patching v. Barnett*, 1880, 49 L. J. Ch. 669.]

Will. Construction. Remoteness.

Testator devised his real estates to trustees, in trust for his son for life, and after the son's death, in trust to sell and stand possessed of the proceeds, in trust for all his grandchildren, the children of his son and three daughters (whom he named), *who should attain the age of 24 years*. The son and daughters had children living at the testator's death, but none born afterwards. Held that the trust for the grandchildren was void for remoteness.

Charles Newman the elder made his will, dated the 26th of July 1824, and which was partly as follows : " I give and devise unto my son, Charles Newman, all that my messuage, farm and lands called Butlers or otherwise, situate, lying and being in Mount Bures and Bures Hamlet, in the county of Essex, or one of them, and also all those messuages and lands called Barnards and Coppens or otherwise, situate, lying

and being in Bures Hamlet and Mount Bures aforesaid, or one of them, and all my messuages, lands, tenements and hereditaments whatsoever and wheresoever, to hold the same farm, messuages, lands, tenements, hereditaments and premises unto and to the use of my son, Charles Newman, and his assigns, for and during the term of his natural life, and, from and immediately after the decease of my said son, Charles Newman, I give and devise the same farm, messuages, lands, tenements, hereditaments and premises unto my brother, John Newman, and my grandson, Charles William Newman, and their heirs, upon trust that they, the said John Newman and Charles William Newman, or the survivor of them, or the heirs of such survivor, do and shall, with all convenient speed after the decease of my said son, Charles Newman, absolutely sell and dispose of the same ; and I declare my will to be that the said John Newman and Charles William Newman, and the survivor of them, and their and his heirs, executors and assigns, shall stand and be possessed of and interested in the clear money to arise or to be produced by the sale or sales of my aforesaid estates and estate, hereditaments and [52] premises, and of and in the rents, issues and profits thereof, from the decease of my said son Charles Newman until the same shall be sold, *in trust for all and every my grandchildren*, the children of my said son, Charles Newman, of my daughter, Elizabeth, the wife of James Stutter, of my daughter, Ann Heald, and of my daughter, Sarah, the wife of — Grimwood, respectively, lawfully begotten, *who shall attain the age of 24 years*, equally to be divided among my said grandchildren attaining that age as tenants in common. I give and bequeath unto my said son Charles Newman and the said John Newman the sum of £1000 of lawful British money, upon trust to invest the said sum of £1000, as soon as may be practicable after my decease, in their or his names or name, in the public or Parliamentary stocks or funds of Great Britain, or in or upon Government or real securities in England, at interest, and upon trust that they, my said son Charles Newman and the said John Newman, and the survivor of them, and their and his executors, administrators and assigns, do and shall pay the interest, dividends and annual produce of the aforesaid sum of £1000, and of the stocks, funds and securities in or upon which the same shall be invested, unto my said daughter Elizabeth, the wife of James Stutter, during the term of her natural life, for her separate use, independently of the debts, control or engagements of her present husband or of any future husband with whom she may intermarry, and her receipts, notwithstanding her coverture, to be good and sufficient discharges for the same ; and, upon and immediately after the decease of the said Elizabeth Stutter, upon trust to pay, transfer and assign the aforesaid principal sum of £1000, and the stocks, funds and securities in or upon which the same shall be invested, and the dividends, interest and proceeds thereof, [53] unto all and every the children and child of the said Elizabeth Stutter, lawfully begotten, *who shall attain the age of 21 years*, equally to be divided between or among such children (if more than one) as tenants in common, and if only one, then the whole to that one child, to which said children and child attaining the age of 21 years I give and bequeath the same accordingly. And I give and bequeath unto my said son Charles Newman and the said John Newman the sum of £2000 of like lawful money, in trust to invest the same, with all practicable speed after my decease, in their or his names or name, in the public or Parliamentary stocks or funds of Great Britain, or in or upon Government or real securities in England, at interest, and upon trust that they, my said son Charles Newman and the said John Newman, and the survivor of them, and their and his executors, administrators and assigns, do and shall pay, transfer and assign the aforesaid sum of £2000, and the stocks, funds and securities in or upon which the same shall be invested, and the dividends, interest and proceeds thereof which shall not be applied under the power or direction hereinafter contained, unto all and every the children and child of my said daughter Elizabeth Stutter, lawfully begotten, *who shall attain the age of 24 years*, equally to be divided between or among such children (if more than one) as tenants in common, and if only one, then the whole to that one child, to which said children or child attaining the age of 24 years I give and bequeath the same accordingly." The testator bequeathed two other sums of £1000 in trust, as to one, for his daughter Ann Heald, and as to the other, for his daughter Sarah Grimwood and their children and child who should attain 21 ; and he bequeathed two further sums of £2000 in trust, as to [54] one,

for the children and child of Ann Heald who should attain 24, and as to the other, for the children and child of Sarah Grimwood who should attain that age. The will then proceeded thus: "And I hereby declare my will to be that my said trustees and trustee for the time being do and shall pay and apply the dividends, interest and annual produce of the respective portions or shares, of and in the aforesaid trust funds, to which my said grandchildren, the children of my said son and daughters, shall respectively be entitled *in expectancy or contingency*, under the trusts hereinbefore declared, for or towards the maintenance, education and benefit of my said respective grandchildren, until they shall respectively attain the age at which the said portions or shares of and in the said respective trust funds *will become absolutely vested*." The testator then gave pecuniary legacies to certain persons absolutely; and, after payment of his just debts, legacies and funeral and testamentary expenses, he gave all the residue and remainder of his monies, stocks, funds, mortgages and securities for money, furniture, plate, goods, chattels and personal estate and effects whatsoever and where-soever to his son, Charles Newman, for his own use and benefit; and appointed him and John Newman executors of his will.

The testator made a codicil to his will, dated the 25th of April 1827, which, after reciting that, by his will, he had given his real estates before mentioned to his son, Charles Newman, for his life; and, after his son's decease, to John Newman and Charles William Newman, and their heirs, upon trust to sell the same, and had declared that the clear money arising from the sale thereof, with the rents, issues and profits thereof from the [55] decease of Charles Newman, until the same should be sold, should be in trust for all and every the children of Charles Newman, Elizabeth Stutter, Ann Heald and Sarah Grimwood, who should attain the age of 24 years, equally to be divided among them attaining that age as tenants in common, proceeded as follows: "Now I declare my will to be that it shall be lawful for my said brother, John Newman, and my said grandson, Charles William Newman, and the survivor of them, and the heirs of such survivor, by the direction and with the consent in writing of my said son, Charles Newman, to sell the said farm, messuages, lands, tenements, hereditaments and premises in the lifetime of my said son; and, in such case, I direct my said trustees and trustee to invest the clear money arising from the sale of the said farm, messuages, lands, tenements, hereditaments and premises, in the public funds of Great Britain, or in or upon Government or real securities in England, at interest, and to pay the dividends, interest, and annual produce thereof unto my said son, Charles Newman, for and during the term of his natural life; and, immediately upon and after his decease, my will is that the said John Newman and Charles William Newman, and the survivor of them, &c., shall stand and be possessed of and interested in the said trust money, funds and securities arising from the sale of the said farm, lands, messuages, tenements, hereditaments and premises, in trust for my said grandchildren, the children of my said son Charles Newman, of my daughter Elizabeth, the wife of James Stutter, of my daughter Ann Heald, and of my daughter Sarah, the wife of — Grimwood, respectively, who shall attain the age of 24 years, equally among them, my said grandchildren, attaining that age, as tenants in common, as in my said will is expressed."

[56] The testator died in August 1828, leaving his son, Charles Newman the younger, and his three daughters named in his will, him surviving. The son and daughters had each of them several children living at the testator's death; but none of them had a child born afterwards.

The bill was filed by a son of Charles Newman the younger against his father and the testator's other children and grandchildren, alleging that Charles Newman was about to cut timber on the devised estates; and that he pretended that the devises and gifts, in the will and codicil, to the testator's grandchildren, were void for remoteness and uncertainty, and that he was absolutely entitled to the estates in fee-simple, as the testator's heir. The bill prayed that the rights and interests of the Plaintiff and Defendants in the estates might be declared, and that Charles Newman might be restrained from cutting timber thereon.

Charles Newman demurred for want of equity.

Mr. Jacob and Mr. L. Wigram, in support of the demurrer, said that the trust declared of the money to arise from the sale of real estates was for a class of persons

which was to be determined on their attaining the age of 24, and, therefore, it was too remote, according to *Leake v. Robinson* (2 Mer. 363); that it was true that the will contained a clause for the maintenance of the grandchildren; but, if that clause applied to the fund to arise from the sale of the real estates (which was very doubtful), it spoke of the shares of the grandchildren as being contingent; and that, in *Judd v. Judd* (*ante*, vol. iii. p. 525), there was a similar clause; but, nevertheless, it was held that the [57] children of Sarah Judd were not intended to take vested interests until they attained 25, and, consequently, that the bequest to them was void for remoteness.

Mr. Knight Bruce and Mr. Elderton, in support of the bill. If the property comprised in this suit is to be considered as real estate, the devise is good, according to *Boraston's case* (3 Rep. 19 a.), *Doe v. Nowell* (1 M. & S. 327), *Bromfield v. Crowder* (1 New Rep. 313), *Phipps v. Williams*, (1) *Doe v. Ward* (9 Adol. & Ell. 582). But if it is to be considered as personal estate, then the clause for maintenance, which clearly includes the proceeds of the sale of this property, affords a strong ground for holding that the grandchildren take vested interests in their shares. In that clause, the testator has used the words "absolutely vested." He seems to have intended to draw a distinction between vesting in enjoyment and vesting in interest.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I should have thought that the case of *Doe v. Ward* was within the terms of *Boraston's case*. In *Doe v. Ward* the testator gave his freehold and leasehold estates, after the death of his daughter, to such of her children as she then had or might have, if a son or sons, *at his or their age or ages of 23*. That is *Boraston's case*.

In that case and in the other cases of the same class [58] there was, in the first place, a gift to the party intended to take; and then followed the words "at, if or when" that party shall attain a particular age; and it was held that those words were used merely for the purpose of pointing out the time at which the devisee was to take in possession. But, in the case now before me, there is no gift except to such of the testator's grandchildren as shall sustain the character of attaining the age of 24. The attainment of that age is part of the constitution of the character of the original taker.

The devise of the legal estate is good; but the person in whom it is vested is a trustee for the heir at law.

Demurrer allowed.

[58] SEDDON v. CONNELL. June 10, 11, 1840.

[S. C. 9 L. J. Ch. (N. S.) 341. Followed, *Harrison v. Brown*, 1852, 5 De G. & Sm. 735.]

Joint Stock Company. Fraud. Public Officer. Construction of 7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96.

A. filed a bill against the public officer of a joint stock bank, alleging that he had been induced to purchase 500 shares in the bank by fraudulent representations made by the directors, in their reports, as to the prosperous state of the company's affairs, and praying for a declaration to that effect and that the purchase might be declared void, as between him and the company, and that the latter might repay him his purchase-money.

Held, that as the litigation was between one member of the partnership as such, and the other members as such, the public officer was improperly made a party to it as representing the company; and a demurrer by him was allowed.

By a deed of settlement, dated the 1st of July 1834, made between the several persons whose names were thereunto subscribed (except the persons parties thereto of the second part) of the one part, and Andrew Cassells and William Walter Cargill

(1) *Ante*, vol. v. p. 44; the House of Lords did not reverse that part of the judgment which related to the devise in trust for Geo. Holland Ackers; with reference to which it was cited in the argument above; see 3 Clark & Fin. 665.

of the other part; after reciting that it had been agreed to form a joint stock banking company in Manchester, under the style [59] or firm of "The Northern and Central Bank of England," and under the authority and conformably to the provisions of 7 Geo. 4, c. 46, intituled, "An Act for the Better Regulating Co-partnerships of Certain Bankers in England;" and that the parties had agreed to raise among themselves a capital of £500,000 to enable them to carry on the business of the company, and that the capital should be divided into 50,000 shares of £10 each: the parties thereto of the first part covenanted with Cassels and Cargill, in the manner specified in the several articles and clauses thereafter contained; and, by such articles, it was (among other things) declared that there should be nine directors of the company, and that Henry Moulton and James Hardie, and the several other persons therein named, should be the first directors, and that every director should faithfully and impartially discharge the duties of his office, and should, at every yearly general meeting, exhibit to the proprietors present a true and accurate summary or balance-sheet and report of the profits and accumulations or losses of the company, from the time of the commencement of its business to the end of the period included in the last preceding report, and of the state and progress of the affairs of the company; and that, unless a board of directors should declare to the contrary, no dividends should be made of the profits of the company for the period preceding the general meeting to be held in April 1835; but such profits should be retained and form part of a fund to be called "The Reserved Surplus Fund;" and that, in every succeeding year, the net profits of the company, after setting apart such proportion, not exceeding one-fourth part thereof, as the directors should think requisite for forming and maintaining the surplus fund, should be divided among the proprietors; and that, previous to every general meeting, [60] the directors should determine upon and declare such dividends out of the clear profits of the company; and that no person should be capable of being elected or of continuing a director of the company unless he was the holder of 100 shares; and that no subscriber of any shares should be considered as a proprietor of the company in respect thereof, until he should have executed the deed of settlement or a deed prepared under the direction of the directors, by which he should covenant to abide by the rules and regulations therein contained; and that every proprietor of the company, as between him and all the other proprietors of the company, should be answerable and liable for the debts, losses and demands of the company, in proportion to their share and interest, for the time being, in the funds or property of the company.

At a general meeting of the company, held on the 28th of April 1836, a report of the directors was read, representing the affairs of the company to be in so flourishing a state that a dividend of £7 per cent. could properly be paid out of the clear profits of the company; and such dividend was then accordingly declared by the directors, on the amount of capital then subscribed, being £10 on each share. After the declaration of that dividend it was resolved that, instead of an annual meeting, there should in future be half-yearly meetings, in February and August in each year, for the purpose of making out a balance-sheet and report of the profits and loss of the bank and declaring a dividend; and a supplementary deed of settlement was afterwards prepared for carrying that resolution into effect. Accordingly a general half-yearly meeting of the company was held on the 25th of August 1836, at which the directors made a report which was, partly, to the effect following: [61] "The directors have much pleasure in informing the shareholders that, after deducting all bad debts and expenses for the half-year ending the 30th of June last, the net profits amount to £36,696, 13s. 4d.; the premiums received for shares during the same period to £13,930, making, together, the sum of £50,556, 13s. 4d. From this statement the directors feel fully warranted in declaring a half-yearly dividend at the rate of £8 per cent. per annum. The directors have further to report that, after paying this dividend amounting to £31,200, there will remain a balance upon the half-year of £19,356, 13s. 4d., which they propose to add to the former surplus of £20,838, 9s. 4d., making the surplus fund £40,195, 2s. 8d. at 30th June 1836. The directors cannot conclude this report without congratulating the shareholders on the steady and increased prosperity of the bank." These reports were printed and sent to the shareholders, and were inserted in the various newspapers circulated in Lancashire.

In August 1836 the Plaintiff, having a sum of £6000 for which he was desirous of finding a safe and beneficial investment, and having seen printed copies of the above reports, was thereby induced to think that the affairs of the company were in a flourishing condition, and that the purchase of shares therein would be a desirable investment; but before he made the investment he made inquiries as to the affairs of the bank of Moulton, the chairman, Hardie, one of the directors, and Evans, the manager of the bank; and all of them told him that the affairs thereof were in a very flourishing condition, and fully warranted the representations made of them in the reports, and assured him that he might safely invest his money in the purchase of shares. The Plaintiff, relying upon such representations and on those contained in [62] the reports, expressed to Moulton and Hardie his determination to invest his £6000 in the purchase of shares, and they undertook to procure and did procure 500 shares, being part of certain reserved shares then in the hands of the directors, to be granted to the Plaintiff by the directors, at a premium of £4 per share. The Plaintiff paid the whole of the purchase-money for the 500 shares, except £1000, with which his account with the bank was debited; and he executed the deeds of settlement, and was the last person but one who executed those deeds. Shortly afterwards the affairs of the bank became very much embarrassed; and the directors, finding it impossible to meet the engagements of the company, applied to the Bank of England to make them large advances for that purpose, which the Bank of England agreed to do; but the full amount of the pecuniary assistance required by the company, or the terms upon which it was to be made, were not made known to the Plaintiff and most of the other shareholders until the latter end of December following. After the Plaintiff had purchased his shares, the market price of the bank shares fell; and the Plaintiff spoke to Moulton on the subject; and Moulton assured him that the fall was only temporary, and that there was no real ground for alarm, and recommended the Plaintiff to take advantage of the fall, and to purchase some more shares. The Plaintiff, relying on those representations, purchased from time to time up to the 6th of December 1836 115 more shares of different persons. Previously to the Bank of England making any advance to the Northern and Central Bank, the affairs of the latter were investigated by certain persons appointed by the Bank of England; and it was then discovered that the affairs of the company had been for a long time involved in pecuniary difficulties, and that they were never in such a prosperous state as to [63] justify the directors in making the reports and declaring the dividends before mentioned, and that such reports and dividends had been made and declared, and that many other fraudulent practices had been adopted by the directors to deceive the public and to keep up the price of shares, in order that they might dispose of the reserved shares, and of other shares belonging to them individually at high premiums. The Plaintiff also then discovered that Moulton, Hardie and Evans, in making the before-mentioned representations to him, had been imposing on him in order to induce him to purchase the 500 shares; and that, at the time when they made those representations to him, they well knew that the same were untrue, and that the company had been for a long time, and was then in great and increasing pecuniary difficulties. On the 29th of August 1839 a general and extraordinary meeting of the shareholders of the bank was held, at which it appeared that one-fourth part of the paid-up capital had been lost, and the company was declared to be dissolved; and certain persons were directed to wind up its affairs. On the 16th of December 1839 William Smith, the then manager of the bank, informed the Plaintiff that the directors had declared the shares standing in his name to be forfeited to the company in consequence of his not having paid them what was due on his account current.

The bill, after stating as above, alleged that all the debts of the company had been paid; and that, inasmuch as the Plaintiff was induced to purchase his 500 shares by the fraudulent representations aforesaid, as well as by the fraudulent means adopted by the directors to deceive the public with respect to the real state of the affairs of the bank and to keep up the market price of shares, he was entitled to have the purchase set aside and his purchase-money repaid to him by the company; that he was more especially induced to purchase the shares by means of the fraudulent representations of Moulton, Hardie and Evans; that Hardie had since died intestate and wholly insolvent, without leaving any assets for the payment of his debts; that

if, in the opinion of the Court, the Plaintiff was not entitled to the relief prayed against the company, then he was entitled to be repaid the purchase-money of the 500 shares, by Moulton and Evans; that Connell had, pursuant to the Act of Parliament, been duly appointed, and was then one of the public registered officers of the company, in whose name the company might sue and be sued either at law or in equity.

The bill prayed that it might be declared that the Plaintiff was induced to purchase the 500 shares by means of the fraudulent representations and practices of the directors, and, more especially, by the fraudulent representations of Moulton, Evans and Hardie, and that such purchase might, as between the Plaintiff and the company, be declared to be void; and that the company might be ordered to repay, to the Plaintiff, the amount of his purchase-money, with interest thereon; or, in case the Court should be of opinion that the Plaintiff was not entitled to have the purchase set aside as against the company, then that it might be declared that the Plaintiff was, by reason of the fraudulent representations of Moulton and Evans, entitled to have his purchase-money, with interest, repaid to him by Moulton and Evans, and that they might be ordered to pay the same to him.

Connell demurred to the bill for want of equity, and because Hardie's personal representative, and the per-[65]-sons who were directors of the bank at the time when the Plaintiff purchased the shares in the bill mentioned (the 500 shares *qu.*?) were not made parties to it.

Mr. Jacob and Mr. Sharpe, in support of the demurrer. The bill alleges that the directors of the company, that is to say, those who were directors in the year 1836, made divers fraudulent representations for the purpose of deceiving the public at large, and inducing the public to buy shares at prices which were beyond their value; and it particularly mentions three persons, of the names of Moulton, Hardie and Evans, as having been concerned in specific representations made to the Plaintiff individually. The parties accused are the directors and officers of the company in 1836, and especially Moulton, Hardie and Evans; Moulton and Hardie being directors, and Evans being the manager of the bank. Hardie, however, is not represented on this record.

The Plaintiff has endeavoured in this suit to avail himself of the provisions of certain Acts of Parliament (7 Geo. 4, c. 46, and 1 & 2 Vict. c. 96), by which, for certain purposes, the public officers of banking companies may sue and be sued on behalf of the company, that is to say, on behalf of the company for the time being. With that view the Plaintiff has filed his bill against Mr. Connell, whom he states to be the public registered officer of the bank, and he treats Mr. Connell as the representative of the entire company, that is, of the entire company as it exists in the year 1840, not as it existed in 1836. The bill prays that it may be declared that the Plaintiff was induced to purchase the 500 shares by means of the [66] fraudulent representations and practices hereinbefore mentioned of the directors of the said company; which must mean the directors at the time the representations were made, or, in other words, the directors of 1836. That is a declaration which is to govern the rest of the prayer: and then the bill prays that such purchase may, as between the Plaintiff and the company, be declared to be void, and that his purchase-money may be repaid to him. Now, in praying relief against the company, in a bill filed against a public officer of that company in the year 1840, the Plaintiff is praying relief against the members of that company as they exist in the year 1840; and we submit that he has erred in imagining that, for the fraud committed on him in 1836, by the directors of the company, he has a remedy against those individuals who constitute the company in 1840. His remedy is against the persons who committed the fraud on him, namely, the directors of the company in 1836, and, especially, Moulton, Hardie and Evans; and, if he has any remedy against any other members of the company, it is not a remedy against the entire company as it exists in 1840, but only a remedy against those who constituted the company at the time when he entered into it, that is, against all the members of the company except himself—against all those who participated in the receipt of his money. Secondly. The Plaintiff has erred in making Connell the party to be sued as representing the company. The Plaintiff is himself a member of the company, not only in respect of the 500 shares which he purchased of the directors; but also in respect of the 115 shares which he purchased of different persons. This then is not a suit by him against the entire

company, but against the company *minus* one. The question raised on this record is not a question between Seddon and [67] the Northern and Central Bank; but between Seddon and all the members of the bank except Seddon. In a suit of that nature, that is, where the dispute is an intestine one, the Acts of Parliament do not authorize the public officer to represent the company. He is authorized to represent the company where one member of the company has, in his individual character, private dealings with the company, by keeping a banking account with them. In such a case the Act of Parliament (1 & 2 Vict. c. 96) provides that, for the purposes of his separate dealings with the company, he shall sue them exactly in the same way as if he were a stranger, and that there shall be no set off of his rights as a partner against his rights as a customer or creditor: therefore, if Seddon had deposited money in this bank, or had got a bill signed by this bank, and a dispute arose between him and the bank, then that would be a case in which he might bring his action or suit against the public officer: because, in that case, the public officer would represent the entire bank, including Seddon; and Seddon would have to bear his proportion of whatever was recovered in that action or suit: he would, in his character of customer, recover the balance of his account; but, in his character of shareholder, he would have to bear his proportion of that balance, and of the costs too, if any. Now that is not the nature of the present suit: but it is one in which the Plaintiff seeks to disengage himself from the partnership; raising therefore a question between himself and the other members.

We now call the attention of the Court to the enormous and whimsical injustice which would be done, if [68] the species of suit which the Plaintiff has framed could be sustained. As Connell is made a Defendant, as representing the entire company, the case is just the same as if, instead of his being made a Defendant, the names of all the existing members of the company appeared as Defendants on this record. Now the case represented is that the directors of the company, in the year 1836, formed a scheme to delude the public at large into buying shares in this bank, and that that scheme succeeded to a great extent; and that they entrapped the Plaintiff and a great variety of other persons: so that the Plaintiff is not the only sufferer by the fraud of the directors; and, consequently, if he were to succeed in this suit, he would obtain relief not only against the other innocent victims of the directors, but also against himself; for he does not seek to extricate himself from the other 115 shares which he purchased; but admits himself to remain a member of the company in respect of those shares. Again, each of the other victims would be entitled to have exactly the same relief against the rest of the company, including the Plaintiff: so that you would have not the practisers of the fraud being made responsible to the victims, but one victim being made responsible to another and to himself. It is obvious, therefore, that nothing like justice would result from sustaining the present bill. The truth is, the real remedy for a person who, like the Plaintiff, has been fraudulently entrapped into purchasing shares in a partnership is to call upon those who did entrap him to make good to him what he has paid, and to take back the shares with the liabilities upon them, and to indemnify him against all liability. *Stainbank v. Fernley* (*ante*, vol. ix. p. 556).

[69] Thirdly. The company is no longer in a situation in which the clauses in the Acts of Parliament relating to the public officers of companies apply; for it is stated in the bill that the company is dissolved, and that all the debts are paid off; and, therefore, practically speaking, the banking business is terminated and the partnership is at an end: and, under the Acts of Parliament, the power of suing the public officer and the power of suing by him exists only whilst there is a partnership. Although the partnership may exist, for the purpose of winding up its affairs as between the co-partners, it is impossible, on these Acts of Parliament, to shew that this power of suing and being sued continues for that purpose.

The Defendant has demurred also for want of parties. It is hardly necessary to say anything on that ground, for it is clear that the directors of 1836, who are primarily liable, and Moulton, Hardie and Evans, who are specifically charged with fraud, ought to have been made parties. With respect to Hardie, it is said that he is dead and that he has not left assets for the payment of his debts; but it is not stated whether he has or has not a representative.

Mr. Knight Bruce, Mr. Stuart and Mr. Geldart, for the Plaintiff. First, with regard to the objection as to the absence of Hardie's personal representative from the record. The statement is that Hardie has departed this life intestate, and that he died wholly insolvent without leaving any assets for the payment of his debts. It is not stated, nor is it material to state, whether any representation to him has been taken out or not. If [70] his personal representative were a necessary party in any view of the case, the allegation that he died insolvent without leaving any assets for the payment of his debts is alone sufficient to prevent its being necessary to make his representative a party.

But there are still stronger grounds for contending that it was not necessary to make his personal representative a party. In the case of a breach of trust, which, in this Court, stands on the footing of a joint and several debt, the Court requires all the persons who were concerned in committing the breach of trust to be parties to the suit; because contribution may be enforced, *inter se*; but, where there can be no contribution, the reason fails. So, in the Courts of Common Law, if all the parties to a contract are not made parties to the action, the Defendant may either plead in abatement or demur, according to the circumstances; but he cannot do so in the case of a *tort*; for every *tort* is, in its nature, several, and the Plaintiff may sue any one of the parties by whom the *tort* was committed, and there can be no defence, either by plea or demurrer, against that mode of proceeding. In equity the distinction exists, not between contract and *tort*, but between matters as to which contribution may be enforced and matters as to which it cannot. A breach of trust is in the nature of a wrong; but it is treated only as a matter of civil debt, that is, as a contract; and there may be contribution. A man may commit a breach of trust without being guilty of a moral fraud. But where there is a case of palpable fraud, where several persons acting, to a certain extent, jointly, make false and fraudulent representations to an individual, with a view to induce him to engage in a particular speculation, that is a case which, though it is not a matter of contract, is rene-[71]-diable in equity; but it is not a case in which this Court will enforce contribution. It was, therefore, matter of surplusage to allege that Hardie was dead; and still more so to allege that he had died insolvent; because, if he had been living and in the most flourishing circumstances, it was purely optional in the Plaintiff to make him a party or not. *Evans v. Bicknell* (6 Ves. 174). Even if this had been a case of contract, the allegation of insolvency would have been perfectly sufficient to dispense with Hardie's presence or that of his representative. *Cockburn v. Thompson* (16 Ves. 326); *Angerstein v. Clarke* (3 Swanst. 147, note); *Maulor v. Jackson* (3 Atk. 406).

The next and the most important question in this case is whether Connell is properly made a party to this suit, as representing the company. Suppose that there was a partnership consisting of four persons, and a friend or relation of one of the partners, but not by his desire or in concert with him, makes a false and fraudulent representation to A. B. that the partnership is solvent and flourishing, and recommends him to join it; and he joins it accordingly. In such a case there might be considerable difficulty in shewing that the partnership might be treated as a nullity, and that A. B. might file a bill against the person who induced him to enter into the partnership, for the purpose of obtaining compensation for the loss occasioned by the fraud, and also against the members of the firm for the purpose of avoiding the contract which the other Defendant had induced him to enter into. That, however, is not the case on this record; and it may be admitted that, in such a case, A. B.'s only remedy would be against the party who made the representation. But is the case the same where one of the [72] partners has, by fraudulent representations, induced the formation of the partnership? There the contract itself is vitiated by the act of one of the parties to it; and, if that contract is founded in fraud, the whole of the transaction fails; and more especially if the party engaged in that transaction be one taking a prominent part on behalf of the partnership, and authorized to act for the partnership. There no one could doubt that the contract would be vitiated, and that the bill to be filed would be a bill against all the partners to be relieved from the partnership, that is, a bill against the four co-partners to get back the money which they had obtained by means of the fraud of one of them, and against that one, to make him answerable for all the consequences beyond the mere fact of annulling the

agreement. The connection of the party who perpetrated the fraud with the partnership entitles the deluded party to be delivered from the whole transaction. Now, in this case, Moulton and Hardie were directors, and Evans was the manager of the company; so that they were not only partners, but agents of the company; and the bill expressly charges that, by their false representations, as well as by the false representations contained in the reports of the whole body of directors, the Plaintiff was induced to purchase the 500 shares in the bank. In such a case there can be no doubt that the Plaintiff is entitled to that which he asks by his bill, namely, to rescind the transaction to get back his money from the partnership; and, moreover, to fix the perpetrators of the fraud with the consequences of the fraud.

Then it was suggested that there is no right to sue the company in respect of a demand of this description; and various ingenious arguments were adduced in support of that proposition, relating to the state of the [73] law rather than to the state of the cause; for what is this but a debt due from the partnership to an individual. Now the 7 Geo. 4, c. 46, provides that: "All actions, suits and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, against such co-partnership, shall and lawfully may be commenced, instituted and prosecuted against any one or more of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal Defendant." And the 1 & 2 Vict. c. 96 provides: "That any person now being or having been, or who may hereafter be or have been a member of any co-partnership now carrying on, or which may hereafter carry on the business of banking under the provisions of the said recited Acts, may, at any time during the continuance of this Act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said co-partnership or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require) any action, suit or other proceeding at law or in equity against any public officer appointed or to be appointed under the provisions of the said Acts, to sue and be sued on the behalf of the said co-partnership; and that any such public officer may, in his own name, commence and prosecute any action, suit or other proceeding at law or in equity, against any person being or having been a member of the said co-partnership, either alone or jointly with any other person against whom any such co-partnership has or may have any demand whatsoever; and that every person being or having been a member of any such co-partnership shall, either solely or jointly with any other person (as the case may require) be capable of proceeding-[74]-ing against any such co-partnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership." Now the issue here raised is that, in effect, the Plaintiff has not become a member of the partnership; inasmuch as his injunction was obtained by fraud: and he is suing the partnership as he alleges it to stand, that is, as a partnership without him. This then is a case for an equitable action against the partnership for money had and received, as in *Colt v. Wollaston* (2 P. W. 154), and *Green v. Barrett* (ante, vol. i. p. 45). Whom, then, is the Plaintiff to sue but the public officer of the company? But, if the Plaintiff is to be treated, for any purpose, as a member of the co-partnership (which, we submit, he cannot be), still he has a right, by the express terms of these Acts of Parliament, to sue the partnership. The embarrassment (if any) arising from such a proceeding is one which the Act of Parliament has created, and the Court must deal with it as well as it can. All that your Honor decided in *Stainbank v. Fernley* was that the defrauded party had a right (if he pleased so to do) to treat the partnership as subsisting, and to proceed for compensation and indemnity against one or more of the perpetrators of the fraud, omitting the rest, without repudiating the partnership or seeking to set aside the engagements or liabilities which had been created by the fraud. That case, therefore, is an authority in our favour; for it shews that it is not necessary to make either Hardie's representative or the other directors parties to this suit. Again: the directors did not join with Moulton, Hardie and Evans in making [75] the representations which induced the Plaintiff to purchase his 500 shares in the bank;

and, even if they had done so, it would have been optional, in the Plaintiff, to make them Co-defendants or not: because the case made by his bill is not one in which this Court will compel contribution. Besides, the company is represented on this record by its public officer, and, therefore, it would have been improper as well as unnecessary to make the directors parties.

The only objection to the bill which remains unanswered is that the Acts of Parliament which have been referred to do not authorize the public officer to be sued where the partnership has been dissolved. That is a gratuitous assumption and contrary to every principle both of law and justice. It has been repeatedly laid down by Lord Eldon and other Judges that, with respect to demands on a partnership, the partnership continues until all those demands are satisfied. The dissolution has relation only to future transactions; the partnership continues as to all antecedent ones. Suppose that a joint stock banking company had received a deposit of half a million for a purpose which was to be answered in two or three days, and that, by the provisions of their deed of settlement, they were enabled to dissolve on short notice; then, according to the argument in support of this last objection, all that they would have to do would be to dissolve, and the creditor would be driven to obtain his money by suing all the shareholders. Such a consequence would be so oppressive and so utterly at variance with the language and spirit of the Acts of Parliament and with the rules of law, that it was scarcely necessary to say a word upon it. It is quite clear that, as to its obligations, the [76] partnership continues until all those obligations are discharged.

THE VICE-CHANCELLOR. The question regarding Mr. Connell is a very important one; and I shall not determine it without reading over the Act of George the 4th, as well as the Act of Her present Majesty. There is great weight in the observation that the Acts of Parliament were not meant to apply to a case where one member of a partnership makes a demand against the other members.

June 11. THE VICE-CHANCELLOR [Sir L. Shadwell]. The only question which I am now about to determine is whether Mr. Connell is properly made a Defendant to this bill in his character of one of the public officers of the Northern and Central Banking Company.

I have read over both the Acts of Parliament; and, in my opinion, it is perfectly plain that neither of them was meant to apply to demands made by one or more members of a partnership against the other members of that partnership.

The relief which the Plaintiff asks is that it may be declared that he was induced to purchase the 500 shares in the bank by means of the fraudulent representations and practices, thereinbefore mentioned, of the directors of the company, and more especially by the fraudulent representations of the Defendants, Moulton and Evans, and of Hardie; and that, as between the Plaintiff and the [77] company, such purchase may be declared to be void; and that the company may be ordered to repay to him the amount of his purchase-money. It is obvious, therefore, that the Plaintiff, at the same time as he asks that, as between him and the company, the relief may be given, admits that, with respect to all other persons, he is a member of the company.

Now there has been a legislative interpretation put by the Act 1 & 2 Vict. on the effect of the Act of 7 Geo. 4; though there are words in the 7 Geo. 4 which might, I think, have made it questionable at least whether the Act of Geo. 4 did not itself comprehend the very cases which are provided for by the 1 & 2 Vict. However, the Act of the 1 & 2 Vict., after reciting the Act of the 7 Geo. 4, and an Act of the 6 Geo. 4, and that it was expedient those Acts should be amended, proceeds to enact: "That any person now being, or having been, or who may hereafter be, or have been, a member of any co-partnership now carrying on, or which may hereafter carry on the business of banking under the provisions of the said recited Acts, may at any time during the continuance of this Act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said co-partnership, or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit or other proceeding, at law or in equity, against any public officer appointed or to be appointed, under the provisions of the said Acts, to sue and be sued on the behalf of the said co-partnership; and that any such public officer may, in his own name, commence and prosecute

any action, suit or other proceeding at law or in equity, against any person being or having been a member of [78] the said co-partnership, either alone or jointly with any other person against whom any such co-partnership has or may have any demand whatsoever; and that every person being or having been a member of any such co-partnership shall, either solely or jointly with any other person (as the case may require), be capable of proceeding against any such co-partnership, by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings, and with the same legal consequences as if such person had not been a member of the said co-partnership, and that no action or suit shall in anywise be affected or defeated by reason of the Plaintiffs or Defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said co-partnership; and that all such actions, suits and proceedings shall be conducted and have effect as if the same had been between strangers." I look upon this as a legislative declaration that the particular cases which were provided for by 1 & 2 Vict. were not provided for by the 7 Geo. 4. But it is perfectly plain that the Act of the 1 & 2 Vict., though it meant to give relief in a case where one member of a partnership might, either solely or jointly with another person, have a demand against the partnership, or *vice versa*, the partnership might have a demand against a member of the partnership, either solely or jointly with some other person, no part of it can, by any construction however forced, be made to provide for determining a question between one member of the partnership as such, and the other members of the partnership as such. In my opinion, therefore, there is no ground whatever for making Connell a party to this suit in the [79] character of public officer of the company, thereby representing the whole company.

If the Plaintiff chooses to seek relief as against the other members of the company, he must seek it in some other form; in what form, it is for him to be well advised before he amends his bill.

Demurrer allowed.

THE VICE-CHANCELLOR, in the course of the argument on the demurrer filed by the Defendant Moulton, a report of which is subjoined, said that what he had decided on Connell's demurrer was, in effect, that inasmuch as the public officer of the company did not, under the Acts of Parliament, represent all the company except one, and as the Plaintiff was, in effect, suing all the company except himself, the public officer was improperly made a party: that, as Mr. Jacob had said, the Acts of Parliament did not authorize suits by one or more of the partners against the rest, to be managed by means of making the public officer a party.

Demurrer. Pleading. Parties. Fraud.

A. filed a bill against a company, and also against some of the directors of the company, praying relief against the company, and if he should be held not to be entitled to relief against the company, then praying relief against the directors. Held, that the bill was demurrable.

An allegation in a bill that a person who would have been a necessary party, was dead, insolvent, and without leaving any assets for payment of his debts, is sufficient to dispense with his representative being made a party.

Where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that *all* the persons charged with the fraud should be made Defendants.

The Defendants Moulton and Evans demurred, separately, to the bill, on the same grounds as the Defendant Connell had done, namely, for want of equity and because Hardie's representative and the persons who were directors of the bank at the time when the Plaintiff purchased his shares were not made parties to the bill.

[80] Mr. Jacob and Mr. Sharpe, in support of Moulton's demurrer. The question

that arises on this demurrer is quite independent of either of the Acts of Parliament before referred to.

The bill first prays relief against the company; and then it prays as follows: "Or in case this Court shall be of opinion that the Plaintiff is not entitled to have the purchase set aside as against the said company, then that it may be declared that the Plaintiff is, by reason of the fraudulent representations, hereinbefore mentioned, of the said Defendants H. Moulton and T. Evans, entitled to have the amount of his purchase-money repaid to him by the said Defendants H. Moulton and T. Evans, and that they may be ordered to pay the same to him." Now it is essential to the maintaining of a suit in equity that the Plaintiff should know and state the relief which he is entitled to. Where a Defendant is liable to the Plaintiff in one of two ways; as, for instance, where he is bound either to transfer stock or to pay money to the Plaintiff, or is liable to be charged either with interest or with profits in respect of money due from him to the Plaintiff, relief may be prayed against him in the alternative; because he is responsible to the Plaintiff *quacunqve viâ*. But a Plaintiff cannot file a bill against A. and B. praying relief against A. and then praying relief against B. in case only he fails in obtaining relief against A. The case of *Edwards v. Edwards* (Jac. 335) somewhat resembles this. There the Plaintiffs stated that their title was good at law; and if not, that it was a case for equitable relief. Lord Eldon allowed a demurrer to the bill, on the ground that the Plaintiffs were [81] bound to state distinctly whether their case was at law or in equity. It so happens in this case that Connell's demurrer for want of equity has been allowed; but if that had not been the case it would have been clear, on reading the prayer of this bill, that either his demurrer or the demurrers of Moulton and Evans must be allowed.

Supposing, however, that the bill had not prayed relief contingently against Moulton and Evans, it would still have been erroneous for want of parties. It states quite as strong a case against Hardie as it does against Moulton and Evans: but, by way of excuse for not making his representative a party, it alleges that he departed this life insolvent and without leaving any assets for the payment of his debts. It is, however, quite consistent with that allegation that he may have left assets sufficient to pay 19s. in the pound on all the demands on his estate.

If the Plaintiff is entitled to any relief at all, it must be relief against all the persons who were concerned in the fraud of which he complains. On that part of the case the Plaintiff's counsel have advanced a doctrine which was never before heard of in a Court of Equity. They said that, in a case of gross fraud, that is, where three persons concur in cheating another, a bill may be filed against one of them alone, without making the others parties; because there can be no contribution. But where is the line drawn between that which, in common language, is called fraud, in respect of which it is said a Court of Equity does not enforce contribution, and that which, in a Court of Equity alone, is termed so, and in respect of which a Court of Equity does enforce contribution, such as a dealing between an attorney and his [82] client, or between a guardian and his ward. A Court of Equity makes no distinction between the different kinds of fraud; it deals with everything as a matter of property. It does not make any man pay damages for fraud; but makes him make restitution. The principle of equity, in all such cases where it gives relief, is to cause restitution to be made of the property that has been improperly acquired by the persons who have acquired it, whether by gross fraud or by that which, in equity alone, is called a fraud. Why then is Moulton sued alone? The Plaintiff's money was applied for the benefit of the company at large; and, consequently, all the old directors and shareholders ought to have been made parties; for it is by them that restitution ought to be made.

We submit, therefore, that the bill is erroneous, first, because it prays relief against Moulton, in the event only of the bill being dismissed as against Connell the representative of the company; and, secondly, because Hardie's representative and the other persons who are equally liable to make restitution to the Plaintiff are not made parties.

Mr. Knight Bruce, Mr. Stuart and Mr. Geldart, in support of the bill. The course which has been pursued, in this case, of putting in three separate demurrers, was wholly unnecessary, and tends only to increase expense: for, though a demurrer cannot be bad in part and good in part, yet it may be bad as to one or more of the demurring parties and good as to the rest.

In many cases of fraud, as for instance where persons are concerned in fraudulently procuring a deed, they [83] having no interest in the property, restitution is out of the question. In such a case it is not restitution, but damages which this Court gives, although the relief is not so called. *Lingard v. Bromley* (1 V. & B. 114). The fraud with which the directors are charged was not committed by them in concurrence with Moulton, Hardie and Evans, but was a totally different and distinct act.

The cases of *Cockburn v. Thompson*, *Angerstein v. Clarke*, and *Madox v. Jackson*, which have been before cited, shew that the allegation that Hardie died insolvent is quite sufficient to dispense with the presence of his personal representative on this record.

Lastly, it was said that the bill is erroneously framed, because it prays relief against Moulton and Evans, in case only the company shall not be held liable. Now Moulton and Evans are directly liable to the Plaintiff on the ground of fraud. The company may, perhaps, in the progress of the cause, discharge themselves by evidence, and be held not liable to the Plaintiff's demand. The Plaintiff then has a right to sue Moulton and Evans, they being liable to him at all events. But can they complain because he does not deal harshly with them, but chooses to proceed against the party who has got his money before he resorts to them for it? The rule established by *Edwards v. Edwards* and other cases of that description has no application to the present case. All that those cases decide is that a Plaintiff must (as has been done here) state his case intelligibly; that, if he comes to a Court of Equity for relief, he must shew that he comes on equitable grounds and that he is entitled to relief in a Court of Equity. If he states a case which [84] may be either a case at law or in equity, the Court cannot tell what he means.

We trust that, as the bill states a clear case of fraud against Moulton, his demurrer for want of equity as well as for want of parties must fail.

Mr. Jacob and Mr. Sharpe, in support of Evans's demurrer. All the arguments in support of Moulton's demurrer apply equally to Evans's. Moreover, Moulton was a director and shareholder; but it is not stated anywhere in the bill that Evans was either one or the other. He is stated to have been manager of the bank. That shews only that he was clerk, secretary or agent of the company. It cannot be assumed that, because he was employed as manager, he was a partner in the bank. An agent to the perpetrators of a fraud may be made a Co-defendant to a bill to be relieved against the fraud, for the purpose of being subjected to the costs of the suit, but not for the purpose of having relief prayed against him. Here, however, the Plaintiff does not pray for costs against Evans, but, obviously, brings him before the Court, not as an agent against whom he prays costs, but as a principal, against whom he prays relief, and relief only. In common cases the costs of the suit are given as incidental to the relief, and, therefore, they need not be specifically prayed for. Consequently, bills in general need not have a separate prayer for costs; but, if a Plaintiff has a case only for costs against a Defendant, he must make the costs a specific part of his prayer; for, costs being incidental to the relief, if no relief is prayed against the Defendant, there is nothing to which the costs can be incident. Therefore, as this bill does not [85] pray specifically for costs against Evans, it cannot be supported against him. There is another ground, too, which makes his case stronger than that of any of the other Defendants. He, not being a shareholder, was not one of the recipients of the money. The bill, therefore, as to him, is clearly out of Court.

Mr. Knight Bruce, Mr. Stuart and Mr. Geldart, for the Plaintiff, read several passages in the bill, in order to shew that Evans was a shareholder in the bank; and particularly one in which it was alleged that a great number of shares in the bank were allotted to him on cash credit, and that he was allowed, from time to time, either to sell them at a premium or to retain them; and they said that the admission made by the Defendant's counsel that an agent might be made a Defendant to a suit to be relieved against a fraud shewed that a Court of Equity regarded a moral fraud as a tort; and they cited *Stainbank v. Fernley*, *Burrowes v. Lock* (10 Ves. 470), and *Evans v. Bicknell* (6 Ves. 174).

Mr. Jacob, in reply, said that an agent in a case of fraud was made a party to the suit for the purpose of being subjected, not to damages, but only to costs.

July 13. THE VICE-CHANCELLOR [Sir L. Shadwell]. As to Moulton and Evans it

is objected that Hardie's representatives are necessary parties. I think that they are not necessary parties; because he is stated to have died insolvent, a point expressly decided in *Madox v. Jackson* (3 Atk. 405), and uniformly acted upon ever since.

[86] I also think that the other directors are not necessary parties; *Lingard v. Bromley* (1 V. & B. 114); because the remedy sought here is in respect of their fraudulent act, that is, a *tort*, and not a mere breach of trust.

As to Evans, upon the bill, I think it must be taken that he is not a shareholder. But, whether he was a shareholder or not, is immaterial; because a case of fraudulent misrepresentation is sufficiently stated against him in respect of which he is liable, though he gained nothing by it. *Arnol v. Biscoe* (1 Vez. 95).

But it seems that the relief asked against Moulton and Evans is only in the event of the Court not giving relief against the company. The prayer is expressly so framed; and therefore in that respect I think the demurrers, both of Moulton and Evans, must be allowed; for the bill must shew, as against each Defendant, that the Plaintiff has a direct right to relief. But the Plaintiff, upon this bill, can only have relief contingently. It seems to me that the prayer has been so constructed by mistake; and that relief should have been directly asked against Moulton and Evans. Therefore, though I allow the demurrers, I think it right that the Plaintiff should have leave to amend upon the usual terms.(1)

[87] LEICESTER v. LEICESTER. March 15, 1839.

Practice. Election.

Although the time for excepting to the answer to the original bill may have expired, yet, if the Plaintiff amends his bill, the Defendant cannot obtain an order for the Plaintiff to elect whether he will proceed at law or in equity, until the time for excepting to the answer to the amendments has expired.

Whether that time is to be computed according to the old practice or the New Orders. *Qu.?*

The Defendant Mary Leicester put in her answer on the 18th of April 1838. The Plaintiff then amended his bill. The Defendant answered the amendments on the 22d of February 1839; and, on the 6th of March following, she obtained an order that the Plaintiff might elect whether he would proceed at law or in equity.

The Plaintiff now moved to discharge that order for irregularity.

Mr. Jacob and Mr. Anderdon, in support of the motion.

It is irregular to obtain an order for putting a Plaintiff to his election whether he will proceed at law or in equity before the time for excepting to the answer has expired. If the New Orders are to regulate the time allowed for excepting, two months have not elapsed since the answer to the amended bill was put in. If the old practice applies, then, the answer to the amendments having been filed in Vacation time, the Plaintiff has eight days of the ensuing term to except to it. *Browne v. Poyntz* (3 Madd. 24), *Coupland v. Bradlock* (5 Madd. 14). In either case, therefore, the order has been irregularly obtained.

Mr. K. Bruce and Mr. Sharpe, for the Defendant. Two very important points of practice are here involved. First, with regard to the time for excepting. Secondly, in respect to this being a case of an original and amended bill.

[88] According to the old practice, the Defendant obtained the order to elect at the expiration of eight days from filing his answer. That was considered a reasonable period, as, on the one hand, affording to the Plaintiff a sufficient time to determine whether he would except to the answer or not; and, on the other, as preventing the Defendant from being unreasonably delayed from procuring the order. At the end of eight days, if no exceptions were filed, the order to elect followed as of course. The Plaintiff was still at liberty to except to the answer by procuring a special order for leave to except *nunc pro tunc*; but neither the circumstance that the Plaintiff obtained

(1) The above was copied from the Vice-Chancellor's own note of his judgment.

the special order, nor the fact that the answer proved insufficient, was allowed to prejudice the order obtained by the Defendant. The 4th of Lord Lyndhurst's Orders has dispensed with the necessity of obtaining the order for leave to except *nunc pro tunc*, but it leaves the old practice unaltered in other respects. In *Coupland v. Bradlock* Sir J. Leach says that, if exceptions are not filed to the answer within eight days after it is put in, it is to be assumed that the Plaintiff is satisfied with the answer. If the practice be as contended for by the Plaintiff, a party may bring an action and file a bill on the same day. He will then have two months for excepting from the filing of the answer; and, just before that time has expired, he may obtain an order to amend and procure further time for excepting to the answer to the amendments. By the new rules of pleading at common law, execution will always be obtained in the action before the time for getting the order to elect has arrived.

Secondly. This case is novel in this respect. The time to obtain the order to elect must be reckoned from the time of filing the answer to the original bill. The [89] Plaintiff cannot be allowed to procure an advantage by amending his bill. The principle of the Court has always been to discourage a Plaintiff's not stating at once the whole of his case. An amended bill has reference back in regard to time to the original bill. The only question with regard to the order is whether the subject-matter of the bill and action is the same; and, if the original bill has been answered and the time for excepting to that answer has expired, the fact of the bill being subsequently amended and those amendments answered, cannot vary the right to the order to elect. In this case the prayer of the original bill is unaltered by the amendments.

If the practice of the Court be against the Defendant a new order on the subject is absolutely necessary. (1)

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 4th General Order of 1828, as amended in 1831, itself assumes an existing distinction between the filing of an answer in and out of term. The language is this: "That in all cases whether the Defendant's answer be filed in *term* time or in *Vacation*, the Plaintiff shall be allowed two months to deliver exceptions to such answer." I observe that Mr. Smith, in his very useful treatise on the practice of this Court (vol. i. p. 561, 2d edit.), states the rule thus: "The Defendant must file a sufficient answer, and the time must have elapsed for excepting to that answer, before he can put the Plaintiff to his election to proceed at law or in equity:" and he refers to *Browne v. Poyntz* [90] in support of that proposition. In that case Sir J. Leach says: "It is irregular to obtain an order to elect before the common time for filing exceptions is expired." But in *Coupland v. Bradlock*, he thus states the practice: "If no exceptions are taken to the answer within eight days after it is put in, it is to be assumed that the Plaintiff is satisfied with the answer." I must consider that when, in that last case, Sir J. Leach said, "within eight days after the answer is put in," he meant eight days with reference to the case then before him, that is, he meant to say (the answer in that case having been put in during the *Vacation*), within the eight first days of the ensuing term; and it is remarkable that, in that case, the Defendant waited until the ninth day of the term ensuing the filing of his answer before he obtained the order.

In this view of the case, as the answer to the amended bill was filed on the 24th of February, the time for excepting will not expire until the end of the eight first days of Easter term.

Then, with regard to the question whether the computation of time is to be made from the time of putting in the original answer or from the time of answering the amended bill. It appears to me that it would be absurd that the time for obtaining the order to elect should be governed by the time of filing the answer to the original bill, notwithstanding that bill has been amended and an answer put in to those amendments. The order, as drawn up by the Defendant, itself recites, as the ground of making it, that the Defendant has put in his answer to the amended bill. If, therefore, the time for obtaining the order to elect was to be computed from the time of putting in the answer to the original bill, it would have been unnecessary to do what this

(1) See the first of Lord Cottenham's Orders of 9th May 1839, which was made in consequence of the decision in the above case.

order most distinctly [91] does, namely, recognise the answer to the amended bill. The Master is directed by the order to inquire whether the subject of the action at law and of the suit in equity is the same; and it would be absurd to suppose that the Master is only to look at the original matter, and not at the amendments, to see whether the claim at law is identical with the claim in equity.

Then with regard to the prayer of the bill being unaltered by the amendments. The prayer might very possibly remain the same, and yet there might be great alteration in the facts on which that prayer was originally grounded. In this view of the case, even on the old practice, which is the most favourable one for the Defendant, I think this order is wrong.(1)

[91] SMITH v. CLEASBY AND OTHERS.(2) Jan. 29, 30, 1841.

Affidavits. Practice.

Plaintiff obtained an *ex parte* injunction. Defendant filed his answer, and served a notice of motion to dissolve the injunction. Exceptions were taken to the answer; to which the Defendant submitted, and then filed a further answer. Between the filing of the exceptions and the putting in of the further answer, the Plaintiff filed affidavits in support of the injunction. The Defendant then moved to dissolve *on the notice served prior to putting in his further answer*. Held, that the affidavits so filed by the Plaintiff might be read on the hearing of the motion.

An injunction had been obtained, *ex parte*, restraining the Defendant, Cleasby, from suing out a *fiat* in bankruptcy against the Plaintiffs. On the 9th of January Cleasby filed his answer; and on the 14th he served a notice of motion to dissolve the injunction. Exceptions were then taken to the answer; to which Cleasby submitted; and on the 26th he filed a further [92] answer. In the interval between the filing of the exceptions and the putting in of the further answer, the Plaintiffs filed affidavits in support of the injunction. The Defendant then moved to dissolve *on the notice served on the 14th*. On the hearing of the motion the Plaintiff's counsel proposed to read the affidavits filed in the interval before mentioned; to which the Defendant's counsel objected.

Mr. Knight Bruce and Mr. Cankrien, for the Plaintiffs, said that an insufficient answer was no answer. *Gregor v. Lord Arundel* (8 Ves. 87), *Turner v. Turner* (1 Dick. 316), *Attorney-General v. Young* (3 Ves. 209); and that Lord Eldon was in the habit of looking at an answer, in order to judge whether it was sufficient or not.

Mr. Richards, Mr. James Parker and Mr. Calvert, for the Defendant, contended that affidavits could not be read against an answer, except for certain purposes, such as verifying documents and facts not admitted or denied by the answer. *Smythe v. Smythe* (1 Swanst. 252), *Norway v. Rowe* (19 Ves. 144).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have had a better opportunity of considering the question respecting these affidavits than I generally have of considering such points; and my opinion is that the way in which the Defendant, Cleasby, has thought proper to conduct his defence makes it imperative on me to receive these affidavits.

He put in his answer on the 9th of January; and on the 14th he gave the notice of motion to dissolve. But [93] he need not have given that notice of motion; he might have waited to see whether the Plaintiffs would or would not except to that answer, which, he must have known at the time, was an insufficient answer, and to which he might have reasonably expected that exceptions would be filed. I say so, because as soon as the exceptions were filed he submitted to them. He, therefore, on having filed an imperfect answer, thought proper, whilst it was in an imperfect state, to give the notice of motion. If he had withdrawn it, and had served a second notice after he had satisfied the exceptions by putting in a full answer, then, I

(1) Affirmed by the Lord Chancellor in March 1839.

(2) *Ex relatione* Mr. Nicholl.

apprehend, further affidavits could not have been received. But I have now to decide on that notice of motion which he served at a time when his answer was imperfect; and it appears to me that the fact which has been stated, namely, that Lord Eldon would look through the answer to see if it was an imperfect answer or not, though it is not exactly this case, yet is an acknowledgment of the principle on which I proceed, namely, that the document which does appear to have been an imperfect answer was only an affidavit, against which affidavits might be filed. And my opinion is that, for the purpose of hearing a motion made in pursuance of *this* notice, I am bound to receive the affidavits.

[94] SPRY v. BROMFIELD.(1) Jan. 30, 1841.

[S. C. 9 Sim. 534; 10 Sim. 224; 5 Jur. 864; 7 M. & W. 545.]

Will. Construction.

Testator gave all his estates, real and personal, to his executors, in trust to be disposed of by them as after mentioned. He then gave all his real estates, houses, and lands, to his wife, for life; "and after the decease of my wife, I give my houses, lands and estates in B. to J. B., but at his death, I will that the whole shall be for the use of the said J. B.'s wife and children, and which children, at the death of their mother, shall inherit the same jointly, during their lives; and if the said children shall die before they arrive at the age of 21, I will that my houses and estates at B. go to H. S.," who was the testator's heir.

J. B. and his wife had three daughters and one son. The daughters were living at the date of the will, and at the testator's death. The son was born afterwards. After the death of J. B., but in the lifetime of his wife, two of the daughters died intestate and unmarried, one before and the other after attaining 21, leaving their brother their heir. After the deaths of the prior devisees, the son and the surviving daughter, both of whom had long attained 21, executed a deed in the nature of a recovery, by which they limited the lands in B. to the use of themselves and their heirs as tenants in common. Held, that they took an estate in fee-simple, as tenants in common, in the lands in B.

The case sent for the opinion of the Barons of the Court of Exchequer, after setting forth the will, proceeded thus:

The testator afterwards made and published various codicils to his will; but none of them affected the aforesaid devises of the estate at Boldre. The testator died in the year 1799, without having altered or revoked his will and codicils, leaving the Rev. John Hume Spry, D.D., in the will called the Rev. Hume Spry, his heir at law: and the will and codicils were proved by Celia Bromfield, the widow, and William Forsteen, in the proper Ecclesiastical Court. The said Celia Bromfield, the widow of the testator, entered into the possession of the devised estates in the parish of Boldre, upon or soon after the testator's death; and she continued in [95] such possession down to the time of her death, which took place in 1831. The Rev. John Bromfield and Anne, his wife, named in the will, had five children, namely, Henry John Bromfield, who died an infant in the lifetime of the testator, and Eliza Bromfield, Georgina Bromfield, Laura Bromfield, and William Arnold Bromfield. Eliza Bromfield, Georgina Bromfield and Laura Bromfield were all born in the testator's lifetime; and, together with their parents, were all living at the respective times of the testator's making his will and of his death. William Arnold Bromfield was born in 1801. The Rev. John Bromfield died in 1801, intestate, leaving the said Anne Bromfield, his widow, and his four last-named children him surviving. The said Georgina Bromfield, one of the children, attained the age of 21 years. Laura Bromfield, another child, died under that age; and both Georgina and Laura survived their father, and died without having been married; and they respectively

(1) See a report of this case, *ante*, vol. ix. p. 534.

left the said Anne Bromfield, their mother, and the said Eliza Bromfield and W. A. Bromfield, their sister and brother, them surviving; and the said W. A. Bromfield was their heir at law. The said Georgina Bromfield did not execute any assurance of her estate or interest in the said Boldre property which she might be held to have been capable of conveying, or any assurance by which a joint-tenancy might have been severed. The said Anne Bromfield died on the 9th of May 1832 intestate as to real estate, leaving the said Eliza Bromfield and W. A. Bromfield her surviving; and the said W. A. Bromfield was and is the heir at law of his said mother. The said Eliza Bromfield and W. A. Bromfield (who are the Defendants in this suit), upon or immediately after the death of their mother, entered into the possession of the entirety of the said devised estates in the parish of [96] Boldre, claiming under the will of the said Philip Bromfield; and they have ever since been and still are in possession thereof. Sometime after the death of Anne Bromfield, the said Eliza Bromfield and W. A. Bromfield duly made and executed a disposition for barring all estates tail, remainders and reversions in the premises, under the statute of the 3d & 4th Will. 4, c. 74, "For the Abolition of Fines and Recoveries, and the Substitution of more Simple Modes of Assurance," and thereby limited the use to themselves and their heirs as tenants in common.

The case then stated the proceedings which had taken place in the Court of Chancery, and added that the question submitted to the Court of Exchequer was, what estate do the Defendants Eliza Bromfield and William Arnold Bromfield take in the lands at Boldre devised by the will of the testator, Philip Bromfield.

The point argued for the Plaintiff was that the Defendants W. A. Bromfield and Eliza Bromfield took estates for life only in the lands at Boldre; and that, the devise or limitation over in favour of the Plaintiff and his children, in case the children of John Bromfield and Anne, his wife, should die before they arrived at the age of 21 years, having become incapable of taking effect, the reversion in fee-simple immediately expectant upon the determination of the estates for life of the said Defendants had become absolutely vested in the Plaintiff as heir at law of the testator.

The points argued for the Defendants were: first, that the Rev. John Bromfield took an estate tail either in possession or in remainder expectant on the life-estates of himself and his wife, Anne Bromfield; which estate [97] tail descended on the Defendant W. A. Bromfield; or, secondly, that the Defendants Eliza Bromfield and W. A. Bromfield became, in the events which happened, joint-tenants for their lives, with several inheritances in fee-simple, of and in the lands at Boldre.

The following certificate was returned by the Barons of the Exchequer:—

"We have heard this case argued by counsel, and have considered it; and are of opinion that the Defendants Eliza Bromfield and John Arnold Bromfield take an estate in fee-simple, as tenants in common, in the lands in Boldre devised by the will of the testator, Philip Bromfield.

"Dated this 30th day of January 1841.(1)

"ABINGER. J. GURNEY."
"E. H. ALDERSON. W. H. MAULE."

[98] ELWORTHY v. WILLIAM PAYNE BILLING AND OTHERS. Feb. 1, 1841.

[S. C. 10 L. J. Ch. 176.]

Sale under Decree. Bidding.

E. B., one of several Defendants, having purchased an estate sold under the decree, for £810, without having obtained leave to bid; another Defendant moved that the estate might be again put up to sale at £810, and if it should fetch more, that

(1) The certificate in this case was correctly copied from the certificate returned by the Barons of the Exchequer. But it seems to be clear that, by Jno. A. Bromfield, the learned Barons meant William A. Bromfield. (*Erratum* transferred from 10 Sim. 166.)

the sale to E. B. might be set aside, and that he might pay the expenses of the resale and the costs of the motion. The Court refused the application, but without costs.

The premises in question in this cause having been put up for sale by auction, in September last, in pursuance of the decree, Edward Billing, one of the Defendants, bid at the auction, *without having obtained the leave of the Court so to do*, and became the purchaser of the premises at the sum of £810. A motion was now made, on behalf of Thomas Billing, another of the Defendants, that the premises might be again put up for sale before the Master, at the sum of £810; and, if they should be resold for more than that sum, then that the sale to Edward Billing might be set aside, and that he might be ordered to pay all the expenses of the resale and of the motion.

Mr. Sharpe, for the Defendant, Thomas Billing, said that every party to a cause in which an estate was directed to be sold was a vendor and a trustee for the sale of the estate; and, therefore, the Court did not allow any party to the cause to bid at the sale without having first obtained the leave of the Court; that, in general, property which had been once sold did not fetch so high a price at a second sale; and, besides, it might not sell so well in February or March as it would have done in September; that it was sworn, by the affidavits in support of the motion, that, in consequence of Edward Billing having bid for the property, other persons who were present at the auction were prevented from bidding for it; and that that allegation was not traversed by the affidavits in opposition to the motion; that the cases [99] *Ex parte Reynolds* (5 Ves. 707) and *Ex parte Lacey* (6 Ves. 625), although they related to purchases made by assignees of bankrupts, were applicable, in principle, to the present case.

Mr. Knight Bruce appeared for another of the Defendants, and supported the motion.

Mr. Jacob and Mr. Willcock, for the Defendant, Edward Billing, said that the application was irregular, as it asked that Edward Billing might be held to his purchase unless someone else would give a higher price for the property; which, in effect, was adopting the purchase and repudiating it at one and the same time: that, if an answer was irregularly filed, the Plaintiff in the suit could not move for payment into Court of the balance admitted by the Defendant to be in his hands, and, at the same time, that the answer might be taken off the file; but he must either accept the answer or reject it altogether: that assignees in bankruptcy were trustees for the sale of the bankrupt's property, and, consequently, the cases cited were cases in which trustees for sale had sold to themselves; but it was quite a different case where the objection to the transaction was, at the utmost, an objection of irregularity: that the auctioneer ought not to have accepted the biddings made by E. Billing: that, it appeared by the affidavits in opposition to the motion, that Thomas Billing, the party on whose behalf the application was made, was present with his solicitor at the sale; and that E. Billing bid for the property in their presence and hearing. For what purpose were they present except to watch the sale? Why, then, did they not interfere to prevent the bidding from being accepted? It is, at the utmost, a case of irregularity; and, at all events, the Court will not set [100] aside the sale because one of the parties asks it, without seeing whether it is beneficial or not.

THE VICE-CHANCELLOR [Sir L. Shadwell], having observed, in the course of the argument, that only two of the parties to the cause supported the application, delivered judgment as follows:—

There is a difference between a mere party to a cause and assignees in bankruptcy, with respect to purchases made without the permission of the Court. Assignees in bankruptcy sell the bankrupt's property, because it is their duty to do so under the statutes relating to bankrupts, and without the direction of the Court. They are merely trustees for sale; and therefore it is reasonable that, where they purchase the property for themselves, such orders should be made against them as were made in the cases cited. But, as far as my experience goes, there is no instance of a similar order being made, where the purchaser was merely a party in the cause, and not, as such, the party to conduct the sale. Ordinarily, the Plaintiff in the suit has the

conduct of the sale. But, in this case, the application is made only by one, and supported by another, of several Co-defendants in the suit.

The Court, having made a rule that, where property is sold under a decree, no party shall bid for it without the permission of the Court; all that it has to do is to take care that its own rule is enforced; but it will not enforce it against a party to a cause in the same manner as it will against assignees in bankruptcy.

I never remember a case in which a party to a suit has bid at a sale directed by the Court without its permission, where the Court has made such an order as is now asked. But, as the party did wrong by bidding at [101] the sale without having obtained the leave of the Court, the proper course is to refuse the motion without costs.(1)

[101] In the Matter of THE WEST RETFORD CHURCH AND POOR LANDS. And
In the Matter of 52 GEO. 3, c. 101. June 3, 4, 1839.

[S. C. 8 L. J. Ch. (N. S.) 317; 3 Jur. 501.]

Charity. Jurisdiction. Stat. 52 Geo. 3, c. 101.

Where two classes of persons claim, adversely to each other, the right of administering the funds of a charity, the Court will not decide the question on a petition presented under 52 Geo. 3, c. 101.

This was a petition presented by two of the trustees of the church and poor lands of West Retford. It stated that, by an indenture, dated the 7th of June 1699, and made between William Johnson of the one part, and William Wintringham, &c., of the other part, after reciting that Johnson and divers other persons had been seized in fee, in trust for the church and poor of West Retford, of a messuage and tenement, situate in West Retford, in [102] the occupation of William Atkinson, of the yearly value of £10 theretofore given to the church and poor of West Retford, and also of a cottage or tenement in West Retford, in the occupation of John Judson, of the yearly value of 20s., also theretofore given to the use of the church of West Retford; and that the trustees were all dead except Johnson: Johnson, for continuing the charity and settling the premises on other trustees, with the advice and direction of W. Simpson, &c., Commissioners for Charitable Uses by virtue of a commission under the Great Seal, bearing date the 16th day of July then last, granted to the parties to the deed of the 2d part and their heirs the messuage, cottage and premises, in trust for the church and poor of West Retford. The petition then stated that it was not known at what time or for what purpose the charity was founded; but it was believed that, from the earliest period at which the charity was known to have existed, the rents and profits of the estate had been considered as applicable, in equal moieties, to the repairs of the church and relief of the poor of West Retford: that, in the years 1753 and 1790, new trustees of the premises were appointed by instruments purporting to convey the premises to such trustees respectively, but which were insufficient for that purpose; wherefore, by an indenture of feoffment, bearing date the 3d day of April 1797, and made between Anthony Barker (surviving son and heir at law of John Barker, junior, who was the survivor of the trustees

(1) The Vice-Chancellor kindly furnished the reporter with the following note of a manuscript case in His Honor's possession:—

Wilson v. Greenwood. Easter Term 1819.

Bill filed by assignees of a bankrupt partner against the solvent partner for an account and sale of the partnership effects. An order was made, in July 1818, for a sale of the partnership effects before the Master. The Defendant attended the sale, and bid, and was declared the highest bidder. A motion was made by Mr. Horne to set aside the sale, on the ground that the partner was not at liberty to bid. Lord Eldon refused it. Mr. Heald and Mr. Shadwell, for Defendant, the purchaser.

named in and appointed by the said indenture of the 7th day of June 1699) of the first part, and the Reverend Abraham Youle, &c., of the 2d part, and J. Holmes of the 3d part, after reciting that the parties of the 2d part had agreed to accept a grant and to become trustees of the premises: it was witnessed that, for continuing the trust, Anthony Barker granted and enfeoffed the charity estate to the parties of the 2d [103] part and their heirs, in trust for the church and poor of West Retford: and it was agreed that, when the trustees should, by death, be reduced to four, the survivors should convey the premises to eight or more proper persons to be appointed by such surviving trustees, and to the heirs of such grantees or feoffees, to the use of such surviving trustees and of such grantees or new trustees and their heirs, on the trusts aforesaid; and so, from time to time as often as the trustees should be reduced to four. The petition next stated that other of the trustees appointed by the indenture of the 3d day of April 1797 being dead, the four surviving trustees, in the year 1818, appointed eight other persons to be trustees of the premises in the room of the dead trustees; and by indentures of lease and release of the 19th and 20th of May 1818, the premises were conveyed to the surviving and new trustees, their heirs and assigns, in trust for the church and poor of West Retford; that, four of the last-mentioned trustees having died, the surviving trustees, in the year 1829, appointed four other trustees in the place of the deceased trustees, and by indentures of lease and release of the 9th and 10th of October 1829, the premises were conveyed to the last-mentioned surviving and new trustees, their heirs and assigns, in trust for the church and poor of West Retford; that, prior to the year 1797, the rents of the charity estate were inconsiderable, and were received by the churchwardens and overseers of the poor of West Retford in equal moieties, and applied by them respectively without any interference on the part of the trustees; that, in 1798, the charity estate was let at an advanced rent, and the trustees, being apprehensive lest they should be responsible for the due application of the rents and profits of the estate, claimed the right to interfere; and they and their successors, from time to time, did interfere in the application [104] of such rents and profits; although such right on their part was not admitted by the churchwardens or overseers; that, in August 1827, the Commissioners appointed, under 58th Geo. 3, c. 91, and 59th Geo. 3, c. 81, to inquire concerning charities, made their inquiry concerning the charity, and in their report, bearing date the 26th of January 1828, they stated, with respect to the charity, as follows:—"It is urged by the Reverend Mr. Youle (who then was the Rector of Retford and one of the trustees) that, although the trustees have the power of letting and managing the estate, the rector, churchwardens and overseers of the poor of West Retford ought to receive the rents of the estate, either from the trustees or the tenants, and ought to apply one moiety for the use of the church, and the other moiety for the use of the poor; but it appears to us that, whatever may have been the customary mode of disposing of the income of the charity when it was of small amount, it is the duty of the trustees themselves to take care that the rents are correctly applied, and particularly that they are kept distinct from the funds raised by the parochial rates;" that, ever since the making of the report, the trustees for the time being of the estate had claimed and exercised the right of seeing to the proper application of the rents and profits of the estate; but the churchwardens and overseers of the poor of West Retford still insisted that the trustees had merely the power of letting and managing the estate and receiving the rents, and that it was the duty of the trustees to pay over such rents to the churchwardens and overseers, to be applied by them without any interference or controul on the part of the trustees, and without any liability to account to the trustees for the due application thereof; and that, at a parish meeting in West Retford, convened by the churchwardens and overseers, and held in December 1838, a determination was expressed, [105] by the majority of the churchwardens and overseers of the poor, to insist upon their right to require the trustees of the estate to pay over the rents and profits to them, to be applied by the churchwardens and overseers without any controul or interference on the part the trustees; that it would be for the benefit of the charity that all doubts as to the powers and duties of the trustees with respect to the application of the rents and profits of the estate should be removed. The petition prayed that the powers and

duties of the trustees with respect to the application of the rents and profits of the estate might be ascertained and declared.

It appeared, from one of the affidavits in opposition to the petition, that, after the petition was answered, the churchwardens and overseers commenced ejectments against the tenants of the charity estate, which were still pending.

Mr. Knight Bruce and Mr. K. Bayley, in support of the petition, contended that the view taken by the Charity Commissioners, as to the mode of applying the rents of the charity estate, was correct.

Mr. R. Atkinson, for all the trustees except the Petitioners, said that they were anxious to have the directions of the Court.

Mr. Jacob and Mr. Cankrien, for the churchwardens and overseers of the poor of the parish, said that the parish officers contended that the legal estate in the charity lands was vested in them, under 59th Geo. 3, c. 12; (1) and, consequently, that there was a dispute not [106] only as to the parties to whom the administration of the charity belonged, but also as to the parties in whom the legal estate in the charity property was vested; and, therefore, the case ought to have been brought before the Court by information, and was not a fit subject for a petition under 52d Geo. 3, c. 101. *Doe v. Hiley* (10 Barn. & Cress. 885), [107] *Attorney-General v. Lewin* (*ante*, vol. viii. p. 366), *In re Dean Clarke's Charity* (*Ibid.* 34), *In re Phillipott's Charity* (*ante*, vol. viii. p. 381), *The Corporation of Ludlow v. Greenhouse* (1 Bligh, N. S. 17).

Mr. Knight Bruce, in reply. The 59 Geo. 3, c. 12, received the Royal assent in 1819, and ever since that time, as well as before, the trustees of the charity estate have been treated and dealt with as trustees by the parish. The language of the 17th section of the Act is that the churchwardens and overseers of the poor "shall and may and they are hereby empowered to accept, take and hold," &c. It is obvious that the language of that section relates to future acquisitions of property, and to cases where no trustees might be appointed, or none could be found as was the case in *Doe v. Hiley*. The Legislature could not have meant to enact that in every case of a parochial trust, whether there were existing trustees or not, the parish officers should be the trustees. It would be monstrous to say that the Legislature intended that no parish should have individual trustees; but that, in every case where lands were held in trust for a parish, the legal estate should be taken out of the trustees and vested in the churchwardens and overseers. *Allason v. Stark* (9 Adol. & Ell. 255). In *The Attorney-General v. Wilkinson* (1 Beavan, 370) and many other cases it has been decided that, where a charity is founded for the relief of the poor of a parish, the funds ought to be applied exclusively to the relief of the poor of the parish who do not receive

(1) That Act, after empowering parish officers to purchase lands for building workhouses and employing the poor, enacts: "That all buildings, lands and hereditaments which shall be purchased, hired, or taken on lease by the churchwardens and overseers of the poor of any parish, by the authority and for any of the purposes of this Act, shall be conveyed, demised and assured to the churchwardens and overseers of the poor of every such parish respectively, and their successors, in trust for the parish, and such churchwardens and overseers of the poor and their successors shall and may, and they are hereby empowered to accept, take, and hold, in the nature of a body corporate, for and on behalf of the parish, all such buildings, lands and hereditaments, and also all other buildings, lands and hereditaments belonging to such parish; and in all actions, suits, indictments and other proceedings for or in relation to any such buildings, lands, or hereditaments, or the rent thereof, or for or in relation to any other buildings, lands or hereditaments belonging to such parish, or the rent thereof, and in all actions and proceedings upon or in relation to any bond to be given for the faithful execution of the office of an assistant overseer, it shall be sufficient to name the churchwardens and overseers of the poor for the time being, describing them as churchwardens and overseers of the poor of the parish for which they shall act, and naming such parish; and no action or suit, indictment or other proceeding shall cease, abate or be discontinued, quashed, defeated, or impeded by the death of the churchwardens and overseers named in such proceedings, or the death or deaths of any of them, or by their removal or the removal of any of them from, or the expiration of, their respective offices."

parochial relief; and consequently the rents of this charity estate are not applicable to any purposes in which the parish [108] officers have any concern; but the Court has to decide to what purposes they ought to be applied.

The petition does not state, nor could it have stated, that any question was raised respecting the legal estate in the charity property. We did not come here with any knowledge that there was any contest about the legal estate; and, therefore, the pendency of the ejectments which have been commenced by the parish officers, against the tenants of the charity estate, cannot render the proceeding by petition improper.

The only question then is whether the case stated on this petition is a proper subject for a petition under the 52 Geo. 3, c. 101. It is difficult to conceive anything more extensive than the language of that Act. It enacts that in every case of a breach of any trust or supposed breach of any trust created for charitable purposes, or wherever the direction or order of a Court of Equity shall be deemed necessary for the administration of any trust for charitable purposes, it shall be lawful for any two or more persons to present a petition to the Lord Chancellor, &c., praying such relief as the nature of the case may require. [THE VICE-CHANCELLOR. My impression always has been that if the question be what persons have a right to administer a trust for charitable purposes, that is, if the right be disputed between A. and B., the question must be decided on information and not on petition. So, too, if the question be what are the purposes to which the funds of the charity ought to be applied, that is a question which ought to be decided on information.] The case stated on this petition is not a complicated one. The only question is, how is the trust to be administered? Surely a case which raises the simple question whether the trustees are themselves to [109] apply the rents of the charity estate, or are to pay them over to the churchwardens and overseers, is a fit subject for a petition. There is nothing here which is *extrà* the charity, that is, no question is raised by this petition which is adverse to the charity. The 52 Geo. 3, c. 101, applies to every case which is *intrà* the charity. *In re Upton Warren* (1 Myl. & Keen, 410).

At the conclusion of the reply Mr. Jacob observed that *Allason v. Stark* was a case of special trust, and was exactly similar to *The Attorney-General v. Lewin*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Putting out of the question anything relating to the legal estate, and looking merely at the case as it stands upon the petition, I cannot but think that it does shew an adverse question raised, in the first place, as to the power of those who are called trustees to do anything more than receive the rents of the charity estate, and hand them over to the churchwardens and overseers.

The petition first states the manner in which the legal estate has been transferred from one set of trustees to another, by means of a series of deeds. It then states that the trustees claimed a right to interfere, and that they and their successors, from time to time, did interfere in the application of the rents and profits. Then it states that the Charity Commissioners visited the parish and gave their opinion; which opinion I really do not understand; because they say, "that, although the trustees have the power of letting and managing the estate, the rector, churchwardens and overseers of the poor of West Retford ought to receive the rents of [110] the estate, either from the trustees or the tenants, and ought to apply one moiety for the use of the church and the other moiety for the use of the poor; but it appears to us that, whatever may have been the customary mode of disposing of the income of the charity when it was of small amount, it is the duty of the trustees themselves to take care that the rents are correctly applied, and particularly that they are kept distinct from the funds raised by the parochial rates." It is very strange that the Commissioners should have thought that the trustees were to hand over the rents to the parish officers, and still to see them administered. Perhaps circumstances might be stated which would make that opinion more reconcileable with itself than it at present appears to be. Still it represents that there was a question raised as to the duty of those whom, for the present purpose, I call trustees, to superintend the churchwardens and overseers of the poor in the application of the rents paid to them. The petition then states, "that ever since the making of the Commissioner's report, the trustees for the time being of the estate have claimed and exercised the right of seeing to the proper application

of the rents and profits of the estate." Then the petition states that a meeting was held and a determination was expressed, by the majority of the churchwardens and overseers of the poor, to insist upon their rights. So that, on the petition, it is represented that there is a question about the right and authority of the trustees, and the rights of the churchwardens and overseers as contradistinguished from the rights of the trustees; and supposing that there was no question between the churchwardens and overseers and the trustees as to their respective rights, still there is a question as to how the rents are to be applied.

[111] If there had been no contending parties, and the trustees had only wanted to know how the rents ought to be applied by them, then the Court would have had authority to direct a reference to the Master, upon petition. But here it is evident, upon the face of the petition, that the Court is not able to stir a step without first deciding upon the adverse right claimed by the trustees, as against the churchwardens and overseers. And the strong impression which was made on my mind by hearing the *Ludlow case* when it was argued in the House of Lords is that, if there be such an adverse question about a charity as is here stated, a petition under the Act is not the mode in which it ought to be brought before the Court for decision. But, in coming to this conclusion, I am not so much influenced by the question that has been raised with respect to the legal estate in the charity property, as by what appears on the face of the petition itself, with regard to the conflicting claims of the parties who insist upon a right to administer the funds of the charity; and on that ground alone I dismiss this petition with costs.

[112] LETT v. RANDALL. June 5, 1839.

[For subsequent proceedings, see 3 Sm. & G. 83; 2 De G. F. & J. 388; 45 E. R. 671; *Gaslight and Coke Company v. Towse*, 1887, 35 Ch. D. 519.]

Will. Construction.

Testator gave his real and personal property to trustees, their heirs, &c., upon trust to pay and divide the same unto and amongst all and every his children who might be living at his decease, share and share alike, for their lives: "and in case any of my said children, being daughters, shall marry, and shall happen to depart this life in the lifetime of her, or their husband or husbands, I direct that the share or shares of her or them so dying, shall go to her or their respective husband or husbands, for his or their life or lives, and, from and after his or their decease, then to be equally divided amongst all and every the child and children of my said daughter and daughters then living; and, in default of any such child or children, then I direct such share or shares shall go and be divided, equally, to and amongst all and every my said children who shall be then living." The testator left a son and seven daughters. One of the daughters died a spinster. Held, that on her death her share in the testator's property did not go to her surviving brothers and sisters, but became undisposed of.

A petition presented by William Randall, the only son and heir of William Randall the testator in the cause, stated that the testator made his will, dated the 1st of July 1824, in the following words: "I direct that all my just debts, funeral expenses, and the charges of proving this my will, may be in the first place duly paid and satisfied by my executors hereinafter mentioned, as soon as conveniently can be after my decease. I give, devise and bequeath unto Thomas Lett, Nathaniel Randall and Thomas Lett the younger, and their heirs, executors and administrators, all and singular my freehold and leasehold and copyhold estates, and also my personal estate, of what nature or kind soever the same may be or consist of, upon trust to pay and make up unto my dear wife the sum of £1200 per annum, including any sum or sums of money she may be entitled to, under and by virtue of the will of her late father, by equal quarterly payments, for and during the term of her natural life; and upon further trust to pay and divide the residue of my said property unto and

amongst all and every my said child and children who [113] may be living at the time of my decease, share and share alike, *for and during the terms of their natural life: and in case any of my said children, being daughters, shall marry and shall happen to depart this life in the lifetime of her or their said husbands, then I direct that the part or share, parts or shares of her or them so dying as aforesaid, shall go to and be paid to her or their respective husband or husbands, for and during the term of his or their natural life or lives, and, from and after his or their decease, then to be equally divided unto and amongst all and every the child and children of my said daughter and daughters then living, share and share alike; and in default of any such child or children, then I direct such part or share, or parts or shares shall go to and be paid and divided equally, share and share alike (and from and after the decease of my said dear wife, I direct that the said sum of £1200 per annum so to be paid unto her as aforesaid shall go to and be equally divided) unto and amongst all and every my said dear children who shall be then living, share and share alike.*" The testator then directed that the provision thereinbefore made for his wife should be taken by her in satisfaction of any claim that she might have upon his property, under any settlement made by him or for dower, or in any manner howsoever, and that the property intended to be settled upon his daughter, Eliza Randall, should cease to be paid to her upon her becoming entitled to her share under his will, and then proceeded thus: "I also direct that all my stock-in-trade, implements and effects may be sold, and the produce invested by my said trustees in the funds, upon trust for the benefit of all and every my said children who may be living at the time of my decease. And I hereby nominate, constitute and appoint the said Thomas Lett the elder, [114] Nathaniel Randall and Thomas Lett the younger, trustees and executors of this my last will and testament."

The testator died on the 28th of December 1825, leaving Sarah Randall, his widow, and the Petitioner and seven daughters, two of whom were married at the date of the will, and one Eliza, who was married shortly afterwards, him surviving. In July 1838 Sarah Randall, one of the daughters, died intestate and a spinster; and her mother took out administration to her.

The Petitioner stated that he was advised that the one-eighth share of the rents of the testator's freehold, copyhold and leasehold estates, to which Sarah Randall, the daughter, was entitled during her life, subject to the payment of the annuity of £1200, did, upon her decease, become undisposed of by the will, and as to the freeholds and copyholds, descended to the Petitioner as the testator's heir at law and customary heir, and, as to the leaseholds (which constituted the whole of the testator's personal estate) devolved to or in trust for the testator's eight children, as his next of kin: and that the Petitioner was also advised that Sarah Randall, the daughter, as being herself one of such next of kin, was entitled to an eighth part of the said eighth part of the leaseholds, in case (as the event happened) she should die unmarried, and that such eighth part of one-eighth devolved, upon her dying intestate as aforesaid, to her mother and six sisters and the Petitioner as her next of kin. The petition prayed that it might be declared that, in the event which had happened, of the decease of Sarah, the daughter, without having been married, the one-eighth part, which belonged to her during her life, of the free-[115]-hold, copyhold and leasehold estates, respectively descended and devolved as before mentioned.

Mr. Knight Bruce and Mr. Campbell, for the Petitioner, and Mr. Wyatt, for Sarah Randall, the mother, said that the limitation over to the surviving children was confined to the event of the daughters marrying and dying in the lifetime of their husbands, without issue; and, consequently, Sarah Randall, the daughter, having died unmarried, her share became, on her decease, undisposed of.

Sir William Horne, Mr. Lloyd and Mr. Parry, for the surviving daughters and their husbands, said that the whole of the testator's property, both real and personal, was given out and out to the trustees of his will; and, therefore, the testator clearly meant to dispose of the whole beneficial interest in his property: that the Courts always avoided, if they possibly could, the construing of a will so as to create even a partial intestacy; and that the testator clearly intended that, in the event of any of his daughters dying unmarried, her share should go over to his surviving children.

Mr. Fellowes appeared for the trustees.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have considered the question that

has been discussed in this case; and the conclusion which I have come to is that it is a case of intestacy.

One does not like to construe a will so as to make the testator die intestate, unless it is impossible so to construe it as to give effect to what may be fairly collected to have been his intention. But there seems nothing [116] like uniformity of disposition in this instrument. The objects of bounty that are named are, first of all, his wife, who is to take an annuity of £1200 a year. Then there are the children living at his own death, and the children living at the death of his wife; and, with respect to the children living at his own death, there is this remarkable variety that, with respect to the general *corpus* of his property, including all his real estate, and his leasehold and other personal estate, other than the stock-in-trade and what he calls implements and effects, they are given to the children living at his decease, with a particular proviso respecting daughters who should marry: but, with respect to the stock-in-trade and the implements and effects in the latter part of the will, they are given absolutely to the children who should be living at the time of his decease. It is quite plain, therefore, that the testator himself had no uniform plan of disposing of his property. Therefore it is extremely difficult when he has not by any express words pointed out who shall be the takers of the shares of those daughters (for there might be more than one) who might happen to die without children, to say that of necessity the shares are given to those of his children who might be living at the death of the daughter or daughters who might happen to die without children, or to those of his children who might be living at the testator's decease.

If I were to hold that those children were to take who were living when the event happened of the daughter or daughters dying without children, that does not secure the testator from dying intestate: because it might happen that all the other children might die in the lifetime of one daughter, which daughter might happen to be the only child who died without any child or children: in which case there would be no person to [117] take under the gift over: and, therefore, I do not see how it is possible to put such a construction on the will as to make it a total disposition of the testator's property in every event that may happen. Consequently, I think that the safe way is to adhere to the rule of law; and that is that, if the property in dispute is not given in express words, it is not given at all.

Declare that, in the event that has happened, the share of the deceased daughter, Sarah Randall the younger, in the testator's freehold, copyhold and leasehold estates, is undisposed of, and that, as to the freehold and copyhold estates, it descended, upon her decease, to the Petitioner as the heir at law and customary heir of the testator, and that, as to the leasehold estates, it devolved upon the next of kin of the testator.

[117] REECE v. HUMBLE. Feb. 10, 1841.

Practice. Injunction.

The Court will grant the common injunction on any day, although out of term, and not a seal day or a continuation of the seal.

Mr. Glasse moved for the common injunction, under the 10th of Lord Brougham's Orders, the eight days after the Defendant's appearance having expired.

The first seal after H. T. was on the 8th of February, at which time the eight days had not expired. The day on which the motion was made was neither a seal day nor a continuation of the seal; but was appointed for hearing causes.

Mr. Glasse said that he entertained a doubt whether the Court would grant the motion before the second seal, which would be on the 22d of February.

[118] THE VICE-CHANCELLOR [Sir L. Shadwell] said that, with respect to granting the common injunction, he had long since abolished all distinction between seal days and other days; and made the order.

[118] *In re* READING DISPENSARY. June 3, 1839.

[S. C. 3 Jur. 697.]

Charity. Jurisdiction.

The Court has no jurisdiction to make an order on a petition presented under 52 Geo. 3, c. 101, for transferring the funds of a dispensary to a hospital, and amalgamating the two institutions.

This was a petition presented, under Sir Samuel Romilly's Act (52 Geo. 3, c. 101), by the president and other officers of the Reading Dispensary, for carrying into effect the report of a committee, which had been approved by a large majority of the subscribers to the dispensary, present at a general meeting, recommending that the funds and effects of the institution should be transferred to a hospital which had been recently established in Reading, called the Royal Berkshire Hospital, and that the two institutions should be consolidated. By the rules of the dispensary, a subscriber of one guinea annually was a governor during the continuance of his subscription, and a subscriber of ten guineas in one sum was a life governor of the institution; and the governors were empowered at a general meeting to make, alter or rescind rules for the management of the charity, to elect or remove officers, physicians and surgeons, and to make any order affecting the funds of the charity. By the rules and regulations of the hospital, an annual subscription of two guineas was required to constitute a governor, and a donation of thirty guineas a life governor: but the committee of subscribers to the dispensary recommended that the persons who should be governors of the dispensary at the time when the two institutions were united should enjoy the [119] same privileges with respect to the hospital as they had enjoyed with respect to the dispensary.

The petition prayed that the trustees of the dispensary might be ordered to transfer the funds and effects of that institution to the hospital, or that it might be referred to the Master to inquire and state whether it was fit and proper that such transfer should be made.

Mr. Jacob, in support of the petition, said that the plan of establishing a county hospital in Reading had been approved of by the magistrates of Berkshire; that great additional benefit would accrue to the poor inhabitants of the town and its vicinity if the proposed plan were carried into effect; that, in reality, it was nothing more than enlarging a dispensary into a hospital; that a hospital included all the benefits of a dispensary, but not *vice versa*; and that there was good ground for believing that the dispensary could not be supported in addition to the hospital, as a great number of the subscribers to the former had already transferred their subscriptions to the latter.

Mr. Knight Bruce, Mr. Wigram and Mr. Sharpe, for some of the subscribers to the dispensary, opposed the petition on the ground that it sought to apply the funds of the institution, which amounted to more than £5000, to purposes for which they were not originally intended, and to change, in a great measure, the nature of the charity. They added, that if the Court had any power to do what was asked, an information and not a petition ought to have been filed.

Mr. Koe, for trustees of the dispensary, submitted to act as the Court should direct.

[120] THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case I do not say that, if an information had been filed, the Court might not have felt itself authorized to do what is asked by this petition. But, even if an information had been filed, it is certainly a case in which the Court would have paused before it made such an order as is now asked. One reason why I think so, is that the Court would be extremely cautious in doing any act that might tend to prevent the raising, from time to time, of contributions in support of institutions such as this dispensary.

By the constitution of the dispensary, every contributor of ten guineas becomes a governor for life, and every annual subscriber of one guinea becomes a governor. It is impossible to look at the manner in which these institutions are conducted, without seeing that people are induced, in some degree, to support them for the sake of the

influence which they acquire by means of having a share in the management. I know from my own observations of what takes place in similar societies in London, that that feeling contributes very much to keep up such charities. The constitution of the Royal Berks Hospital is very different from that of the dispensary; because those only who subscribe thirty guineas are to be life governors, and those who subscribe two guineas are to be governors during the continuance of their subscriptions. Consequently the amount of the subscriptions required to constitute governors of the hospital is quite different from the amount required to constitute governors of the dispensary; and on that account it may be reasonably supposed that the governors of the latter would consist, in part at least, of a different class of persons from the governors of the former; and, if the Court should at any time take upon [121] itself to put an end to the dispensary and to amalgamate it with the hospital, it would, I think, be doing an act which, when publicly known, would tend very much to check the formation of other similar charities. Therefore, even if an information had been filed, the Court would, I think, have paused before it made the order asked by this petition.

Besides, it appears to me that, under Sir Samuel Romilly's Act, the Court has no jurisdiction to do what is asked; because, ever since the passing of that Act, the received opinion has been that it is so to be dealt with as to be made applicable only to cases where the conduct of the trustees of a charity comes under consideration, and to cases where it becomes necessary to give some order or direction for the administration of the funds of the charity. But I cannot conceive that an order or direction, the direct effect of which is to put an end to a charity, can be considered as an order or a direction for its management.

In my opinion the rules of the dispensary which have been referred to do not at all authorize the governors, as such, to do what is proposed by this petition. One of those rules is that the governors shall make, alter or rescind rules and regulations for the management of the charity, and elect and remove officers, physicians and surgeons, and make any order affecting the funds of the charity. Surely what is meant by that is that they may make any order affecting the funds of the charity which is conducive to its continuance. I cannot suppose that it could be intended that the very order which gives to the governors the power to make, alter, or rescind rules and regulations for the management of the charity, [122] and to elect and remove officers, physicians and surgeons (all of which measures have reference, plainly, to the continuance of the institution), should extend to enable the governors to make an order which should so affect the funds of the charity as to make it incapable of being carried on from the time when such order should be made. Another of the rules prescribes: "That the management of the institution shall be in the hands of a president, three vice-presidents, a treasurer, and a committee of six, three of whom shall form a quorum; who shall inspect the accounts, report the state of the dispensary, and the number of patients received in the year, and produce the same at the annual general meeting." It is quite plain, therefore, that the management of it means the management of it as an existing institution.

Inasmuch then as no complaint is made about the management of the dispensary as an existing society; but the sole object of this petition is, in effect, to put an end to it by amalgamating the funds with the funds of the hospital, which will be governed in a totally different manner, and which would make it cease to have a separate existence, I am of opinion that the petition asks what the Court is not authorized to do, at any rate, under Sir S. Romilly's Act; and, if the Court sees that the object ultimately aimed at is one which it has no jurisdiction to order, it will not do so idle and frivolous a thing as to send a preliminary inquiry to the Master. Moreover, there would be this further objection to a preliminary inquiry. By the petition, it is asked that it may be referred to the Master to consider whether the transfer will be proper to be made, or, in other words, I am asked to refer a question of law to the Master; which, I apprehend, this Court will never do. The result is that I shall abstain from making any order on the petition.(1)

(1) The parties who opposed the petition had not been regularly served with it; and, therefore, were not entitled to appear at the hearing. Had they been regularly

[123] EDWARDS v. GOODWIN. June 6, 1839.

Plaintiff. Practice. Witness.

Although the Plaintiffs in a creditor's suit have no common interest, yet the Court will not, even after decree, allow one of them to examine the other as a witness in the Master's office in support of his debt.

Motion *after decree*, by one Plaintiff in a creditor's suit, to examine his Co-plaintiff, in the Master's office, as a witness to prove the debt alleged to be due to the party making the motion. The debt of the Co-plaintiff had been admitted by the Master; subject, however, to the question whether it was not barred by the Statute of Limitations, which remained to be decided.

THE SOLICITOR-GENERAL, in support of the motion, said that the rule that a Plaintiff could not examine a Co-plaintiff as a witness did not apply to this case; because, the decree had been made, and, therefore, the Plaintiffs were no longer acting together: that the two Plaintiffs had no common interest; but had separate rights; and consequently the matter as to which it was proposed to examine the Co-plaintiff was one in which he had no interest: that no bill of discovery could be filed against the Co-plaintiff, as he was not the party liable to the demand: that though *Walker v. Wingfield* (15 Ves. 178) was a [124] case in which the Defendants were allowed to examine a Plaintiff, yet there was no substantial distinction between that case and the present; for the two Plaintiffs in this case had no common interest; and, the decree having been made, the bill could not be dismissed with costs: in this case, as in that, the Co-plaintiff did not object to be examined: that, in *Fereday v. Wightwick* (4 Russ. 114), an application by a Defendant to examine a Plaintiff, was refused; but there a bill of discovery might have been filed; and, moreover, the application was made before decree.

The other cases cited in support of the motion were *Armiter v. Swanton* (Amb. 393) and *Troughton v. Getley* (1 Dick. 382).

Mr. Wigram and Mr. Heathfield appeared to oppose the motion.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have no authority to make the order.

The party proposed to be examined has an interest in maintaining the suit; to the costs of which he would be liable in case the bill should be ultimately dismissed.

[125] BROWN v. WEATHERBY. Feb. 19, 20, 1841.

[S. C. 12 Sim. 6.]

Heir. Parties. Stat. 3 & 4 Will. 4, c. 104.

To a suit for administering the real assets of a testator, under 3 & 4 Will. 4, c. 104, the heir, as well as the devisee, is a necessary party.
The case of *Weeks v. Evans*, reported *ante*, vol. vii. p. 546, overruled.

On the case of *Weeks v. Evans*, reported *ante*, vol. vii. p. 546, being cited on the argument of a demurrer in the above-mentioned cause, THE VICE-CHANCELLOR doubted whether the decision in that case was warranted by the facts stated in the report. In consequence of which Mr. G. Richards, who was one of the counsel in *Weeks v. Evans*, procured and furnished His Honor with the papers in that cause.

On the next day His Honor made the following observations on the reported case:—

In this suit of *Weeks v. Evans* I have been furnished, by Mr. Richards, with the brief. It was a creditor's suit by two persons on behalf of themselves and all other

served, it is presumed that the petition would have been dismissed with costs. See *ante*, p. 101.

the creditors of a deceased; and it appears that the deceased devised all his estate to his wife, whom he made his executrix. She proved the will; and it further appears that, at the time of the death of the testator, he was a trader within the meaning of the bankrupt laws. The wife being the sole Defendant, the cause came on as a short cause, I presume; and the common decree was made in a creditor's suit. The minutes, as drawn up, merely directed accounts of the personal estate. It seems that, at some subsequent time, there was some mention of this cause to the Court; for the registrar has a note to the following effect: "Heir not a necessary party." That is also the note on the brief of counsel. At a *subsequent time* there was an application in three causes, that is, in this cause, in a [126] cause wherein J. Lowe and others were Plaintiffs and Anna Evans was the Defendant, and in a cause in which Anna Owen and others were Plaintiffs and Anna Evans was the Defendant. An order was made, on the 1st of February 1836, by which the costs of the heir at law were directed to be paid by Anna Evans. What effect the other suits had on the order I cannot tell: but there was some sort of arrangement by which the heir at law was to have his costs paid. Otherwise I should say that, but for that specialty, the decision is wrong.(1)

[126] WOODROFFE v. DANIEL. June 6, 1839.

Practice. Solicitor. Inspection of Documents.

Where documents, which a Defendant is ordered to produce, are permitted to remain in his solicitor's office, for the Plaintiff's inspection, the solicitor is not entitled to charge the Plaintiff for inspecting them; although the Clerk in Court would have been entitled to demand 6s. 8d. per hour.

On a motion in this cause, made by Mr. Jacob and opposed by Mr. Knight Bruce, THE VICE-CHANCELLOR ruled that, where documents in the possession of a Defendant are allowed to remain in his solicitor's office instead of being deposited with his Clerk in Court, the solicitor is not entitled to make any demand upon the Plaintiff for inspecting them: although the Clerk in Court, if they had been deposited with him, would have been entitled to charge the Plaintiff 6s. 8d. per hour for the inspection. It being for the accommodation of the Defendant that the documents are allowed to be inspected at his solicitor's office.

[127] WILLIS v. BROWN. June 10, 18, 1839.

Bedford Level. Construction of the Bedford Level Act, 15 Cha. 2, c. 17.

By the Bedford Level Act, it was enacted that all conveyances by indenture, of the 95,000 acres allotted to the then Earl of Bedford, or any part thereof, entered with the registrar of the Level, should be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable considerations, inrolled within six months, in one of the King's Courts of Record at Westminster, and that no lease, grant, or conveyance of, or charge out of or upon the 95,000 acres or any part thereof, except leases for seven years or under in possession, *should be of force but from the time it should be entered with the registrar.* Conveyances were afterwards made of part of the 95,000 acres, but were not registered. Held, that those conveyances were nevertheless valid for all purposes, except for entitling the grantees to the privileges conferred by the Act, on the owners of lands within the Level, and for the other purposes of the Act.

By an order made in this cause on the 20th of December 1837, it was referred to the Master to inquire and state whether a good title could be made to the farms, lands and hereditaments sold, under the decree, to John Dobede, Esq. The Master

(1) *Ex relatione*, Mr. Nicholl. Mr. G. Richards stated that the report of *Weeks v. Evans* comprised all the necessary facts.

reported that a good title could be made to all the hereditaments, except a freehold farm called Metlam farm, situate in the parish of Soham in the Isle of Ely.

The farm in question formed part of the 95,000 acres of fen land mentioned in an Act of Parliament passed in the 15th year of King Charles the 2d, c. 17, intituled: "An Act for Settling the Draining of the Great Level of the Fens called Bedford Level." That Act, after reciting that certain moors, marshes, fenny and low surrounded grounds within the counties of Northampton, Norfolk, Suffolk, Lincoln, Cambridge and Huntingdon, were called the great level of the fens, and after several fruitless undertakings for draining the same, were, upon the desires of many persons of worth, undertaken to be drained by Francis, then late Earl of Bedford, and that the said earl was to have, for his recompence for effecting that difficult work only 95,000 acres of the said [128] grounds: which was a work of so great and public concernment that His late Majesty, King Charles the 1st, gave great encouragement to the said earl and others whom he had taken in to be adventurers and participants with him therein; and, in order to the effecting thereof, the said earl and his adventurers and participants had bestowed great sums of money for perfecting the same; and, after his death and some interruptions, William Earl of Bedford, son and heir to Earl Francis, with divers of his adventurers and participants, proceeded in the completing and finishing the said works; and the commissioners appointed as therein mentioned did adjudge the same drained; but the same could not be preserved without a perpetual constant care, great charge, and orderly government: it was enacted that William Earl of Bedford, son and heir of Earl Francis, and the adventurers and participants of the said Earl Francis and Earl William or either of them, their heirs and assigns, should be a body politic and corporate by the name of "The Governor, Bailiffs, and Commonalty of the Company of the Conservators of the Great Level of the Fens:" which corporation should consist of one governor, six bailiffs, twenty conservators, and commonalty, and should have a common seal, and assemble and meet together when, where, and as oft as they pleased, and appoint a registrar and other officers, and allow them salaries and remove them and make new at their pleasure: and William Earl of Bedford was to be the first governor, and certain persons therein named were to be the first six bailiffs, and certain other persons therein named the first conservators: and the said governor, bailiffs and conservators were to continue until Wednesday in Whitsun week in the year 1664, and from thenceforth until new elections by the said corporation, or the major part which should be then present: and that the said gover-[129]-nor, bailiffs and conservators should and might lay taxes, from time to time, upon all the said 95,000 acres only for support, maintenance, and preservation of the said great level, and levy the same, with penalties for non-payment, and all other things do in order to the support, maintenance and preservation of the said great level and works made and to be made: sect. 2. That the said governor, bailiffs and conservators of the said corporation for the time being, for the maintenance and preservation of the said great level by convenient outfalls to the sea, should, for ever thereafter, be and were thereby made and constituted commissioners of sewers for and of the said great level of the fens; and they were thereby invested with all the powers and authorities of commissioners of sewers within the same: sect. 5. That all conveyances by indenture of the said 95,000 acres or any part thereof, entered with the said registrar, in a book to be kept for that purpose, should be of equal force to convey the freehold and inheritance of the said 95,000 acres or any part thereof, as if the same conveyances by indenture were for valuable considerations of money enrolled, within six months, in one of the King's Courts of Record at Westminster; and no lease, grant, or conveyance of, or charge out of or upon the said 95,000 acres or any part thereof, except leases for seven years or under in possession, should be of force, but from the time it should be entered with the said registrar as aforesaid, the entry whereof being endorsed by the said registrar upon such lease, grant, conveyance or charge, should be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise: sect. 8. That the said corporation should give public notice, from time to time, of the parts and proportions of the said 95,000 acres for which any tax or penalty were or should be in arrear, by affixing [130] openly at the shire-house or market-place in Ely aforesaid a schedule in parchment, under the seal of the said corporation, containing such parts

and proportions of the said 95,000 acres for which any tax or penalty should be in arrear with the names of the respective owners entered upon the tax roll with the said corporation, of the said parts and proportions of the said 95,000 acres so in arrear : sect. 12. That the said governor, bailiffs, conservators and commonalty, upon Wednesday in Whitsun week, yearly, should, at a public meeting to be holden for the said corporation by the greater number then present, elect a new governor, bailiffs and conservators respectively ; provided that none should be capable to be or continue governor or bailiffs that should not have 400 acres or more of the said 95,000 acres, nor to be a conservator that should not have 200 acres or more of the said 95,000 acres, nor should any of the commonalty have a voice in elections that had not 100 acres or more of the said 95,000 acres ; and that the said governor, bailiffs and conservators should and might be removed by the said governor, bailiffs, and conservators and commonalty, or the greater number of them present at their public meetings, and new chosen in place of him or them so dead or removed : sect 15.

The vendors made out the following title to the farm. By articles of the 20th of May 1723, made previous to the marriage of the Honourable Charles Townshend with Awdry, the daughter of Edward Harrison, the farm of which Edward Harrison was seised in fee was agreed by him to be conveyed to the use of C. Townshend for life, with remainder to trustees to preserve, &c., with remainder to the use that Awdry Harrison might receive a rent-charge of £1000 a year, with remainder to the use of the first and other sons of [131] the marriage successively in tail male, with divers remainders over, with the ultimate remainder to Edward Harrison, his heirs and assigns ; and by indentures of lease and release, of the 17th and 18th of March 1726, a conveyance was made pursuant to those articles. Those indentures were registered at the Fen Office on the 19th of December 1828.

By an indenture of bargain and sale, dated the 22d of June 1751, and by a recovery suffered in pursuance thereof, in Trinity term in the 24th and 25th years of King George 2d, the farm was limited to such uses as Charles, who had then become Viscount Townshend, and the Honourable George Townshend, his eldest son by Awdry, his wife, should jointly appoint, and, in default thereof, to the uses limited by the release of the 18th of March 1726. The indenture of bargain and sale was not entered at the office of the Commissioners of the Lower Fen Drainage until the 29th of March 1815.

By indentures of lease and release and appointment, of the 16th and 17th of December 1751, Charles Viscount Townshend and George Townshend appointed and conveyed the farm to divers uses which afterwards determined or failed of effect, with remainder to the use of the first son of the body of George Townshend on the body of Charlotte Lady Ferrars to be begotten, in tail male, with divers remainders over. The last-mentioned indentures were not entered at the Fen Office until the 29th of March 1815.

By a bargain and sale, dated the 13th of February 1776, and by a recovery suffered in Hil. term in the 16th year of Geo. 3d, George Townshend, then Viscount Townshend, and George Townshend Baron de Ferrars, his eldest [132] son, conveyed and limited the farm to such uses as they should jointly appoint, or as Baron de Ferrars, if he should survive his father, should appoint, and, in default thereof, to the uses limited by the release of the 17th of December 1751. The last-mentioned indenture of bargain and sale was not entered at the office of the Commissioners of the Lower Fen Drainage until the 29th of March 1815.

By lease and release and appointment, of the 19th and 20th of March 1777, George Viscount Townshend and his son, Baron de Ferrars, appointed and conveyed the farm to certain uses, to secure a yearly rent-charge of £200 to Lord de Ferrars and such other persons as should, during the life of Lord Townshend, be entitled to the barony, in manner therein mentioned, with a limitation to the use of George Viscount Townshend and his assigns for life, with remainder to trustees to support contingent remainders, with remainder to such uses, &c., as George Viscount Townshend and Lord de Ferrars, during their joint lives, should appoint, and, in default of such joint appointment, then as Lord de Ferrars, if he should survive George Viscount Townshend, should appoint, and, in default of such last-mentioned appointment, to the use of George Viscount Townshend and the heirs male of his body, with divers remainders

over. The indenture of lease of the 19th of March 1777 was entered at the Fen Office on the 14th of August 1815; but the release was never entered there.

By indenture of the 23d of December 1777, in consideration of the marriage between George Townshend Baron de Ferrars and Charlotte Mainwaring Ellerker, George Townshend Baron de Ferrars covenanted, in case he survived his father, to settle hereditaments of the [133] yearly value of £5000, of which he should become seized in tail as aforesaid on the decease of his father, George Lord Viscount Townshend, to certain uses which have since determined or failed of effect, with remainder to the use of the first and other sons of the then intended marriage successively in tail male, with divers remainders over. The last-mentioned indenture was entered at the Fen Office on the 19th of December 1828. George Viscount Townshend, who, some time before his death, was created Marquis Townshend, died in 1807.

George Townshend Baron de Ferrars, who, on the death of his father, became George Marquis Townshend, by his will, bearing date the 19th of July 1811, devised the farm to his brother, Lord John Townshend and Robert Blake, Esq., and their heirs, upon trust, by mortgage or sale thereof, to levy and raise so much money in aid of his personal estate not specifically disposed of as would be sufficient to pay his debts, legacies, and funeral and testamentary expenses, and, as to such part thereof as should not be sold for those purposes, upon trust to convey the same to the use of Lord John Townshend and Robert Blake and their heirs, during the life of Lord Charles Vere Ferrars Townshend, son of the testator, upon the trusts therein mentioned, and, after the decease of Lord Charles Vere Ferrars Townshend, to the use of the first and every other son of Lord Charles Vere Ferrars Townshend, successively, in tail male, with divers remainders over.

The Marquis of Townshend died on the 28th of July 1811. By lease and release of the 12th and 13th of June 1815, the release being made between Lord John Townshend, Robert Blake, the present Marquis of Townshend (who was the son of the late marquis), and various other [134] persons, after reciting indentures of lease and release of the 30th and 31st of May 1811, by which the late marquis conveyed his estates in Cambridgeshire and certain other counties to John Smith and Francis William Saunders and their heirs, upon certain trusts for raising and paying several sums of money, and, subject thereto, in trust for the late marquis, his heirs and assigns; and after reciting the will of the late marquis and his death: it was witnessed that, *for barring all estates tail* (if any) and all reversions and remainders thereupon expectant or depending of and in the estates comprised in the release of the 31st of May 1811, and *for confirming and corroborating the title of Smith and Saunders, as trustees as aforesaid, of and in the same estates, and for strengthening and confirming the title of Lord John Townshend and Robert Blake, as devisees as aforesaid, of and in the same estates*, the four last-mentioned persons, together with the present marquis, conveyed the farm and other estates unto and to the use of Sir Giles Godin and his heirs, to make him tenant to the *præcipe* for the purpose of suffering three or more recoveries, which were to enure to the use of Smith and Saunders and their heirs, upon the trusts therein mentioned. The recoveries were accordingly suffered in Trinity term in the 55th year of Geo. 3d. The indentures of the 12th and 13th of June 1815 were not entered at the office of the Commissioners of the Lower Fen Drainage, until the 19th of December 1828; and they were so entered and registered at the request and expense of Thomas Skeels, a purchaser of part of the estates of the late Marquis Townshend from Smith and Saunders, the trustees for sale.

By lease and release of the 5th and 6th of February 1816, Smith and Saunders and Lord John Townshend and Blake conveyed the farm to William Dunn Gardner, [135] his appointee, heirs and assigns. The last-mentioned indentures were entered at the Fen Office on the 18th of June 1818.

By lease and release of the 28th and 29th of May 1818, Gardner conveyed the farm to John Shearing, the testator in the cause, his heirs and assigns. The last-mentioned indentures were entered at the Fen Office on the 15th of June 1818.

A petition, presented by two of the parties to the suit, after stating the 8th section of the Bedford Level Act and the deeds and other matters before mentioned, alleged that, by the articles of agreement of the 20th of May 1723 and the indentures of lease and release of the 17th and 18th of March 1726, George Marquis of Townshend

became tenant in tail male of the Metlam farm, under the limitation thereof, therein contained, to the use of the first and other sons of Charles Townshend by Awdry Harrison, successively, in tail male; that George Marquis of Townshend died in the year 1807, leaving George Townshend Baron de Ferrars his eldest son and heir at law him surviving, who thereupon became Marquis of Townshend and entitled to the Metlam farm, for an estate tail to him and the heirs male of his body; and afterwards, viz., in the year 1811, died leaving the present marquis, his eldest son and heir at law, who thereupon became entitled to the farm for an estate tail to him and the heirs male of his body; that Dobede, the purchaser under the decree, contended that the estate tail created by the articles of agreement of the 20th of May 1723 and the indentures of the 17th and 18th of March 1726 was intended to have been barred by the indenture of bargain and sale of the 22d of June 1751 and the reco-[136]-very suffered in pursuance thereof in Trinity term in the 24th and 25th years of Geo. 2d.; but the same indenture and recovery had not that effect, as the bargain and sale was not entered at the Fen Office till the year 1815, and there was no tenant to the *præcipe* at the time the recovery purported to be suffered; and that estate tail was not barred by the bargain and sale of 1776 and the recovery suffered in pursuance thereof, by reason of the bargain and sale not having been entered at the Fen Office till the year 1815; and, further, that the same estate tail was not barred by the lease and release of the 12th and 13th of June 1815 and the recovery suffered in pursuance thereof, by reason of the last-mentioned indentures not having been entered at the Fen Office till the year 1828; and the possession which had been had thereunder had not been adverse to the present Marquis of Townshend, because his title to the farm *was thereby admitted*, and those indentures, having been entered at the Fen Office in the year 1828, the possession of the farm could not become adverse to the parties claiming under the estate tail till the death of the present marquis. But the Petitioners contended that the title was good, whether it was to be considered as a title depending upon the operation of the above-mentioned Act of Parliament, which, they submitted, was only a registry Act, and did not require deeds to be entered with the registrar appointed by virtue of the Act, except for the purpose of enabling the corporation to know who were the owners liable to the assessments referred to by the Act, or for the benefit of third parties: or whether it was to be considered as a title depending upon adverse possession, under the Statute of Limitations (3 & 4 Will. 4, c. 27); for that the right of the present Marquis of Townshend must be considered as having been an expectant estate under the 3d section of that Act, the time [137] for claiming which, or the adverse possession against which, began on the demise of his father in July 1811; and that, under the 2d section of the same Act, the present marquis had 20 years for asserting his right: and, not having so done, he was barred; and, under the 21st section of the Act, all those persons were also barred that he might have lawfully barred: and that neither the recovery deeds of June 1815, nor the enrolment of those deeds in 1828, was any acknowledgement of the right of the present Marquis Townshend, so as to prevent the bar by adverse possession; for the Petitioner submitted that, according to the 14th section of the Act, the acknowledgement, in order to preserve the right, must be an acknowledgement in writing under the hand of the party in possession given to the other party or his agent, which, it was further submitted by the petition, those deeds clearly were not; but, on the contrary, the recovery deed, so far as the present Marquis Townshend was concerned, was most cautiously worded to avoid even the imputation of any admission of the title; it being expressed to be made for barring all estates tail (*if any*) and all remainders dependent thereon; and it was further submitted by the petition that, if the said recovery deed was no acknowledgement of title, the enrolment of that deed in 1828 could not be so under the circumstances above stated.

The petition prayed that, under the circumstances above stated, it might be declared that a good title was deduced to Metlam farm.

The following are the enactments of the Statute of Limitations, 3 & 4 Will. 4, c. 27, which were referred [138] to in the petition and in the course of the argument: Sect. 2. "That after the 31st day of December 1833, no person shall make an entry or distress, or bring an action to recover any land or rent, but within 20 years next after the time at which the right to make such entry or distress or to bring such

action, shall have first accrued to some person through whom he claims; or, if such right shall not have accrued to any person through whom he claims, then within 20 years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same." Sect. 3. "That when the estate or interest claimed shall have been an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land or the receipt of such rent in respect of such estate or interest, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession." Sect. 14. "That when any acknowledgement of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgement shall have been given shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgement shall have been given at the time of giving the same, and the right of such last-mentioned person or any person claiming through him, to make an entry or distress, or bring an action to recover such land or rent, shall be deemed to have first accrued at, and not [139] before, the time at which such acknowledgement, or the last of such acknowledgements, if more than one, was given." Sect. 21. "That when the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right which such tenant in tail might lawfully have barred."

Mr. Jacob and Mr. Patch, for the Petitioners. The case of *Hodson v. Sharpe* (10 East, 350) shews that there is no weight in the objection that the deeds for making the tenants to the *præcipe* were not registered at the respective times when the recoveries were suffered; and, consequently, those recoveries were effectual for the purposes for which they were suffered. But supposing that not to be so, there has been an adverse possession for a sufficient length of time to bar any title under the entail. The late marquis died in 1811. His devisees then entered into possession; and, in 1816, they sold the farm to Gardner, under whom the vendors claim: so that, from 1811, that is, for more than 20 years, there has been a possession adverse to the entail. The consequence is that not only the estate tail is barred, but all the estates and interests which the tenant in tail might have barred by suffering a recovery are destroyed. (See 3 & 4 Will. 4, c. 27, ss. 2 and 21.) Therefore the present marquis and all persons claiming after his estate tail are barred. Moreover, in 1815, the present marquis joined in confirming the title of his father's devisees; so that, *quacunque ritâ*, the title is free from objection.

[140] Mr. G. Richards, for the purchaser. The eighth section of the Bedford Level Act first of all enacts that conveyances of any part of the 95,000 acres, entered with the registrar, shall be of equal force to convey the freehold and inheritance thereof, as if the same were for valuable consideration, enrolled, within six months, in one of the King's Courts of Record at Westminster: and then it enacts that no conveyance of any part of the 95,000 acres, except leases for seven years or under, in possession, shall be of force but from the time it shall be entered with the registrar as aforesaid. Nothing can be more clear and positive than the language of this section. *Hodson v. Sharpe* was the case of an action brought by a landlord against his tenant; and all that it decides is that the Act was not intended to operate as between parties standing in that relation to each other. It is a decision founded on the well-known principle of law, that a tenant shall not be allowed to dispute his landlord's title. The language of Lord Ellenborough and of the other learned Judges implies that, as between strangers or persons between whom no privity exists (as is the case here), the objection for want of registration of the deed would be fatal.

Next, as to the point of adverse possession. Supposing that, in this case, there had been any adverse possession, the release of June 1815, which the trustees accepted from the present marquis, obviously alludes to the estates tail and remainders over as

subsisting. The registration of that deed in 1828 was a sufficient acknowledgement to prevent the estates tail and the remainders over from being barred by length of time. (See 3 & 4 Will. 4, c. 17, s. 14.) And, supposing that the conveyance of June 1815 has [141] any operation, it can have no effect beyond the life of the present marquis: and, therefore, upon his death, either his issue or the persons entitled in remainder or reversion may claim the farm.

I submit, therefore, that both upon the construction of the local Act, and upon the point of length of time, the Master has come to the right conclusion.

Mr. Jacob, in reply. The release of June 1815 does not contain an acknowledgement of any estate tail. The expression used in it is "all estates tail, *if any*." How can the registration of that deed be an acknowledgement sufficient to take the case out of the Statute of Limitations? In order to have that effect, it must be an acknowledgement in writing, signed by the person in possession, and given to the party entitled, or his agent. But, in this case, that which is said to have been acknowledgement was given, not to the party entitled, but to the clerk of the Fen Office. The deeds purporting to create the entail also were not registered; if so, then according to the purchaser's own argument, no estate tail was ever created.

The main question is, what is the meaning of those words in the local Act which say that no conveyance of any part of the 95,000 acres shall be of force until it shall be entered with the registrar? Does it mean that the conveyance shall not be of force for any purpose, or shall not be of force with reference to the purposes of the Act. I apprehend that it means with reference to the purposes of the Act. The owners of the 95,000 acres were to have votes in the election of the officers of the corporation, and were to be subject to rates and taxes; [142] and it was for those purposes and for those purposes alone, that it was necessary that the conveyances to them should be registered at the Fen Office. The Act does not alter the common law or repeal any prior statute; consequently, the deeds were to be valid as between the parties to them; and the nullity was confined to the purposes of the Act.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I wished to take a little time for consideration in this case, not for the purpose of satisfying any great doubt that I had as to the general principle, but for the purpose of reading over the whole of the Bedford Level Act.

The case is a very simple one.

Upon the marriage of Charles Townshend, afterwards Viscount Townshend, with Awdry Harrison, articles were made, by virtue of which, in equity, there was a limitation in strict settlement created, which had the effect of making the eldest son of the marriage tenant in tail in equity. After the articles of agreement had been executed, a conveyance was made, by lease and release, of the 17th and 18th of March 1726, which clothed the equitable interests with the legal estate, and, therefore, so far as it went, tended to make the eldest son of the marriage tenant in tail. It seems that the eldest son of the marriage was George Marquis Townshend, who died in 1807. By bargain and sale of the 22d of June 1751 and a recovery, the estate tail and remainders over, so far as the bargain and sale and recovery had effect, were barred. Then instruments of lease and release and appointment of the 16th and 17th of December 1751 were executed, which, so far as they went, had the effect of making the Marquis of Townshend tenant for [143] life, and his eldest son, who afterwards became Lord de Ferrars, tenant in tail. Then there was a bargain and sale of the 13th of February 1776 and a recovery, which were intended to have the effect of barring the estate tail that had been last created, and of reconveying the estate, subject to a joint power of appointment reserved to the marquis and his son, Lord de Ferrars, and to a separate power of appointment reserved to the son in case he should survive his father, to the uses to which the estate previously stood limited. And then deeds of lease and release and appointment of the 19th and 20th of March 1777 were executed, which purported to settle the estate in strict settlement on the marquis and his son Lord de Ferrars, subject, however, to the joint appointment of the marquis and his son, and, in default of such joint appointment, subject to the appointment of the son, if he survived his father. Then a deed of the 23d of December 1777 was executed by Lord de Ferrars, which did not purport to convey any estate, but merely operated by way of covenant: and, then there was the will of Lord de Ferrars, who had

become the second Marquis of Townshend, by virtue of which he attempted to devise the estate in question virtually upon trust to sell.

The second marquis died in 1811.

Then certain deeds of the 12th and 13th of June 1815 were executed by the present Marquis of Townshend, who was the eldest son of the late marquis ; and under those deeds the vendors in this case claim as against the Townshend family. Now, the objection to the title is that the lease and release of the 17th and 18th of March 1726 were not registered at the Fen Office till the 19th of December 1828 ; that [144] the bargain and sale on the 22d of June 1751, and the lease and release of the 16th and 17th December 1751, and the bargain and sale of the 13th of February 1776, were not registered till the 29th of March 1815 ; and, moreover, that it appears that the lease for a year of March 1777 was registered on the 14th of August 1815 ; but the corresponding release never has been registered at all. The deeds which had the effect of conveying the estate from the Townshend family to the person under whom the purchaser claims were registered on the 19th of December 1828.

Now, but for the question which arises upon the Bedford Level Act, there would be no objection at all to the title. That objection arises upon the language of the 8th section of the Bedford Level Act, which enacts "that all conveyances by indenture of the 95,000 acres" (that is to say, of that portion of the great level consisting of 400,000 acres, which had been previously allotted to the Earl of Bedford and the co-adventurers with him in the work of draining the great level) "or any part thereof, entered with the said registrar in a book to be kept for that purpose, shall be of equal force to convey the freehold and inheritance of the said 95,000 acres or any part thereof, as if the same conveyances by indenture were for valuable considerations of money enrolled within six months in one of the King's Courts of Record at Westminster." That is a portion of the section which appears to me to convey a benefit, and was meant to convey a benefit, namely, by making all conveyances of the 95,000 acres or any part thereof, by indenture registered in the Fen Office, to have the same force and effect as if they had been by bargain and sale enrolled under the statute of Hen. 8. It was obviously meant to give an increased convenience to the owners [145] of this land. There come the following words :—"And no lease, grant or conveyance of, or charge out of or upon the said 95,000 acres or any part thereof, except leases for seven years or under in possession, shall be of force but from the time it shall be entered with the said registrar as aforesaid ; the entry whereof being endorsed by the said registrar upon such lease, grant, conveyance or charge, shall be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise." Now, it is obvious that the latter part of this section is meant to confer a benefit, in this way, namely, by making an endorsement upon the deed proof of the registration, instead of putting the parties, who might wish to prove the registration, to the necessity of resorting to an authenticated copy of what had been done at the Register Office. Then the question is whether those words in the first part of the latter portion of this section are to be taken as making any lease, grant or conveyance to be absolutely of no force, except from the time when it should be entered with the registrar. I confess that, at the time when the question was argued before me (not having for some time read over this Act), it appeared to me that what was said by Mr. Jacob in answer to the objection to the title was the correct answer, namely, that the intention of the framers of this Act was that no conveyance of any portion of the 95,000 acres should be of force for the purposes of the Act, until it should be registered ; and upon deliberately reading over the whole of this Act of Parliament, I think that that is the true construction. It appears that after a recital with which the Act is introduced, speaking of the whole work together, that is the work which consisted not merely in draining the 95,000 acres, but the whole of the district comprised in the Act, it is recited, "that [146] the same cannot be preserved without a perpetual constant care, great charge and orderly government ; which being represented to the King's most excellent Majesty that now is, he hath been graciously pleased to declare more than an ordinary willingness to promote and countenance a work of so public concernment and many ways advantageous to his kingdom : to the end, therefore, that a work of this nature may receive public support and encouragement : " then follow the enacting clauses. It appears, there-

fore, that it was an object of the framers of this Act to form a particular mode of governing the property, and of determining who should be the members of the government constituted by the Act, and in what manner taxes should be raised that were necessary for the purpose of keeping up the work which had been accomplished. Then by the 12th section it is provided that the corporation which was constituted by the Act "shall give public notice from time to time, of the parts and proportions of the said 95,000 acres for which any tax or penalties is or shall be in arrear, by affixing openly at the shire-house or market-place in Ely aforesaid, a schedule in parchment under the seal of the said corporation, containing such parts and proportions of the said 95,000 acres for which any tax or penalty is or shall be in arrear, with the name and names of the respective owner or owners entered upon the tax roll with the said corporation, of the said parts and proportions of the said 95,000 acres so in arrear:" and there is another provision in the Act which directs that the persons who are to form the corporation, in order to be eligible for governors or bailiffs, shall have a certain number of acres; and in order to be eligible as conservators, a certain other number of acres, and that the commonalty shall have another number of acres; and there are [147] throughout a great variety of provisions which depend upon the holding of different quantities of the 95,000 acres; and I cannot but think that the main object of the framers of this Act was to give the benefit which I have mentioned; and, in the next place, to declare that no conveyance should be of force for the purposes of the Act, except it were registered; in order that, as much as possible, all dispute might be avoided as to what persons were, at any time, owners of the land who were to be charged, and whose land was to be distrained upon and sold, in case the arrearages were not paid. To a certain extent, that view of the Act is supported by the decision in *Holson v. Sharpe*; but I confess that I do not quite go along with the view of the Act taken by the Judges of the Court of Queen's Bench in that case. It seems that the question in that case arose as follows:—There had been a lease made, and the lease had not been registered; and it was insisted by the lessee that it was void as against his landlord, merely because it had not been registered. Now, in the argument of the case, the counsel for the Plaintiff said that the lease, though invalid till registered, as against third persons claiming adversely, was yet binding between the parties themselves, notwithstanding the words of the Act that no lease, except leases for seven years or under in possession, should be of force but from the time it should be entered with the registrar; for that only means of no force *as against third persons*. This seems to have caught the attention of the Court, for the following passage is introduced in a parenthesis: "The Court then said they would hear what could be urged against that construction." It seems then that a stop was put to any general argument, and that that was the point upon which the Court did hear counsel. Now Lord Ellenborough, in giving judgment, says: "The Act [148] no doubt meant, for the protection of titles, that leases and conveyances within this district should be registered, that every person interested in the inquiry might know in whom the title to any such land was." And then his Lordship goes on to say, "And, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the Act had not been complied with and relied on it, the legal objection might prevail at law." Now I must protest against the adoption of that view of the Act; because that is a view of the Act which is directly at variance with all that has ever been held in this Court with respect to the Register Acts. It was decided by Lord Hardwicke, in *Le Neve v. Le Neve* (3 Atk. 646), that where a person had notice of a non-registered incumbrance, and, with such notice, took a subsequent conveyance and caused that to be registered, he should be postponed in equity to that incumbrancer of whose incumbrance he himself had notice; and, in the ease of *Davis v. Lord Strathmore* (16 Ves. 419), which I very well remember, my Lord Eldon held, precisely in accordance with the doctrine laid down by Lord Hardwicke in *Le Neve v. Le Neve*; and, therefore, though I quite agree with what Lord Ellenborough says with regard to the object of the Legislature being that persons interested in the inquiry might know who the owners of the land were, yet I must protest against that latter part of his Lordship's doctrine which would go to extend it to a case to which, I apprehend, by the law of the land, as administered in this Court, it would not extend. Mr. Justice Le Blanc and Mr. Justice Bayley seem to agree in the notion that this Act

was made for the purpose of giving general notice ; but still both of those learned [149] Judges, and especially Mr. Justice Bayley, intimate that there was another ground on which the action might be maintained, which has nothing to do with the present question. The Court of King's Bench, however, have, to a certain extent, put a construction upon the Act which goes to mitigate the general effect of the words in the 8th section, "shall be of force but from the time it shall be entered with the registrar." And I wish it to be most distinctly understood that I am of opinion that the meaning of those words is not that conveyances of parts of the 95,000 acres shall not have any force at all, but that they shall have no force for the purposes of the Act, except from the time of their being entered with the registrar. That being my opinion, it is not necessary for me to advert to any other ground upon which the title to the farm may be supported ; though I must say that, it appears from what is stated on the face of this petition, that the possession has always gone with the apparent title under the deeds. The persons have uniformly taken as tenants for life and tenants in tail in succession, according to the import of the deeds ; and the very last conveyance was made by the present Marquis of Townshend for the purpose, in fact, of confirming his father's will ; and the possession appears uniformly to have gone, since that time, according to the intent of the parties ; therefore, in that way, the title would be perfectly good. But my opinion is that, independently of that fact, the title is good upon the true and sound construction of the Bedford Level Act.

[150] JONES v. WINWOOD. Feb. 16, 24, 1841.

[S. C. 10 L. J. Ch. 165 ; 5 Jur. 190 ; 3 M. & W. 653. See *In re Beddingfield and Herring's Contract* [1893], 2 Ch. 336.]

Power.

In 1819 an estate was settled to such uses as T. W. D. and F., his wife, should, during their joint lives, appoint, and in default of appointment, to the use of W. T. D. for life, with remainder to trustees to preserve, &c., with remainder to the use of the wife for life, with remainder to trustees to preserve, &c., with remainder to the use of the sons of T. W. D. and his wife, successively in tail, with remainder to the use of their daughters as tenants in common in tail, with cross-remainders in tail, with remainder to W. T. D. in fee. In 1824 W. T. D. took the benefit of the Insolvent Debtors Act, and conveyed all his estate to the provisional assignee. In 1828 W. T. D. and F., his wife, in execution of their joint power, appointed the estate to trustees in fee, in trust to sell. The trustees afterwards sold the estate. Held, that the power of appointment was not destroyed by the conveyance to the provisional assignee ; and that the appointment of 1828 vested in the trustees the whole inheritance in fee, except that portion of it which was vested in the provisional assignee.

The decision in *Badham v. Mee*, 7 Bing. 695, and 1 Myl. & Keen, 32, dissented from.

The bill was filed for the specific performance of an agreement entered into on the 15th of November 1833 by the Plaintiffs Isaac Jones, Patrick Brown and William Thomas Davies, for the sale of an estate, in the parish of Kilie Ayron in Cardiganshire, to Henry Q. Winwood, for £3801. Some time after the agreement was made Henry Q. Winwood assigned the benefit of it to his brother, the Defendant John Winwood. The purchaser's counsel having perused the abstract of title to the property, and being of opinion that the exercise of a power of appointment by Davies, by an indenture of the 17th of September 1828, was invalid at law, and, therefore, that the Plaintiffs could not make a good title to the estate, the parties agreed, on the 1st of July 1835, that a suit should be instituted for the specific performance of the agreement of 1833, and that the purchaser should not, either in the Master's office or before the Court, take any objection to the title except the one before alluded to ; and, if a specific performance should be decreed, that he would consent to its being

[151] decreed with costs; and, if the bill should be dismissed, that he would pay the Plaintiff's costs as well as his own.

The Defendant's answer contained the following statements with respect to the title to the estate.

That it appeared, by the abstract, that the hereditaments and premises were, under and by virtue of indentures of lease and release of the 27th and 28th of December 1819, and a fine and recovery levied and suffered in pursuance thereof, settled (after certain uses which had since determined) to such uses, upon such trusts and, generally, in such manner as the Plaintiff, W. T. Davies and Frances, his wife, should, from time to time during their joint lives, by any deed or deeds, instrument or instruments in writing to be by them jointly sealed and delivered in the presence of and attested by two or more credible witnesses, appoint, and, in default of such appointment, and, in the meantime, subject thereto, to the use of W. T. Davies and his assigns for his life, with remainder to the use of a trustee and his heirs, for the life of W. T. Davies, upon trust to preserve contingent remainders, with remainder to the use of Frances, the wife of W. T. Davies, and her assigns, for her life, with remainder to the use of the trustee and his assigns, during the life of Frances Davies, upon trust to preserve contingent remainders, with remainder to the use of the first and other sons of W. T. Davies and Frances, his wife, successively in tail general, with remainder to the use of the daughters of W. T. Davies and Frances, his wife, as tenants in common in tail general, with cross-remainders between and among them in tail general, with remainder to the use of W. T. Davies, his heirs and assigns: that, by indentures of [152] lease and release of the 26th and 27th of March 1823, the hereditaments and premises were, in exercise of the joint power of appointment, reserved to W. T. Davies and Frances, his wife, by the indenture of the 28th of December 1819, appointed and conveyed by them unto and to the use of John Herbert, Esq., his heirs and assigns, subject to a proviso, whereby it was declared that, upon payment by W. T. Davies to Herbert of £1400, with lawful interest at the time therein mentioned, Herbert, his heirs or assigns, would reconvey and assure the hereditaments to the uses and upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes, declarations and agreements expressed and declared concerning the same, in and by the indenture of the 28th of December 1819, or as near thereto as might be and circumstances would permit: that W. T. Davies, in August 1824, was discharged from prison under the provisions of the Insolvent Debtors Act; and, thereupon, by an indenture of bargain and sale of the 6th of August 1824, he, pursuant to the directions of the Act, bargained and sold all his estate in the hereditaments (1) to the provisional assignee of the estates and effects of insolvent debtors in England, who, by an indenture of bargain and sale of the 18th of April 1825, conveyed the same to the Plaintiff, Isaac Jones (the assignee appointed by the creditors of W. T. [153] Davies); that, after the discharge of W. T. Davies under the Insolvent Act, and the execution of the indentures of bargain and sale as aforesaid, W. T. Davies and Frances, his wife, by an indenture of appointment of the 17th of September 1828, in exercise of the power of appointment to them reserved, or given by the indenture of release of the 28th of December 1819, and the fine and recovery levied and suffered in pursuance thereof, appointed the hereditaments and premises, subject to the mortgage, in fee, to Herbert, unto and to the use of the Plaintiff, Patrick Brown and Jenkin Beynon (the latter of whom never acted under, and afterwards duly disclaimed the trusts of the deed of appointment), their heirs and assigns, upon trust for sale; and, under which indenture of appointment the Plaintiff, P. Brown, as the acting trustee, claimed to be seised of the equity of redemption in fee-simple of the hereditaments and premises, or, at all events, to

(1) According to the case made for the opinion of the Barons of the Exchequer, as after mentioned, all the estate, right, title, interest and trust of W. T. Davies, to all his real and personal estate and effects, in possession, reversion, remainder or expectancy, except the wearing apparel and other such necessities of the insolvent and his family not exceeding, in the whole, the value of £20, were conveyed and assigned to the provisional assignee, his successors and assigns.

have full power, in conjunction with the mortgagee of the hereditaments and premises, and Isaac Jones, to make a title to the fee-simple of the hereditaments and premises discharged from the uses and limitations of the indenture of the 28th of December 1819: but that he, the Defendant, was advised and submitted that W. T. Davies had no power or right, after his insolvency and the execution by him of the bargain and sale of his real estate to the provisional assignee of the Insolvent Debtors Court, to concur with Frances, his wife, in the execution of the power of appointment reserved to them by the indenture of the 28th of December 1819; and that no estate was vested in P. Brown under such appointment; inasmuch as the power of appointment was destroyed by the insolvency of W. T. Davies and the execution of such bargain and sale as aforesaid.

[154] At the hearing of the cause on the 7th of April 1837, it was ordered that a case should be made for the opinion of the Barons of the Exchequer on the following questions.

First, whether the power of appointment contained in the indenture of release of the 28th of December 1819, in the pleadings mentioned, was or was not destroyed by the conveyance of the 6th of August 1824, by the insolvent, William Thomas Davies, of all his estate to the provisional assignee in the pleadings mentioned?

Second, if the power was not destroyed, what estate passed under the appointment made by the indenture of the 17th of September 1828, in the pleadings mentioned?

The case having been argued, the Barons of the Exchequer returned a certificate in favour of the title, (1) accompanied by the following reasons.

"In this case we propose to give the reasons which have induced us to give our certificate to the Lord Chancellor in favour of the Plaintiff.

"By the original conveyance, dated the 27th and 28th of December 1819, certain lands were settled to such uses as William Thomas Davies and his wife should, at any time or times, and from time to time, during their joint lives, by deed or other instrument in writing, duly executed, direct and appoint, and, in default of and until such appointment, to the use of William Thomas [155] Davies, for life, with remainder to trustees to preserve, &c., and then to the use of his wife for life, and then in like manner to the use of his sons, in succession, in tail general, and then to the use of the daughters in tail general, with cross-remainders, and with remainder in fee to William Thomas Davies himself. In 1824 William Thomas Davies took the benefit of the Insolvent Act, and conveyed to the provisional assignee, on the 6th of August 1824, all his interest in the premises, which was subsequently transferred by the provisional assignee to Isaac Jones, the assignee of the estate, in the usual way. Under these circumstances, William Thomas Davies and his wife, in execution of their joint power of appointment, conveyed on the 16th and 17th of September 1828, by lease and release, the premises to Patrick Brown and Jenkin Beynon, in fee, upon trust for the creditors of William Thomas Davies. And the point to be considered is whether, by this appointment, any estate passed, and what estate, to the trustees.

"The first question is whether the power was revoked by the conveyance to the provisional assignee; and we are of opinion that it was not. Indeed, on this part of the case, there seems to be little difficulty. No authority was cited for the proposition contended for by the Defendant's counsel, that where, by previous conveyance, a party has prevented himself from executing a power as fully as he could have originally executed it, the power is at an end. Nor can any such proposition be maintained. Even upon the authority of the decision of *Badham v. Mee*, as explained by Sir John Leach, this question may be answered in the negative. For he considered the power as not well executed in that case, because the particular limitations made by the appoint-[156]-ment under it could not have been valid if introduced into the original deed creating the power. But, if the previous conveyance had altogether put an end to the power, such reasons would have been wholly unnecessary.

"Now it is obvious, as was indeed pointed out by the Court in the course of the

(1) See the certificate, *post*, 158; see also 3 Mees. & Wels. 653.

argument, that limitations might have been made, subsequently to the conveyance in 1824, which would apply to the life-estate of the wife and the estates tail of the children, and which might have been legally introduced into the original deed, and, consequently, upon the principles stated in *Badham v. Mee*, such an execution of the power would have been valid; and, if any valid execution of the power could have been made, the first of the Lord Chancellor's questions must be answered in the negative.

"But, in truth, the whole case turns upon the answer to be given to the second question. For, if the execution of this power by the deed of September 1828 be invalid, then no estate passed by it; and the original limitations contained in the deed of 1819 remain still in force.

"We think, after full consideration, this power was well executed, so as to convey the estate for life of the wife and the estates tail of the children to the trustees under the deed of 1828.

"We cannot adopt the principle laid down by Sir J. Leach in affirming the certificate sent by the Court of Common Pleas in *Badham v. Mee*. It is not clear that such was the ground on which that Court made their certificate, the reasons for which were not given by them.

[157] "We do not think it is right to translate into words the effect of the appointment under the power, taken in conjunction with the other circumstances, and then to consider whether such limitations could, according to the peculiar rules affecting the transmission of landed property, have been legally inserted in the original deed.

"The utmost extent to which the principle could be carried (and, looking at the principles which govern the execution of these powers, which were originally mere modifications of equitable uses, taking effect as directions to trustees, which bound their conscience, and which a Court of Equity would compel them to perform, it may be questionable whether even this ought to be done) would be to insert the limitations actually contained in the appointment itself in the original deed, and then to examine whether such limitations would be repugnant to any known rule of law. Now, if we do that in this case, no difficulty will be produced. Here, if the limitation of the estate made by the appointment under this power had been inserted in the original deed, there would have been no incongruity upon the face of that instrument. A fee would have been given to Brown and Beynon, the trustees, and no more. But then, in considering what operation such a deed, good in point of form, will have, the Court looks at the other circumstances; and, finding that the insolvent had previously, by an innocent conveyance (for such the assignment under the Insolvent Act must, we think, be considered to be), conveyed away his life-estate and his remainder in fee, it adjudges that he cannot, by executing the power, derogate from his own previous conveyance, and concludes therefore that the deed does not operate on the estates previously assigned.

[158] "The result therefore is that, by executing the power, the insolvent conveys to the trustees all that had not been previously assigned under the Insolvent Act to his assignees. In conformity with this opinion, we shall send our certificate to the Lord Chancellor.

"We have, however, to observe that no notice was taken in the argument of the previous mortgage for £1400, with a power of sale, to John Herbert. Our opinion therefore is given on the supposition that that deed forms no part of the case. If it does, we are not prepared to say that, at law, the execution of the power was not inconsistent with that conveyance."

The following certificate was returned by the Barons of the Exchequer:—

"We have heard this case argued by counsel and have considered it, and are of opinion, first, that the power of appointment contained in the indenture of release of the 28th December 1819 was not destroyed by the conveyance, bearing date the 6th of August 1824, by the insolvent W. T. Davies of all his estate to the provisional assignee:

"And, secondly, that, by the indenture of the 17th of September 1828, an estate in fee-simple was conveyed to the trustees therein named, subject, however, to the estate for the life of the insolvent, and (on failure of the intermediate estates) to the

remainder in fee to the insolvent, which had been, prior thereto, conveyed to the assignees of the insolvent's estate.(1)

"ABINGER. W. BOLLAND."

"J. PARKE. E. H. ALDERSON."

[159] The cause now came on to be heard on the equity reserved.

Mr. Wigram, Mr. G. Richards and Mr. Walford, for the Plaintiffs, said that, as the purchaser had consented to a case being sent to law, which he was not bound to do, he was compellable to complete his purchase, provided the Court confirmed the certificate.

Mr. Knight Bruce, Mr. Jacob and Mr. Rudall, for the purchaser. There are two questions in this case. First, whether the joint power of appointment given to Davies and his wife existed after the assignment to the provisional assignee. Second, if it did, whether it was well exercised by the deed of the 17th of September 1828.

First. The power in this case is a general one; and there is no authority for saying that when such a power is annexed to a life-estate vested in the donee, and that estate is transferred by him to another person, the power is any longer capable of being exercised by him. The cases of *Badham v. Mee* (7 Bing. 695, and 1 Myl. & Keen, 32) and *Hole v. Escott* (2 Keen, 44, and 4 Myl. & Cr. 187) are direct authorities against the power existing under such circumstances. Indeed, there is a stronger ground for holding that the power in this case is gone, than there was for holding that the powers in those cases were destroyed: for there the powers were merely powers of selection amongst certain specified objects, namely, the children of the donees; but here the power is a general one; and therefore the donee might [160] have exercised it by appointing the estate to himself. There the appointment was in favour of the children; but here the appointment is against the children.

Secondly. The interest attempted to be created by the deed of the 17th of September 1828 is illegal. It is a base fee with a remainder over: and, as no estate tail has been converted into a base fee, the estate to take effect on the determination of the base fee cannot be barred. (See 3 & 4 Will. 4, c. 74, s. 19.)

Jones and Brown are united with each other in the contract for sale. They are trustees for different classes of creditors and for different purposes. Who is to give a receipt for the purchase-money: and who is to apportion the purchase-money between them?

The Court of Exchequer cannot overrule the decisions in the Court of Common Pleas and in this Court. Where there are conflicting decisions upon a point affecting the title to an estate, this Court never compels the purchaser to complete his purchase.

Mr. Rudall referred to, Co. Litt. 265 a., *Albany's case* (1 Rep. 111), *Edwards v. Slater* (Hard. 410), *Clerk v. Pywell* (2 Keb. 555), *Penne v. Peacock* (Ca. temp. Talb. 41), *Doe v. Britain* (2 Barn. & Ald. 93), *Fearne Cont. Rem.* 74, *Price v. Strange* (Madd. & Geld. 159), *Willcox v. Bellaers* (Turn. & Russ. 491), *Sharpe v. Adcock* (4 Russ. 374), and *Blosse v. Lord Clanmorris* (3 Bligh, 62).

[161] Mr. Wigram, in reply. The conveyance to the provisional assignee, being an innocent conveyance, did not destroy the power in gross. The case of *Badham v. Mee* is no authority against the certificate of the Barons of the Exchequer; for that case was decided merely on the ground that the appointment, being an appointment of an estate in fee, would not have been good if it had been contained in the deed creating the power. All that the Court decided in *Doe v. Britain* was that the donee of the power could not derogate from his own grant. In *Hole v. Escott* the contingent remainders to the children had failed for want of a freehold to support them; and then the case became just the same as if there never had been any such contingent remainders. The Lord Chancellor commences his judgment by saying that he does not mean to discuss the question in *Badham v. Mee*: and his Lordship held the appointment in the case before him to be bad, because, the contingent remainders having failed, the father was exercising the power so as to take effect out of the fee, that is, to defeat his own grant. That case was decided solely on the ground that the contingent remainders had failed for want of a freehold to support them. The judg-

(1) The above was correctly taken from the copy of the certificate with which the reporter was furnished.

ment does not at all proceed upon the assumption that the decision in *Badham v. Mee* was right; and it has never been spoken of as a decision that can be supported.

It was said that the appointment made by the deed of the 17th of September 1828 was bad, because by it a fee was mounted on a fee; but it has been settled, for a series of years, that a base fee may exist in one person, and a remainder in fee in another, to take effect on the determination of the base fee.⁽¹⁾

[162] THE VICE-CHANCELLOR. I shall take time to consider the questions which have been discussed in this case; as a great deal has been said which requires much consideration.

Feb. 18. THE VICE-CHANCELLOR [Sir L. Shadwell]. The first question before me is whether the certificate of the learned Judges of the Court of Exchequer shall be confirmed.

I am clearly of opinion that it ought to be confirmed.

They have thought fit to give the reasons for their opinion, and with those reasons I, in substance, coincide.

It is impossible to read the report of *Badham v. Mee*, in 7 Bing. 704, without supposing that the ground upon which the Judges of the Court of Common Pleas in 1831 rested their opinion was really that which Sir J. Leach, according to the report in 1 Myl. & Keen, p. 54, assumed to be their ground for giving the certificate, and made his ground for confirming it in 1832.

That ground plainly admitted that, notwithstanding the bankruptcy of Richard Mee, his power of appointment among his sons subsisted, as unquestionably it did, subject only to this restriction, that he could not exercise it to the prejudice of his assignees, who were [163] entitled to the fee in remainder after the estates in tail general limited to the sons in succession. That remainder in fee the assignees took under the limitations in default of and subject to any appointment under the power, whether any prior estate tail might or might not be enlarged into a base fee. Moreover, the bankrupt, Richard Mee, did not, in execution of his power, appoint a base fee, so as to give ground for the objection that Sir J. Leach assumed. But the bankrupt appointed, in fee-simple, to his son; and the law provided that the appointment should not affect the remainder in fee, which the assignees had previously acquired by virtue of the limitation in default of appointment. The remainder in fee, therefore, which the assignees took at first, continued in them unaffected by the exercise of the power.

The case of *Thorpe v. Goodall*, 17 Ves. 388, 460, 1 Rose, 40, 270, and the Act 6 Geo. 4, c. 16, s. 65, 77, prove that, even in a case where a bankrupt, but for the execution of a power by him, would be tenant in tail, the power, as well as the estate tail, is vested in the assignees.

In the present case, subject to the joint power of appointment given to the husband and wife, the estate for life and the ultimate remainder in fee limited to the husband, passed, under the indentures of 6 August 1824 and 18 April 1825, to Isaac Jones, the insolvent's assignee; and the appointment of September 1828 was an appointment in fee, which, by operation of law, vested the whole inheritance in fee-simple in Brown and Beynon, except only that portion of it which was already vested in Isaac Jones, and which, by law, could not be affected by the appointment. The whole inheritance, except [164] that portion, was then vested in the trustee to preserve contingent remainders in the wife for her life, and comprehended the contingent remainders to the children. The joint power of appointment might have been exercised in various ways without injuring the estate of Isaac Jones. It might have made his estate neither better nor worse by appointing that the daughters should take, in tail general, before the sons. It might have made his estate better by appointing the fee at once to him.

I give my opinion upon this part of the case, as it would have stood if the mortgage of 1823 had not been executed.

(1) Mr. Ingram, in the course of his reply, referred to 1 Sugd. Pow. 44, 45 and 72; and to the observations on *Badham v. Mee*, in p. 80; and also to *Rattle v. Popham*, Str. 992.

The mortgage certainly does not make the title worse, but rather better; as under it the legal estate in fee may be acquired.

The next question is, if the certificate be confirmed, ought the Court to decree the Defendant to take the title?

And I am of opinion that the Court ought to do so.

Though I am clear in opinion that the certificate is substantially right, I am free to admit that, in the abstract, the certificate of the Court of Common Pleas, confirmed by Sir J. Leach, must create a doubt when there is only opposed to it the certificate of the Court of Exchequer.

But it is impossible to read the pleadings in this cause, and not to see that the real intention of the Plaintiffs and the Defendant was to call in question, as Sir William Follett, according to the report in 3 Mee-[165]-son & Welsby, is stated to have said, the authority of the decision in *Badham v. Mee*; and that, if it should be held that the decision in *Badham v. Mee* was not law, the Defendant should take the title. It would have been absurd to have made the agreement of the 1st of July 1835 upon the supposition that, if a decision were made against *Badham v. Mee*, the Defendant should still not take the title, on the ground that decision against decision left the matter in doubt. The utmost that could have been expected in favour of the title was that a decision might be obtained in opposition to that in *Badham v. Mee*.

And, as I understand the agreement of the 1st of July 1835, the objection to the agreement of the 15th November 1833, in respect of its having been made by Isaac Jones and Patrick Brown, for a sale at one entire sum, is one that cannot now be taken.

The decree must therefore be to confirm the certificate, and order a specific performance with costs to be paid by the Defendant.

[167] BAILLIE v. JACKSON. June 11, 1839.

Creditors' Suit. Infant. Defendant. Decree.

After a decree and order on further directions in a suit by creditors, the Plaintiffs discovered that there was an infant tenant in tail of the deceased's real estates in existence, who was born prior to the filing of the bill. On the hearing of a supplemental suit, by which the infant was first brought before the Court, the accounts were directed to be taken over again as against the infant, with liberty to the Master to adopt any of the accounts before taken, if he should find it beneficial to the infant so to do.

In a suit for administering the property of a person deceased, if an infant Defendant is interested in the real estates, the Court will not direct those estates to be sold until the accounts of the personal estate have been taken and the cause heard for further directions.

Josias Jackson, the testator in the cause, devised his plantations and estates in the island of St. Vincent, to trustees, in trust for his eldest son, the Defendant Josias Jackson, for life, and, after his decease, in trust for his children as tenants in common in tail. After the testator's death, the Plaintiffs, Messrs. Baillie & Sons, of Bristol, merchants, being mortgage and judgment creditors of the testator, filed a bill against Josias Jackson, the son, Jennetta Jackson, the widow and executrix of the testator, the trustees, and the testator's younger children, who were interested in his estates under the trusts of his will, praying that the sums due to the Plaintiffs might be raised and paid out [168] of the testator's real and personal estates, and that a manager, receiver and consignee might be appointed of the real estate.

By the decree in the cause, made on the 13th of March 1828, it was referred to the Master to inquire and state what estate and interest the testator had in the plantations and the live stock and utensils upon or belonging thereto, at the execution of the mortgage deed under which the Plaintiffs claimed, and what other mortgages, charges and encumbrances there were affecting the plantations, and what was due thereon, and to whom; and what person or persons was or were entitled to the rents

of the plantations, either in priority or subject to such mortgages, charges and encumbrances.

On the 3d of May 1832 the Master made his general report in pursuance of the decree: and, that report having been confirmed, the cause came on for further directions on the 21st of July 1832, when it was referred back to the Master to take an account of what was due to the Plaintiffs and the several other parties in the pleadings named, in respect of the several charges and encumbrances affecting the estates in the cause, and to ascertain their priorities.

The Master having made his report in pursuance of the order on further directions, and that report having been confirmed, the cause came on again for further directions on the 20th of July 1836; and the Plaintiffs were then informed, for the first time, that the Defendant Josias Jackson, the testator's son, was married, and had issue a son, Henry Barnewall Jackson, born in November 1822, which was more than two years before [169] the bill was filed; and, in consequence of that information, the cause was ordered to stand over for the purpose of bringing Henry Barnewall Jackson before the Court.

The Plaintiffs accordingly filed a supplemental bill against Henry B. Jackson and the Defendants in the original suit, stating that H. B. Jackson alleged that, having been born before the filing of the original bill, he was not bound by any of the proceedings in the suit; and that the other Defendants alleged that, the original suit having been imperfect by reason of H. B. Jackson not having been a Defendant thereto, all the proceedings in it were irregular, and they were not bound thereby: but the Plaintiffs charged that all the Defendants, except H. B. Jackson, were bound by the decree, orders and other proceedings in the original suit. The supplemental bill further stated that H. B. Jackson then alleged that, not only as between himself and the Plaintiffs, but as between himself and the other Defendants, the decree, order and other proceedings were not binding upon him; and the Plaintiffs charged that, under the circumstances aforesaid, the Defendants to the original bill were necessary parties to the supplemental bill; and that the Plaintiffs were entitled to the benefit of the original suit and the proceedings therein as against all the Defendants except H. B. Jackson; and that they were entitled to the same or the like relief against H. B. Jackson, as, by the original bill, was prayed against the Defendants thereto. The supplemental bill prayed that the Plaintiffs might have the benefit of the suit and proceedings against the Defendants (other than H. B. Jackson), and might have the same or the like relief, as against H. B. Jackson, in respect of the matters therein stated and charged, [170] as, by the original bill, was prayed against the Defendants thereto in respect of the matters therein mentioned; and that the bill might be deemed and taken to be a supplemental bill to the original bill.

The original suit now came on again to be heard for further directions, and the supplemental suit came on to be heard at the same time.

Mr. Knight Bruce and Mr. Heathfield, for the Plaintiffs, said that the question was whether the accounts which had been taken in the original suit were not conclusive upon the infant Defendant, Henry Barnewall Jackson; or whether liberty ought to be given to the Master to adopt such of the accounts as he might think proper; or whether all the accounts ought to be taken over again. They cited *Brookfield v. Bradley* (Jac. 632).

Mr. Wakefield and Mr. Wray, for Henry B. Jackson, said that it could not be for the benefit of the infant Defendant to be bound by anything that had been done in his absence.

Mr. Turner and Mr. Bigg, for Warner Ottley, a Defendant to both suits, said that the question was what was most for the infant's benefit; that, if all the accounts were directed to be taken over again, and the Plaintiffs succeeded in establishing their claim (as they had done in the original suit), the costs of the two suits would fall upon the infant's estate; and that the infant's father had been a party to everything that had been done in the original suit.

[171] Mr. Anderdon and Mr. E. F. Moore appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, the Defendant to the supplemental suit being an infant, all the accounts must, in the first instance, be directed to be taken again; but that the decree ought to be so constructed as not to bind the

Master to put the infant's estate to the expense of taking the whole of the accounts, unless he should find that it would be beneficial to the infant so to do.

The decree which was drawn up was, in substance, as follows:—

Declare the Plaintiffs entitled to the benefit of the decree of the 13th of March 1828 and the several proceedings under the same and subsequent or previous thereto, against all the Defendants to the supplemental suit, except the infant Defendant, Henry Barnewall Jackson, the only son of the Defendant Josias Jackson and the first tenant in tail *in esse* under the testator's will; and declare the said decree and orders, and the accounts taken under the same, not binding on the said Defendant the infant H. B. Jackson; and refer it to the Master to take an account of the personal estate and effects (not specifically bequeathed) of the said testator, Josias Jackson, come to the hands of the Defendant, Jennetta Jackson, his widow and executrix, or to the hands of any other person or persons by her order or for her use; and let the said Master also take an account of what is due to the Plaintiffs and all other the creditors of the said testator; and also an account of the testator's funeral expenses and legacies; interest to be computed on debts and legacies, and advertisements to be published for creditors; and, as to the debt claimed [172] by the Plaintiffs to be due to them from the said testator's estate, if the said Master shall find any accounts settled in the said testator's lifetime and signed by the said testator, he is not to disturb the same; and, if the said Master shall consider it to be for the benefit of the infant Defendant, Henry Barnewall Jackson, to adopt any of the accounts already taken under the decree and orders in the original cause, he is to be at liberty to adopt the same to any extent or in any respect he shall think for the benefit of the said infant Defendant, and to state any special circumstances at the request of any of the parties; and let the said testator's personal estate (not specifically bequeathed) be applied in payment of his funeral expenses and debts in a due course of administration, and then in payment of the legacies given by his will; and let the said Master inquire and state what charges or incumbrances there were affecting the testator's estates at his death, and what charges and encumbrances there are now affecting the same, and what is due and to whom in respect thereof respectively; and let the Master state their priorities; and let the said Master inquire, and state to the Court, what real estates the said testator was seised of or entitled to at the time of his death; and let the said Master inquire and state by whom and in what character the rents and profits of the real estates which the said testator died seised of or to which he was entitled at the time of his death have, from the death of the said testator up to the time when the Plaintiffs were appointed consignees in the original cause, been received, and how the same have been applied; and, for the better taking the said accounts and discovery of the matters aforesaid, the parties are to produce before the said Master upon oath all deeds, &c., and are to be examined upon interrogatories, &c., &c.; and let the consignees and managers [173] appointed in these causes be continued; and this decree is to be without prejudice, as between the Plaintiffs and all the Defendants except the said infant Defendant Henry Barnewall Jackson, to any of the decrees and orders, proceedings and arrangements made prior to the date hereof; and reserve further directions and costs; and any of the parties are to be at liberty to apply to this Court as they may be advised.

Mr. Knight Bruce suggested that a direction for the sale of the testator's real estates ought to be inserted in the decree, the whole amount of the testator's personal estate being only £1600, and the sum due to the Plaintiffs being £29,000. He said that it was now the constant practice of the Court to direct, by the decree at the hearing of a cause, the testator's real estates to be sold in case his personal estate should appear to be insufficient for payment of his debts. *Lloyd v. Jones* (9 Ves. 65).

THE VICE-CHANCELLOR said that he was aware that what was asked was frequently done; but the impression on his mind was that it was done because the parties desired it: and that the Defendant H. B. Jackson, the tenant in tail of the real estates, being an infant, it would be improper to direct the real estates to be sold until the accounts of the testator's personal estate and debts had been taken by the Master; and then, if it appeared from the Master's report that the personal estate was insufficient to pay the testator's debts, the Court, on hearing the cause for further directions, would direct the real estates to be sold.

[174] ELIZABETH CLOUGH, Widow, v. LAMBERT AND OTHERS. June 21, 1839.

[S. C. 3 Jur. 672.]

Husband and Wife. Separation Deed.

A separation deed recited that divers unhappy differences subsisted between the husband and wife, in consequence of which they had agreed to live separate. The husband then covenanted to pay an annuity to a trustee for the wife during her life; but there was no covenant on the part of the trustee, or any other person, to indemnify the husband against the debts of the wife. The husband died, and the annuity became in arrear. Held, that the covenant might be enforced against the husband's executors; for, there being no evidence to the contrary, there might have been circumstances, alluded to by the recital, which would have warranted a divorce *a mensâ et toro*; but that the covenant, being voluntary, could not be enforced against the husband's creditors.

By a deed of separation, bearing date the 23d of May 1817, and made between Henry Gore Clough of the first part, the Plaintiff, his then wife, of the second part, and Cayley Johnson of the third part, after reciting that divers unhappy differences had subsisted, and did still subsist, between Henry Gore Clough and his wife, and that, in consequence thereof, they had mutually agreed, and did thereby agree, from thenceforth for and during their respective natural lives, to live separate and apart on the terms and conditions thereafter mentioned. H. G. Clough, for himself, his heirs, executors and administrators, in pursuance of such agreement, covenanted with Johnson, his executors and administrators (amongst other things) that he would, from thenceforth during his natural life, live separate and apart from the Plaintiff, and would not thereafter cohabit, abide or dwell with her as his wife, nor use or frequent her company or conversation at any time or times thereafter, otherwise than as he might lawfully do with a stranger; and further, that H. G. Clough, his executors, administrators or assigns should not nor would, at any time or times thereafter, claim or demand any of the jewels, plate, monies, clothes, linen, plate, wearing apparel, or other goods, property or effects whatsoever which the Plaintiff then had, or at any time during such separation should or might purchase, or by any other means [175] have, acquire, or become possessed of; but that the Plaintiff should and might, from time to time and at all times, peaceably and quietly retain, use and enjoy the same; and, moreover, that H. G. Clough, his heirs, executors or administrators should and would, yearly during the natural life of the Plaintiff, pay to Johnson, his executors or administrators, the sum of £100, by quarterly payments, the first payment to be made on the 23d of August then next: and it was thereby agreed and declared that Johnson, his executors, administrators and assigns, should stand possessed of the yearly sum of £100, in trust to apply and dispose of the same in and towards the maintenance and support of the Plaintiff: provided that if Henry Gore Clough should by any action, suit or prosecution at law or in equity, which should or might be brought or commenced against him for the recovery of any debt or debts incurred and contracted by the Plaintiff after the date of the deed, be compelled to pay the same, then and in such case, and from time to time as often as the same should happen, it should be lawful for Henry Gore Clough, his executors and administrators to retain out of the next and every succeeding payment of the yearly sum of £100 all such sum and sums of money, costs, charges and expenses as he, his executors and administrators should, at any time thereafter, be lawfully charged with or compelled to pay, or should be put unto or sustain for or in respect of any and every of such debt, action, suit, or prosecution as aforesaid.

Mr. and Mrs. Clough continued to live separate from each other until Mr. Clough's death; and he paid the annuity of £100 down to the last day of payment previous to his death; and was never called upon to pay any debt incurred by his wife.

[176] Johnson left this country several years ago, and had ever since resided abroad. After Johnson's departure, Clough paid the annuity to the Plaintiff.

Clough, by his will, dated the 20th of January 1837, gave all his personal estate and effects, after payment of his debts and funeral and testamentary expenses, to the Defendants Lambert and Harrison, in trust for his reputed son Frederick Gore, if he should live to attain the age of 25; with a limitation over, in case of the death of his son under that age, in favour of the Defendants; and he appointed them the executors of his will.

Clough died on the 20th of April 1838. No part of the annuity was paid to the Plaintiff after her husband's death.

The bill, after stating as above, prayed that the Defendants might account for Clough's personal estate, and that the same might be applied in a course of administration, and that thereout the Plaintiff might be paid the arrears of her annuity; and that a sufficient sum might be set apart and invested for securing the future payments thereof.

The answer submitted whether the Plaintiff's demand, founded on the covenant, was a valid and legal claim against Clough's estate, the same *not being supported by any consideration, and having been entered into with a view to a separation between the Plaintiff and her husband*; and whether, if legal, the satisfaction of the claim must not be postponed until after Clough's simple contract creditors had been paid.

[177] Mr. Knight Bruce and Mr. Moore, for the Plaintiff.

Mr. Girdlestone and Mr. Elmsley, for the Defendants. *Primâ facie* deeds of separation between husband and wife are contrary to the policy of the law, and, therefore, void. There are, however, two classes of cases in which they are upheld: first, where the separation has taken place on grounds which would justify an application to the Ecclesiastical Court for a divorce *a mensâ et toro*, such as adultery or cruelty. In such a case the deed is good; because it is only an agreement by the husband to do that which the law would have compelled him to do. The other class of cases in which such deeds have been supported is where there is a covenant by the wife's trustee to indemnify the husband against any debts that the wife may contract. In that case there is a consideration for the deed; and therefore it is held to be good. But in the deed now sought to be enforced it does not appear that the separation took place on any of the grounds on which the Ecclesiastical Court would have decreed a divorce *a mensâ et toro*. All that the deed recites, as to the cause of the separation, is that divers unhappy differences had subsisted and continued to subsist between the parties. Nor is there any covenant on the part of the trustee to indemnify the husband against the future debts of the wife, or any other consideration on which the deed can be supported. No action could have been maintained at law, on the covenant to pay the annuity to the wife; and that being so, a Court of Equity cannot enforce it. *Jones v. Waite* (5 Bing. N. C. 341). [THE VICE-CHANCELLOR. That was the case of an action brought upon a simple contract; not on a deed. There must be a consideration—[178]—tion to support a simple contract; but an instrument under seal is good without any consideration.]

The case of *Westmeath v. Westmeath* (Jac. 126; see 140, 141) also was referred to in the course of the argument.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question which I am called upon to decide in this case is, in fact, whether, as against the executors of the husband, the wife, if she were to sue in the name of her trustee, could enforce at law her husband's covenant to pay the annuity. Now no circumstances have been stated which tend to shew that the foundation of the deed is such as that it cannot be enforced at law. There is no illegality on the face of the deed. The circumstances under which the separation took place are not stated distinctly in the deed; nor is there any evidence to shew what those circumstances were. All that appears upon that part of the case is the recital in the deed that various unhappy differences had subsisted and did still subsist between the husband and wife, in consequence of which they had agreed to live separate during their lives. For anything that appears to the contrary, there may have been circumstances alluded to under that recital which would have justified the wife in applying to the Ecclesiastical Court for a divorce *a mensâ et toro*.

The covenant, being under seal, requires no consideration to make it binding; and, being good *primâ facie*, it lies on those who assert the contrary to prove it; for, as was laid down by Mr. Justice Patteson, in the case cited by Mr. Girdlestone, the

Court cannot presume illegality. (See 5 Bing. N. C. 352.) Then, as nothing appears [179] on the face of the deed, and as no evidence has been adduced of extrinsic circumstances tending to shew that the deed is invalid, I am bound to hold that it is good. The consequence is that the wife may enforce the covenant against the executors of her husband; but, there being no consideration for it, she cannot enforce it against his creditors.

[179] KEYMER v. PERING. June 22, July 8, 1839.

Practice. Cross-Examination. Witness.

A party who intends to cross-examine a witness must, himself, make an appointment for that purpose with the Examiner, and give notice of the time appointed to the witness and the solicitor of the opposite party.

Motion by Plaintiff, after publication passed, to suppress the deposition of a London witness, named Bromley, who had been examined for the Defendant.

On the 11th of April the Plaintiff gave notice to Mr. Villiers, one of the Examiners, that, in the event of Bromley being examined for the Defendant, the Plaintiff intended to cross-examine him. On the following day Bromley was examined in chief, and on that day Mr. Villiers gave notice to the Defendant's Clerk in Court that he had been so examined. In consequence of the notice given to Mr. Villiers, the witness, as soon as his examination was finished, was taken to the office of Mr. Plumer, the other Examiner, to be cross-examined; but no cross-interrogatories had been then left. On the 13th of April the cross-interrogatories were left in Mr. Plumer's office; and the Defendant served Bromley with notice to that effect. Bromley, however, never attended to be cross-examined.

On the 15th of April the Plaintiff, who was under an undertaking to speed, gave rules to pass publication; and on the 22d publication passed.

[180] Mr. Knight Bruce and Mr. G. Richards, in support of the motion. When the Plaintiff had filed the cross-interrogatories, he had done all that it was his duty to do. As those interrogatories were filed within 48 hours from the time when the witness was produced for examination in chief, the Defendant was bound to produce the witness again to be cross-examined. 1 Smith's Practice, 359; *Whittuck v. Lysaght* (1 Sim. & Stu. 446).

Mr. Jacob and Mr. Bethell, for the Defendant. The Plaintiff ought to have given the Defendant notice that the cross-interrogatories had been left, and that he wished an appointment to be made with Mr. Plumer for cross-examining the witness; but he did not give any notice at all, either to the Defendant or his solicitor. In consequence of the notice given to Mr. Villiers, the witness was taken to Mr. Plumer's office, but no cross-interrogatories had been then filed.

If there has been any irregularity, the Plaintiff has waived it by giving the rules to pass publication.

Mr. Knight Bruce, in reply. The party who wishes to cross-examine a witness has no means of compelling the witness to attend for that purpose. There is no process to enforce the witness's attendance, except the *subpoena* for his examination in chief. All that the opposite party can be required to do is to exhibit his intention of cross-examining the witness by filing cross-interrogatories: and the party who has examined the witness in chief is bound to keep his control over the witness, and to search for [181] cross-interrogatories, until the last moment of the 48 hours has expired. If he finds that cross-interrogatories have been filed, it is his duty to make the appointment for the cross-examination of the witness: the party who seeks to cross-examine the witness never makes the appointment. Notice was given to Mr. Villiers. Notice to the Defendant or his solicitor was not necessary: when the Plaintiff had filed his cross-interrogatories he had done all that he was bound to do.

THE VICE-CHANCELLOR. The notice that the Plaintiff intended to cross-examine the witness was not given to the Defendant's solicitor, but only to Mr. Villiers, who was to examine the witness in chief. As the Defendant's solicitor had no notice that

the Plaintiff intended to cross-examine the witness, I doubt whether it was his duty to search for cross-interrogatories: I will, however, consult the Examiners on the subject.

July 8. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have seen Mr. Plumer and Mr. Villiers; and have ascertained from them that the practice of the Examiner's Office is that, where a party produces a witness to be examined by one of the Examiners, the opposite party having notice and intending to cross-examine the witness makes an appointment with the other Examiner for that purpose; and then gives notice of the time appointed to the witness and also to the solicitor of the party producing the witness.

The notice served by the Plaintiff on Mr. Villiers was a mere nullity; for Mr. Villiers was not the Examiner who was to cross-examine the witness.

[182] Not only the practice of the Examiner's Office, but the course which convenience obviously requires, is that the party who intends to cross-examine a witness should himself make the appointment for that purpose.

Motion refused with costs.

[182] ASKEW v. PEDDLE. June 22, 1839.

Practice. Four-Day Order.

It is not irregular to obtain the Four-day Order for production of deeds before the certificate of the Defendant's default has been filed.

Motion to discharge the Four-day Order for production of deeds, &c., under a decree (see Seton on Dec. 421), on the ground that the Master's certificate that the Defendant had made default in producing the deeds, &c., was not filed until after the order was obtained.

The order was made on the 8th of May, and the certificate was not filed until the 11th of that month; but the order was not delivered out until after the certificate had been filed.

Mr. Jacob, Mr. Stuart and Mr. Hislop Clarke, for the Defendant, in support of the motion, relied on *Frisby v. Stafford* (ante, vol. vii. p. 365). They cited also *Harris v. Cotter* (1 Myl. & Keen, 568), and *Rushton v. Troughton* (ante, vol. ii. p. 33).

Mr. Knight Bruce and Mr. Wood, for the Plaintiff, relied on *Harris v. De Tastet* (1 Sim. & Stu. 263) as precisely in point. They cited also *Eyles v. Ward* (2 P. W. 517), and said that the orders obtained in *Harris v. Cotter* and *Rushton v. [183] Troughton* were acted upon before the reports on which they were obtained were filed: that, in *Frisby v. Stafford*, the object of the order was to enforce the filing of an examination, not the production of deeds: that the case of *Harris v. De Tastet* was not cited in any of those three cases: and that the General Order of 1692 (Beam. Ord. 292) had been overruled by the practice which had prevailed for a long series of years, inconsistent with it: that, in this case, the certificate was filed within four days after it was signed; and the order was not acted upon until after the filing of the certificate.

THE VICE-CHANCELLOR [Sir L. Shadwell]. (1) The cases of *Harris v. Cotter* and *Rushton v. Troughton* are totally different from the present. The question there was whether an adverse order could be sustained, the certificate not being filed. The order in the present case is the Four-day Order; and it directs that, in default only of compliance with the order, there shall be a serjeant-at-arms.

Now this very question on the production of documents under a decree was decided in *Harris v. De Tastet*; and the order was held good, though the certificate had not been filed. Mr. Hnssey (the registrar) assures me that he has no doubt as to the regularity of the order. In *Harris v. De Tastet* Mr. Walker (the late registrar) stated what the practice was, and Mr. Hussey confirms that statement. The result is that, if there be any apparent inconsistency with *Frisby v. Stafford*, it must be taken that the different practice in the case of production of documents has sanctioned a departure from the General Order of 1692. Lord Eldon has said that long-continued practice governs the Court.

(1) *Ex relatione*, Mr. Wood.

[184] Cases of this description must be determined, not so much by absolute principle as by a course of decision; and *Harris v. De Tastet* is an authority expressly in point, the authority of which is confirmed by the present registrar's statement as to the practice since that case was decided.

Motion refused without costs.

[184] SHADFORTH v. TEMPLE. June 23, 1839.

[S. C. 3 Jur. 996.]

Heir and Administrator. Rent. Conversion. Agreement.

By a contract for the sale of an estate, it was agreed that the purchase should be completed on a certain day, but that all rent to accrue in the *interim* should belong to the vendor, *his heirs*, executors and administrators. The vendor died intestate before the day appointed for completing the purchase. Held, that rent accrued between that day and the vendor's death belonged to his heir.

This was a suit by the widow and administratrix of a vendor against the purchaser and the vendor's heir, for the specific performance of a contract for the sale of an estate.

By the terms of the contract, which was dated the 3d of September 1838, the purchase was to be completed by payment of the purchase-money, execution of the conveyance and delivery of possession on the 13th of May then next; but all rent and other profits of the estate to accrue in the meantime were to belong to the vendor, *his heirs*, executors and administrators.

The vendor died intestate in January 1839.

The question at the hearing of the cause was whether the rent which accrued between the vendor's death and the day appointed for completing the purchase belonged to the administratrix or to the heir of the vendor.

Mr. Smythe, for the Plaintiff, referred to *Townley v. Bedwell* (14 Ves. 591).

[185] Mr. Morley and Mr. Prior appeared for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. From the words of the contract, I infer that it was the vendor's intention that the estate should be kept as realty up to the time when it was to be converted absolutely into personal estate; and, therefore, I think that the intermediate rent belongs to the heir.

[185] WROE v. CLAYTON. June 25, 1839.

Practice. Injunction. Plea.

An order *nisi* for dissolving an injunction cannot be obtained on putting in a plea.

After the Plaintiff had obtained the common injunction, the Defendant put in a plea to the bill, and then obtained an order *nisi* for dissolving the injunction.

Mr. Knight Bruce and Mr. Martindale, for the Plaintiff, now moved to discharge the order for irregularity.

A plea is not an answer for all purposes. A Plaintiff is entitled to have a full answer before an injunction can be dissolved.

Mr. G. Richards, for the Defendant. A plea, for the purpose of obtaining the order *nisi*, must be deemed to be an answer. It is defined, by Lord Redesdale, to be a special answer; and it concludes with asking the Court whether the Defendant ought to be compelled to put in any further or other answer to the bill. It is dealt with as an answer: for if it is not set down for argument, or if it is allowed on argument, it [186] may be replied to, and then it becomes an answer to all intents and purposes. If a replication is filed to it, is not the Defendant to be then at liberty to obtain the order *nisi*?

THE VICE-CHANCELLOR [Sir L. Shadwell]. It occurred to me that an order *nisi* was never made on a plea being filed; and Mr. Walker (the registrar) is astonished at such an order having been drawn up: it cannot stand for a moment.

The order *nisi* begins with a recital that the Defendant has put in a full answer and thereby denied the Plaintiff's equity.

The order *nisi* must be discharged.

[186] PATON v. SHEPPARD. June 28, 1839.

[Distinguished, *Finney v. Grice*, 1878, 10 Ch. D. 14.]

*Will. Construction. Household Furniture. Fixtures. Dividends.
Tenant for Life of Stock.*

Under a bequest of household furniture, fixtures, belonging to the testator, in a leasehold house, occupied by him, will pass.

A tenant for life of stock died on the day on which a half-year's dividends became due. Held that they belonged to his personal estate.

In contemplation of the marriage of Mr. and Mrs. Paton, a leasehold messuage in Gower Street, Bedford Square, of which Mr. Paton was the assignee, and £10,000 consols and £5549, 16s. 6d. South Sea stock were assigned and transferred to trustees, in trust for Mr. and Mrs. Paton for their lives successively, and, subject thereto, in trust for their issue. Mr. and Mrs. Paton, soon after their marriage, went to reside in the house in Gower Street, and continued to reside there until Mr. Paton's death. By his will, he left all his *household furniture*, linen, plate and wines, to his wife, [187] for her use so long as she remained unmarried; but, in the event of her marrying again, he desired that the whole of the furniture, linen, plate and wines should be sold, and the proceeds divided amongst his children. Mr. Paton died on the 5th of July 1837. After his death the trustees of the settlement, under a power therein contained, sold the house to Sir James Leighton for £1900, and the fixtures therein, consisting of stoves, blinds, bell-pulls and other articles generally considered as tenant's fixtures, to the same gentleman for £150. On the 5th of July 1837, the day of Mr. Paton's death, a half-yearly dividend, amounting to £247, 2s. 5d., became due on the stock comprised in the settlement.

A petition in the cause, presented by three of the children and residuary legatees under the will of Mr. Paton, alleged that Mrs. Paton (who had consented to be bound by the decision of the Court on the petition), claimed to be absolutely entitled to the £247, 2s. 5d.; and that she also claimed to be entitled, either absolutely or for her life, to the £150, the proceeds of the fixtures, some of which were alleged to have been in or about the house in Gower Street at the date and execution of the settlement; but that the Petitioners were advised that both those sums belonged to their late father's residuary estate. The petition prayed that the £247, 2s. 5d. and £150 might be declared to belong to Mr. Paton's residuary estate, and might be disposed of accordingly.

Mr. Turner, for the Petitioners. The first question is whether Mrs. Paton takes a life interest in the fixtures under the settlement, or whether she is entitled to them, absolutely, under the will; that [188] is, whether they are to be considered as part of the testator's furniture.

The language of the settlement shews that the fixtures were not intended to be included in it. It recites the original lease by which the owner of the fee demised, to the lessee, all that piece or parcel of ground situate, &c., together with the messuage or tenement erected thereon. It next recites that, by divers mesne assignments, &c., the piece or parcel of ground, messuage or tenement and premises became vested in Mr. Paton for the residue of the term created by the lease: and then it assigns the piece or parcel of ground, messuage or tenement and premises which were demised by the lease, to the trustees, to hold to them, their executors, &c., for the residue of the term. If Mr. Paton had intended to pass the fixtures as well as the

leasehold premises, that intention would have appeared from the recitals, and he would have assigned the fixtures to the trustees, to hold to them, their executors, &c., absolutely. It is plain, therefore, that the settlement does not include the fixtures. The remaining question upon this part of the case is whether the fixtures are household furniture within the meaning of the will. It is observable that the testator, in the bequest to his wife, couples his household furniture with his plate, linen and wines, which are all of them moveable articles: consequently, the fair inference is that he did not intend to give to her any part of his household furniture except such as was moveable. In *Slanning v. Style* (3 P. W. 334) the testator bequeathed to his wife his tea-table, tea-kettle and all his pewter, brass, linen and woollen, with all his household goods and [189] implements of husbandry whatsoever, in or about his dwelling-house: and Lord Talbot, Chancellor, held that a clock in the house would not pass by the words "household goods" if it were fixed to the house.

The next question relates to the dividends of the stock which became due on the day of Mr. Paton's death: that is, whether those dividends are part of his personal estate, or whether they belong to his widow under the trusts of the settlement.⁽¹⁾ As Mr. Paton lived up to the day on which the dividends became due and payable, I submit that they form part of his personal estate. I admit that rent reserved on a lease cannot be distrained for until the expiration of the day on which it is made payable. But there is this distinction between rent and dividends of stock: there is a mutual contract between the lessor and the lessee which is not complete unless the lessee has had the enjoyment of the demised premises up to the last moment of the day on which his rent is reserved: but the holders of stock are annuitants; and an annuitant is entitled to receive his annuity on the morning of the day on which it is payable. The Act of Parliament relating to the stock in question directs the dividends to be paid half-yearly, on the 5th of January and the 5th of July.⁽²⁾

(1) The settlement was dated long before the passing of the Apportionment Act, 4 & 5 Will. 4, c. 22.

(2) The following sections of the 25 Geo. 2 (for converting the several annuities therein mentioned into several joint stocks of annuities, transferable at the Bank of England, to be charged on the Sinking Fund, and also for consolidating the several other annuities therein mentioned into several joint stocks of annuities transferable at the South Sea House) were referred to by Mr. Turner. "And be it further enacted that, from and after the said 24th day of June 1752, all the said several and respective principal sums transferable at the Bank of England as aforesaid, amounting, in the whole, to the sum of £8,200,000, as also such sum or sums of money as shall or may be made payable to the Governor and Company of the Bank of England for the charges of management, shall be and are hereby charged and chargeable upon the said Sinking Fund, and shall be issued and paid, half-yearly, on the 5th day of January and the 5th day of July in every year, out of the surplus funds and other duties and revenues composing the said Sinking Fund, and shall be deemed and taken to be charges and incumbrances thereupon until redemption thereof by Parliament, subject, nevertheless, to such charges and incumbrances as are already made thereupon by Parliament; and the Commissioners of the Treasury, or any three or more of them now being, or the High Treasurer or Commissioners of the Treasury of His Majesty, his heirs or successors for the time being, without any further or other warrant to be sued for, had or obtained in that behalf, shall and may, from time to time, *issue the same at the respective half-yearly or other days of payment*, whereon the same shall become due and payable at the said receipt of Exchequer, to the first or chief cashier or cashiers of the Governor and Company of the Bank of England, and their successors for the time being, by way of impress and upon account, for the purposes above mentioned; and that all and every such cashier or cashiers to whom the said money shall from time to time be issued shall, *without delay*, apply and pay the same accordingly, and render his account thereof according to the due course of the Exchequer. And be it further enacted that, from and after the said 10th day of October 1752, all the said several and respective annuities transferable at the Bank of England amounting, in the whole, to the sum of £17,571,573, 16s. 4d., as also such sum or sums of money as shall or may be made payable to the Governor and Company of the

[190] Mr. Knight Bruce, for Mrs. Paton, said that it was clear that, as against the trustees of the settlement, Mr. [191] Paton might have removed the fixtures from the house; that stoves, &c., were a very important part of the furniture of every house; and that a person taking a ready furnished house would be much surprised to find it unprovided with those articles; that rent and other periodical payments were not fully due until the end of the day which the party liable had to pay them in. *Norris v. Harrison* (2 Madd. 268).

THE VICE-CHANCELLOR [Sir L. Shadwell]. If Mr. Paton had thought fit to say that he would remove the stoves, &c., from the house, the trustees of the settlement could not have obtained an injunction to prevent him from removing them. They were fixed to [192] the house in this sense, namely, that it was at his option to remove them if he thought proper so to do: but they are not the less furniture because they were fixed to the house. (1)

With respect to the dividends of the stock which became due on the 5th of July 1837, the day of Mr. Paton's death, I am of opinion that, as he might have received those dividends on applying to the bank at any time on that day, they now form part of his personal estate.

Declare that Mrs. Paton is entitled to the income of the fixture fund during her widowhood; and that the dividends of the stock, which became due on the day of Mr. Paton's decease, belong to his residuary personal estate.

[193] BICKFORD v. SKEWES. June 29, 1839.

[S. C. 4 My. & Cr. 498; 41 E. R. 192.]

Contempt. Trial.

The Plaintiff obtained an injunction with a direction to try his right in an action.

A year afterwards, and shortly before the Spring Assizes, the Defendant moved that the Plaintiff might proceed to trial at those Assizes, or that the injunction might be dissolved. The Court refused the motion with costs, but intimated that it expected the Plaintiff to go to trial at the next Summer Assizes. The Defendant being in contempt for non-payment of the costs of the motion, the Plaintiff, shortly before Summer Assizes, moved to defer the trial until the Defendant should have cleared his contempt. Motion refused.

Bank of England for the charges of management of the said annuities, shall be, and they are hereby charged and chargeable upon the said Sinking Fund, *and shall be issued and paid half-yearly, on the 5th day of April and the 10th day of October in every year*, out of the surplus funds and other duties and revenues composing the said Sinking Fund, and shall be decmed and taken to be charges and incumbrances thereupon until redemption thereof by Parliament, subject, nevertheless, to such charges and incumbrances as are already made thereupon by Parliament; and the Commissioners of the Treasury, or any three or more of them now being, or the High Treasurer or Commissioners of the Treasury of His Majesty, his heirs or successors for the time being, without any further or other warrant to be sued for, had or obtained in that behalf, shall and may, from time to time, *issue the same at the respective half-yearly or other days of payment whereon the same shall become due or payable*, at the said receipt of Exchequer, to the first or chief cashier or cashiers of the Governor and Company of the Bank of England and their successors for the time being, by way of impress and upon account, for the purposes aforementioned; and that all and every such cashier or cashiers to whom the said monies shall be issued shall, from time to time, *without delay*, apply and pay the same accordingly, and render his account thereof according to the due course of the Exchequer."

(1) In *Kelly v. Powlet*, Amb. 605, the Master of the Rolls said: "The word 'household furniture' has as general a meaning as possible. It is incapable of a definition. It is capable only of a description. It comprises everything that contributes to the use or convenience of the householder or ornament of the house." See also *Cole v. Fitzgerald*, 1 Sim. & Stu. 189; and 3 Russ. 301.

This was a suit to restrain the infringement of a patent; and the Plaintiff had obtained an injunction for that purpose, subject to his bringing an action to try the validity of his patent. The Plaintiff accordingly commenced his action; but suffered more than a year to elapse without going to trial; in consequence of which the Defendant, shortly before the last Spring Assizes, moved the Vice-Chancellor and afterwards the Lord Chancellor that the Plaintiff might be compelled to go to trial at the then ensuing Assizes, or that the injunction might be dissolved. But those learned Judges successively refused the motion, with costs, on the ground that the Defendant himself had been guilty of *laches*, in not applying earlier to the Court. The Lord Chancellor, however, intimated that the Court would expect the Plaintiff to try his action at the next Summer Assizes.

The Defendant being in contempt for non-payment of the costs of that motion, the Plaintiff now moved that all proceedings in the action might be stayed, or that he might be at liberty to defer proceeding to trial, until the Defendant should have paid the costs.

Mr. Knight Bruce and Mr. Roupell, in support of the motion. In *Wilson v. Bates* (3 Myl. & Cr. 203) the Lord Chancellor says: [194] "The question has also been raised indirectly in other cases: in those cases, I mean in which, the Plaintiff being in contempt, the Defendant has applied to the Court to stay further proceedings until the costs of the contempt shall have been paid. If the circumstance of a Plaintiff being in contempt of itself puts an end to his power of proceeding, that would be an unnecessary and useless step on the Defendant's part. Instead of that the Defendant would be content to remain passive and quiescent. Such, however, is not the course taken by parties litigant, or sanctioned by the practice of the Court; the course is for the Court, upon a motion for that purpose and not before, to make an order staying the proceedings until the Plaintiff has paid the prior costs; that is to say, it makes a special order." Here the party moving is the Plaintiff; but it is immaterial whether the motion is made by the Plaintiff or by the Defendant. We contend that what is laid down by the Lord Chancellor in *Wilson v. Bates*, and in the cases of *Eddowes v. Neville* and *Price v. Dalton* (3 Myl. & Cr. 203, 204), which his Lordship proceeds to cite, are express authorities for granting the present application. The Plaintiff is bound to go to trial at the next Assizes; and is it right that the Defendant should have the benefit of the obligation imposed on the Plaintiff by the Lord Chancellor's order, before he has obeyed that order on his part by paying the Plaintiff the costs of the motion?

Mr. Jacob and Mr. Bethell, for the Defendant. Lord Bacon's Order, directing that they that are in contempt are not to be here (Beam. Ord. 35), has been considerably modified in modern times. In *King v. Bryant* (3 Myl. & Cr. 195) the [195] Lord Chancellor says: "The Court will not hear a party in contempt coming himself into Court to take any advantage of proceedings in the cause; but such a party is entitled to appear notwithstanding, and resist any proceedings taken against him; and it would be a very easy way of evading that rule if his adversary, instead of giving him notice, were to avoid serving him, and then to say that he could not take advantage of the rule in order to impeach the previous proceedings. However, there is no such practice." In *Wilson v. Bates* it was decided that a Plaintiff is entitled to sue out an attachment against a Defendant for want of answer, although he is himself in custody for a contempt in non-payment of costs. In *Eddowes v. Neville* and *Price v. Dalton* the proceedings sought to be stayed were proceedings against the parties making the applications. Here the proceeding sought to be stayed is a proceeding commenced by the party making the application, and which, consequently, is under his control. This Court has no jurisdiction to grant the application. The proceeding to which it relates is not a proceeding in equity; nor is it an action or an issue directed by the Court; the Court could not commit the Defendant, if he were to non pros the action or carry the record down to trial. There is no authority or precedent for the motion.

Mr. Knight Bruce, in reply. If a party is in contempt for disobeying an order of the Court, he cannot do any act to compel his adversary to proceed. If the Defendant, when he moved to dissolve the injunction, had been in contempt, he could not have been heard. The refusal of this motion was clogged with a condition which he could not have obtained had he been in contempt. As he is now in contempt, is

he in a [196] situation to enforce the performance of that condition? The Court having said that it expects the Plaintiff to go to trial at the next Assizes, it is necessary for him to obtain the sanction of the Court for postponing the trial. The jurisdiction of the Court over the action is as complete as if it had been an action or an issue directed by the Court; and if the Defendant clears his contempt, the Court may reimpose the condition.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The motion now before me is one of the first impression.

A party who is in contempt may, at any time, clear his contempt. At the time when the Lord Chancellor's order was made the Defendant was not in contempt. That order is still in full force; and I cannot understand how the circumstance that the Defendant has subsequently come into contempt can give to the Plaintiff the right to postpone the trial of his action, which, to a certain extent, he is under an obligation to try. The Defendant may, perhaps, clear his contempt before the trial; but, whatever may be the circumstances of the Defendant, the order of the Court must remain as it is.

Although the cases cited afford some countenance for this application, I cannot think that they warrant it; and therefore I shall refuse the motion without costs.

[197] WOODS v. WOODS. July 2, 6, 1839.

Impertinence. Pleading. Supplemental Bill. Exception. Report.

A bill was filed against A., to set aside a purchase made by him, on the ground of fraud. A. died after filing his answer. The Plaintiff then filed a supplemental bill against A.'s devisees, stating the allegations in the original bill, and several passages in the answer, some of which were stated by way of pretence, and charges were founded upon them. Held, that the supplemental bill was not impertinent.

The Master having allowed all the exceptions taken to a bill for impertinence, the Plaintiff took one general exception to the report, alleging that the Master ought not to have found the bill impertinent in all the points excepted to. The exception will be supported, if the Court thinks that the Master ought not to have allowed one of the exceptions.

This case came before the Court upon an exception, taken by the Plaintiffs, to a report of Master Dondeswell, finding that the bill in this cause was impertinent in all the points excepted to by the Defendants.

The Plaintiffs were the children of Robert Woods, deceased. In October 1835 they filed a bill against Elizabeth Hulme, the trustee for sale of their late father's real estates under his will, and against Thomas Woods, the purchaser of those estates, for the purpose of setting aside the purchase on the ground of fraud. Thomas Woods put in his answer to the bill; and, shortly afterwards, the Plaintiffs served a notice of motion for the production of certain deeds and other documents admitted by him to be in his custody: but, before the motion was made, Thomas Woods died. Upon his death the children of Robert Woods filed a bill against the devisees and executors of Thomas Woods, and also against Elizabeth Hulme, stating that, in or about the month of October 1835, the Plaintiffs exhibited their original bill against Thomas Woods and Elizabeth Hulme, which stated, as the facts were, that, &c. The bill then set forth the whole, or nearly so, of the contents (1) of [198] the original bill, the proceedings which had taken place in the original suit, and the will and death of Thomas Woods. It then alleged as follows: "And your orators and oratrixes are advised that the said suit having so become defective and abated by the death of the said Defendant, Thomas Woods, they are entitled to have the same or the like relief, in respect of the several matters in the said original bill mentioned, as against the several Defendants hereto, as the personal and real representatives of the said Thomas Woods, entitled

(1) The contents so set forth filled seven brief sheets, and were the subject of the six first exceptions in the Master's office. The supplemental bill occupied 39 brief sheets.

to or interested in his real and personal estate under his will, by means of a bill of supplement in the nature of a bill of revivor, or otherwise, as they would have been entitled to have as against the said Thomas Woods himself if living; and that they are entitled to the benefit of the discovery, disclosures and admissions made by the said answer of the said Defendant Thomas Woods, and to have relief, in respect of such several matters and things so disclosed and stated, as if the same had been originally known to your orators and oratrixes, and had been inserted in the said original bill, originally or by way of amendment thereof; and they claim the full benefit of the said answer, whereunto, in case of need, reference is hereby made: and your orators and oratrixes shew that, in and by the said answer, are set forth divers matters and things of which they were, at the time of the filing of their said original bill, altogether ignorant, and in respect of which, but for the death of the said Thomas Woods, they would, upon a production and inspection of the documents relating thereto, have amended their said bill, and, amongst others, the matters and things hereinafter set forth, and which are herein stated and set forth for the purposes of this suit, subject, however, to the verification thereof, upon production and inspection of the said deeds and [199] documents relating thereto, when obtained from the said Defendants."

The bill then stated as follows: "That, by the said answer of the said Thomas Woods, it is stated that the said Robert Woods, by an indenture bearing date the 5th day of January 1781, conveyed certain parts of his real estates to William Burton and his heirs, for securing the sum of £1000 and interest: and that it is thereby further stated that certain other parts of the real estates of the said Robert Woods were purchased by him of George Nicholl and Phillipa, his wife: and further, that it is by the said answer alleged that, for the purpose of enabling the said Robert Woods to complete the said purchase, he was desirous of raising the sum of £1500 upon the security of the said premises so by him purchased of George Nicholl and Phillipa, his wife; and further, that, in consequence, indentures of lease and release, bearing date respectively the 21st and 22d days of June 1786, were duly made and executed between and by," &c. The bill then set forth the names of the parties to the recitals and the operative part of the release, by which the premises purchased by Robert Woods of Nicholl and wife were conveyed to Elizabeth Clabon for the term of 1000 years, for securing the repayment of the £1500 which Robert Woods had borrowed of her, and, subject thereto, to Robert Woods in fee. The bill then proceeded as follows: "And further, that it is by the said answer alleged that in the month of November 1785, the said Robert Woods borrowed the further sum of £1000 from Richard Purvis, and for securing the same sum and interest, indentures of lease and release, bearing date respectively the 1st and 2d days of July 1786, were duly made and executed, the said indenture [200] of release being made and executed between and by," &c. The bill then set forth the names of the parties to the recitals and the operative part of the release, by which Robert Woods conveyed certain parts of his real estates which he had purchased of William Lark to Purvis in fee by way of mortgage for securing the repayment of the £1000 and interest. The bill then proceeded thus: "And further, that it is by the said answer stated that the said sums of £1000, £1500 and £1000 remained at the time of the death of the said Robert Woods due upon security of the said hereditaments charged therewith; and further, that it is by the said answer admitted that the said Robert Woods died on the 14th day of November 1788, and that he left his said widow and children him surviving, as in the said original bill mentioned; and that he duly made and published his last will and testament of such date, and in such words and figures as in the said original bill set forth; and that the said will was duly proved in the Court of the Archdeaconry of Suffolk by him, the said Defendant Thomas Woods, and the said Elizabeth Hulme; and that he did take upon himself the execution, and that he did, accordingly, together with the said Elizabeth Hulme, act in the execution of the trusts of the said will; but it is thereby denied that he acted principally, or, in any respect, exclusively of the said Defendant Elizabeth Hulme, in the execution of the trusts thereof: and further, that it is by the said answer alleged and pretended that the debts of the said Robert Woods, at the time of his death, amounted to the sum of £5262, 16s. 11½d., so far as the said Defendant had been able to ascertain the same, exclusive of the said sum of

£1500 due to the said Elizabeth Clabon; and that the value of his property applicable to pay such debts did not exceed the sum of £3665: and further, that it is by the said [201] answer alleged and pretended that the said Elizabeth Hulme was, in the year 1789, desirous that the said Defendant Thomas Woods should purchase the real estates of the said Robert Woods, and that he should have the same conveyed to him at a fair value, in order that the purchase-money should be applied towards payment of the said testator's debts; and further that it is by the said answer alleged and pretended that it was settled that the said Defendant should pay for the said estates the sum of £6580, subject, nevertheless, to the deduction, out of such purchase-money, of the amount of the said mortgages: and further, that it is by the said answer alleged that a conveyance of the said estates was thereupon made and executed to the said Defendant Thomas Woods in the manner next hereinafter set forth, that is to say, that such conveyance was made by indentures of lease and release, the said indenture of release bearing date the 10th day of October 1789, and being duly made and executed between and by the said Elizabeth Hulme therein described as of," &c. The bill then set forth the names and descriptions of the other parties to, and the recitals and the operative part of the release: and then followed these words: "However, although the said indenture of release is stated to bear date the 10th day of October 1789, yet it is, by the said answer, admitted that such conveyance was not, in fact, executed by the said Elizabeth Hulme until the 17th day of February 1791: and your orators and oratrixes charge that the contents of the said indenture of release of the 10th day of October 1789 are imperfectly and insufficiently and also delusively set forth in the said answer; neither did the said Thomas Woods thereby account for the same; and your orators and oratrixes expressly crave reference thereto when discovered and produced by the Defendants, in the possession or power of whom, [202] or some of whom, the said indenture of release, or, if not, some copy thereof now is or ought to be: and your orators and oratrixes further shew that it is by the said answer alleged that the said Thomas Woods had, since the month of October 1789, been in possession, by himself and his tenants, of the said hereditaments and premises, with the exception of certain particulars therein mentioned, to have been since sold by the said Defendant Thomas Woods, and such parts of the old inclosed lands as were exchanged for other lands under an award made in the year 1805, pursuant to the provisions of the Inclosure Act therein mentioned, and with the exception also of certain other hereditaments, part of the real estates of Robert Woods (which, it is thereby alleged, were not included in the said purchase made by the said Defendant, Thomas Woods, although the same were included in the said conveyance to him, and which, it is thereby alleged and pretended, were sold by the said Elizabeth Hulme, and that she received the purchase-money for the same), and that the said Defendant, Thomas Woods, claimed to be absolutely entitled to the said hereditaments and premises save as before mentioned." (1)

"However your orators and oratrixes hereby charge and humbly submit that the said indentures of lease and release, dated October 1789, under which the said Defendant, Thomas Woods, so claimed to be entitled as aforesaid, were and are, under the circumstances and for the reasons in the said original bill and herein, appearing, fraudulent; and that the same ought to be held and treated as fraudulent, null and void to all intents and purposes."

[203] The bill then set forth various other allegations in Thomas Woods's answer as pretences made by him and the Defendants; and those allegations were followed by charges contradicting or invalidating them. The charges related to matters prior to the filing of the original bill, and formed the subject of the 15th and ten following exceptions in the Master's office.

The bill then asked that the Defendants might answer all and singular the matters thereinbefore contained and set forth; and it interrogated, particularly, to all the allegations and charges, except those taken from the original bill, as to which it asked,

(1) The above allegations from the answer of Thomas Woods were the subject of eight of the exceptions before the Master, beginning with the 7th and ending with the 14th.

merely, whether that bill did not contain such statements, charges and prayer as thereinbefore mentioned.

The prayer of the bill was as follows :—"That the said Defendants may answer the premises and that it may be declared, by and under the decree of this honourable Court, that your orators and oratrixes are entitled to the full benefit and advantage of the said original bill and suit against the said Thomas Woods deceased, and to have the same or the like relief in respect of the several matters and things in the said original bill and hereinbefore contained, as against the said several Defendants as claiming or entitled under the said will of the said Thomas Woods, or otherwise as representing him and his real and personal estates, as your orators and oratrixes would have been entitled to under the said original bill against the said Thomas Woods if he had been living; and that this bill may be taken as a bill of revivor, and as a supplemental bill in the nature of a bill of revivor to the said original bill, or otherwise together with the said original bill; and that such relief may be given thereupon as may be [204] necessary for the interest of your orators and oratrixes; and that your orators and oratrixes may accordingly have such relief in respect of the said fraudulent and pretended purchase of the said hereditaments and premises by the said Thomas Woods, as is prayed by the said original bill; and, in particular, that the said indenture of the 10th of October 1789 may be decreed to be delivered up by the said Defendants to be cancelled; and that the Defendants may be decreed to produce and deliver up all title-deeds belonging to the said hereditaments and premises in their possession or power, and also to concur in all such conveyances as may be necessary for the purposes of the relief by the said original bill and hereby prayed; and that all such accounts as are by the said original bill prayed to be taken as against the said Thomas Woods, and all such further and other accounts as may be necessary for the full compensation and relief of your orators and oratrixes in the premises may be directed to be taken against the said Defendants respectively as the case may require:" that the personal estate of Thomas Woods might be applied in payment of what should be found due to the Plaintiffs; that the Defendants might admit assets of Thomas Woods, or that the usual accounts might be taken of his personal estate; that, if necessary, his real estates might be applied in payment of what should be found due to the Plaintiffs; that an account might be taken of the rents of the hereditaments and premises to which the bill related, which had been received by the Defendants since the death of Thomas Woods; that the Defendants might be restrained from selling, mortgaging, &c., those hereditaments; that a receiver might be appointed of the rents thereof; and that the trusts of Robert Woods's will might be carried into execution.

[205] The bill then prayed for the injunction and for a *subpoena* commanding all the Defendants to appear to and answer the bill, and to abide by and perform such order and decree as the Court should make in the premises: but it did not pray for a *subpoena* to revive the original suit.

The Defendants, except Elizabeth Hulme, took 25 exceptions to the bill for impertinence: and the Master allowed all the exceptions.

The following reasons were assigned by the Master for his report :—

"It is contended in this case that a considerable part of the bill is impertinent, inasmuch as it unnecessarily states various parts of the original bill and of the answer that has been filed by the deceased Defendant; and inasmuch as it also states various matters which are not matters of supplement, and which, if stated at all, ought to have been stated by amendment to the original bill.

"The six first exceptions relate to what are considered the unnecessary statements of the original bill; and the eight next relate to the statements of the answer; and the rest to what is contended not to be matter of supplement. Some discussion took place as to what is the proper designation of the bill in question: but whether it is to be considered as a bill of revivor and supplement, or as an original bill in the nature of a bill of revivor and supplement, or as a supplemental bill in the nature of an original bill, I am of opinion that it was not necessary to set out the statements contained in the original bill and answer. The facts stated in the original bill are indeed put in issue; but the Plaintiff [206] has not thought it necessary to interrogate as to those facts; nor does he pray that the Defendants may answer the original bill;

but he claims to be entitled, as I conceive he is, to have the benefit of the former proceedings and of the admissions contained in the answer of the deceased Defendant.

"If the bill is to be considered as a supplemental bill, the case alluded to by Sir A. Hart in Molloy's Reports (vol. ii. p. 39), is an authority that the statements of the bill and answer which have been excepted to are impertinent. But, without relying upon that authority, I am of opinion that, as the Plaintiff is entitled to the benefit of the former proceedings, it was unnecessary to set forth the statements in the original bill and in the answer which have been excepted to; and that they are, therefore, impertinent.

"With respect to the remaining exceptions I have had some doubt: for though in *Seeley v. Boehm* (2 Madd. 176) it was held that a Plaintiff may state by way of amendment part of the answer by way of pretences, yet I was inclined to think that he might, when the facts were not known to him at the time when he filed his original bill, set out the statements of the answer, in a supplemental bill as pretences, and charge such matters as he might think necessary, for the purpose of invalidating such statements. Lord Redesdale, in folio 263 (edit. 3), says that if any event happens which alters the interest of any party or gives any interest to any person not a party, the Plaintiff may file a supplemental bill or bill of revivor, as the case may require; and, if he thinks some discovery necessary to support his case, he may [207] file a supplemental bill to obtain that discovery. The present bill is not a bill of discovery merely, but is one for relief also. Lord Redesdale adds that he may also file a supplemental bill to put in issue some matter necessary for his case, when he cannot obtain permission to alter his original bill by way of amendment: and in page 49, Lord Redesdale says that whenever the same end may be obtained by amendment, the Court will not permit a supplemental bill to be filed. If this bill can be amended, as I am of opinion it can, the Plaintiff may state the defences set up by the answer, by way of amendment, and controvert them: *Seeley v. Boehm*. It is stated that the matters introduced into the bill, and to which the latter exceptions refer, were unknown to the Plaintiff until the putting in of Thomas Woods's answer: but, in *Colclough v. Evans* (*ante*, vol. iv. p. 76), the Vice-Chancellor said that such a statement will not make the bill supplemental or shew that it is improper. I am, therefore, of opinion that the whole of these exceptions must be allowed."

The exception taken to the Master's report was in the following terms:—"For that the said Master hath, in and by his said report, certified that the said Plaintiffs' bill in the said report mentioned is impertinent in all the points excepted to by the said Defendants. Whereas the said Master ought not to have certified that the said bill is impertinent in all such points."

Mr. Knight Bruce and Mr. Anderdon, for the Plaintiffs, in support of the exception to the report. If a suit becomes abated, the Plaintiff may, if he pleases, abandon his original bill and file an entirely [208] new bill. There is no case in which it has been held that a bill can be amended as against the devisee of the original Defendant. The proceeding against the devisee is supplemental: he cannot be compelled to answer to any matters in the original bill to which his testator has not fully answered. In this case a new bill was absolutely necessary; and nothing has been inserted in it which was not necessary to make the matter intelligible. It is taken for granted that the Plaintiffs might have amended their original bill; if that be so, what difference can it make to the Defendants, if the Plaintiffs, instead of amending their bill, introduce the same matter into their supplemental bill? The Master has applied a rule, applicable to one state of circumstances, to a totally different state of circumstances. Mitford on Pleadings, third edit., pages 55 and 77. *Backhouse v. Middleton* (2 Freem. 132; S. C. 1 Ch. Ca. 173).

Mr. Jacob and Mr. Koe, in support of the Master's report. A Plaintiff who files a supplemental bill is not at liberty to insert in it all the allegations of the original bill; but ought to introduce so much only of that bill as is necessary to shew his right to carry on the suit as against the new Defendant. What the Master has expunged in this case does not go to the right of the Plaintiffs to carry on the original suit against the devisees and executors of Thomas Woods: it is unnecessary for connecting the new Defendants with Thomas Woods. The Plaintiffs here seek not only to carry on the old suit, but to institute a new, concurrent suit; so that

there will be two suits going on, concurrently, for the same purpose; with the additional advantage of examining witnesses in the second suit, after they have [209] been examined in the first. *Devaynes v. Morris* (1 Myl. & Cr. 213); *Wagstaff v. Bryan* (1 Russ. & Myl. 28); *Onge v. Truelock* (2 Molloy's Rep. 31; see 39).

We now come to that part of the supplemental bill which relates to statements introduced from the answer of Thomas Woods. The only legitimate purpose of a supplemental bill is to bring new Defendants before the Court. It was not necessary to introduce the allegations in the answer any more than the allegations in the original bill for that purpose. The original suit determines what the rights of the parties were at the time of filing the original bill. No new matter can be introduced, unless it can be done by way of amendment. *Colclough v. Evans* (*ante*, vol. iv. p. 76); Mitf. on Plead. 53, 55.

As the exception to the report is worded, it cannot be sustained, if the Court shall be of opinion that the Master ought to have allowed any one of the exceptions. *Pearson v. Knapp* (1 Myl. & Keen, 312); *Moore v. Langford* (*ante*, vol. vi. p. 323).

Mr. Knight Bruce, in reply. *Colclough v. Evans* was decided on the ground that the issue was sought to be varied after replication filed. The case of *Crompton v. Wombwell* (*ante*, vol. iv. p. 628) decides that a supplemental bill may be filed for the purpose of putting newly-discovered matter in issue. That case is not at variance with *Colclough v. Evans*. [THE VICE-CHANCELLOR. In *Colclough v. Evans* the supplemental bill was filed for the purpose of putting in issue matter contradictory to the statements in the original bill.] *Wagstaff v. Bryan* decides merely that no new de-[210]-fence can be made where no new fact is stated. *Devaynes v. Morris* shews only that new facts cannot be put in issue where the rights of the parties have been decided upon. Mitf. on Plead. 27, 48, 59, 77.

THE VICE-CHANCELLOR. I will read over the whole of this bill before I decide upon the exception.

July 6. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the Plaintiffs filed their bill as parties claiming under Robert Woods, and they made a person of the name of Thomas Woods a party, and also a person of the name of Elizabeth Hulme. An answer to the bill was put in by Thomas Woods, and then Thomas Woods died, having made his will, under which those persons claim who referred the supplemental bill for impertinence. Upon the death of Thomas Woods, the Plaintiffs filed the bill in question; which is, properly speaking, an original bill as against those persons on whose application it was referred; but with respect to Elizabeth Hulme, it is not an original bill, because she was a party to the original bill; but as to the other Defendants the bill is an original bill; and it is in the nature of a supplemental bill: because it is filed for the purpose of carrying on the suit against those Defendants who took, by transmission of interest from Thomas Woods by means of his devise. I mention that because reference was made to several passages in Lord Redesdale's Treatise. Since the case was argued, I have looked over every portion of that work which seems to have any relation to the case.

In page 61 of the 4th edition (3d edition, p. 48) his Lordship says: "Where the imperfection of a suit arises [211] from a defect in the original bill or in some of the proceedings upon it, and not from any event subsequent to the institution of the suit, it may be added to by a supplemental bill merely." (1) In page 63 (3d edit. p. 49) his Lordship says: "When any event happens subsequent to the time of filing an original bill, which gives a new interest in the matter in dispute to any person not a party to the bill, as the birth of a tenant in tail, or a new interest to a party, as the happening of some other contingency, the defect may be supplied by a bill which is usually called a supplemental bill, and is, in fact, merely so with respect to the rest of the suit, though, with respect to its immediate object and against any new party, it has, in some degree, the effect of an original bill." Then in page 68 (3d edition, p. 53) he says: "But if the interest of a Defendant is not determined, and only becomes vested in another by an event subsequent to the institution of a suit, as in the case of alienation by deed or devise, or by bankruptcy or insolvency, the defect in the

(1) His Honor referred also to Mr. Jeremy's Note (c.) in p. 61.

suit may be supplied by supplemental bill, whether the suit is become defective merely, or abated as well as become defective." Then in pages 70 and 71 (3d edition, pp. 55, 56) he says: "If a suit becomes abated, and by any act besides the event by which the abatement happens, the rights of the parties are affected, as by a settlement or a devise under certain circumstances, though a bill of revivor merely may continue the suit so as to enable the parties to prosecute it, yet to bring before the Court the whole matter necessary for its consideration, the parties must, by supplemental bill, added to and made part of the bill of revivor, shew the settlement, or devise, or other act by which their rights are affected. And in the same manner if any other event which occasions an abatement is accompanied or followed by any matter [212] necessary to be stated to the Court, either to shew the rights of the parties, or to obtain the full benefit of the suit, beyond what is merely necessary to shew by or against whom the cause is to be revived, that matter must be set forth by way of supplemental bill added to the bill of revivor. If the death of a party, whose interest is not determined by his death, is attended with such a transmission of his interest that the title to it, as well as the person entitled, may be litigated in the Court of Chancery, as in the case of a devise of a real estate, the suit is not permitted to be continued by a bill of revivor. An original bill, upon which the title may be litigated, must be filed; and this bill will have so far the effect of a bill of revivor, that, if the title of the representative substituted by the act of the deceased party is established, the same benefit may be had of the proceedings upon the former bill as if the suit had been continued by a bill of revivor."

Then he says, in p. 75 (3d edition, p. 58): "A supplemental bill must state the original bill, and the proceedings thereon; and, if the supplemental bill is occasioned by an event subsequent to the original bill, it must state that event, and the consequent alteration with respect to the parties; and, in general, the supplemental bill must pray that all the Defendants may appear and answer to the charges it contains. For if the supplemental bill is not for a discovery merely, the cause must be heard upon the supplemental bill at the same time that it is heard upon the original bill, if it has not been before heard: and, if the cause has been before heard, it must be further heard upon the supplemental matter. If indeed the alteration or acquisition of interest happens to a Defendant, or a person necessary to be made a Defendant, the supplemental bill may be exhibited by the Plaintiff in the original suit against such person alone, [213] and may pray a decree upon the particular supplemental matter alleged against that person only; unless, which is frequently the case, the interests of the other Defendants may be affected by that decree."

And then he says, in pages 97 and 98 (3d edition, 76, 77): "It has been already mentioned that when the interest of a party dying is transmitted to another in such a manner that the transmission may be litigated in this Court, as in the case of a devise, the suit cannot be revived by or against the person to whom the interest is so transmitted; but that such person, if he succeeds to the interest of a Plaintiff, is entitled to the benefit of the former suit; and, if he succeeds to the interest of a Defendant, the Plaintiff is entitled to the benefit of the former suit against him; and that this benefit is to be obtained by an original bill in nature of a bill of revivor." "When the validity of the alleged transmission of interest is established, the party to the new bill shall be equally bound by or have advantage of the proceedings on the original bill, as if there had been such a privity between him and the party to the original bill claiming the same interest."

It is obvious that in these passages there is a good deal of repetition: but I think the substance of them is that where a bill is filed asking for relief against a given individual, and he dies, and, by any act of his own, as by a devise, his interest in the estate which is the subject of the suit is transmitted to other persons, those other persons are to be made parties to the suit by means of a bill which, with respect to them, is an original bill, but which, with respect to the original bill, is a bill of supplement. Lord Redesdale says that such a bill must state the original bill and the proceedings had upon it.

[214] Now, in this case, it is to be observed that the persons who referred the bill for impertinence were none of them parties to the original bill. It does not appear that they have office copies, or that they will be ever compelled to take office

copies of the original bill, or that they know anything of its contents. Now, the bill which has been filed against them is a bill which is framed in compliance with the rule laid down by Lord Redesdale. It begins by stating to some extent certain matters which are contained in the original bill. It then states that the answer of Thomas Woods was put in, and then the devolution of his interest to the other Defendants by means of the will which it sets forth. Then it reverts back to certain portions of the answer of Thomas Woods: and then it proceeds to make certain charges with respect to those matters of fact which appear to have been brought forward as a defence to the original bill by means of those portions of the answer which are stated.

It is observable that the answer of Thomas Woods has set forth certain deeds of the 5th of January 1781, of the 21st and 22d of June 1786, of the 1st and 2d of July 1786, and of the 10th of October 1789; none of which were at all noticed in the original bill. Now, where a Defendant has put in an answer to the original bill, and has set up certain matters as a defence, it is competent to the Plaintiff to amend his bill, and to state by way of pretence that the Defendant alleges so and so, and then to charge certain circumstances to meet those allegations. If that might be done in the case of an original bill against the original Defendant, it is obvious that the same thing in form cannot be done with respect to those persons who, for the first time, are made parties to the suit by an original bill in the nature of a supplemental bill: but it is not pretended to be said that the Plaintiff may not have the same advantage against [215] them as he might have had if they had been Defendants to the original bill? He cannot amend, because they were not parties to the original bill: but, I apprehend, it is perfectly competent to the Plaintiff, when he files the bill for the purpose of bringing the new Defendants before the Court, to take notice of the circumstances which are set up by way of defence, in the answer of the deceased Defendant, and then to charge such matters, and put such interrogatories, as he thinks proper, in order to see how the case will stand when they have answered his supplemental bill in the nature of an original bill.

Having stated this with regard to the general question, I come to the first six exceptions, which relate to those portions of the original bill which are set forth, certainly at some length, in the supplemental bill. But I must say that, knowing nothing of the matter myself, I should not have comprehended what the case was about, if I had not read those passages, excepting one passage which, it appears to me, was not necessary, that is, the passage which is the subject of the third exception. Referring to the will of Robert Woods, it is said that it was, "in the words and figures hereinafter set forth, the inditing and spelling thereof being set forth with the greatest accuracy." (1) I can easily conceive that the learned author of this bill may have thought that some preface was necessary for the purpose of introducing the document which follows: but still, if it was necessary to set out the will with all its errors, it would have been sufficient to allege that the testator made his will as follows, and then to have set out the [216] will. Therefore, if we are to proceed rigidly, I think that those who referred the bill for impertinence are entitled to the benefit of the third exception.

But, with respect to all the other exceptions, I think that the bill is incapable of being understood, unless you see the case which was made out by the principal facts stated in the original bill. I must assume that the Defendants know nothing of the original bill. Why, then, are they not to be informed by this bill (which is the first and only bill with respect to them) what are the contents of the original bill? My opinion therefore is that the matters which form the subject of the first six exceptions, omitting the third, are properly introduced into the bill.

I feel it painful to differ from one for whom I have so great a respect as I have for Master Dowdeswell; but I confess that I am not swayed by the reasons which he has given for allowing all the exceptions. He says, &c. (2) Why, of course, the original bill having been answered, the Plaintiffs could not compel the new Defendants

(1) Several words in the will were misspelt. It was not thought necessary to notice this part of the case in the statement, as it did not seem to be of any importance.

(2) His Honor here read the Master's reasons down to the words "original bill:" see *ante*, pp. 205, 206.

to answer it, unless they had thought proper to state the whole of that bill and put interrogatories, and require them to be answered. Then he says, &c.(1) Now advertg to the fact that these persons are, for the first time, brought into Court as Defendants, and are no parties to the original bill, and cannot be made to answer any of its contents, except by means of the supplemental bill, my opinion is that it was necessary, in order to shew what the nature of the case was be-[217]-tween the Plaintiffs and the original Defendant Thomas Woods, that those passages should be set forth which are set forth from the original bill, with the exception which I have stated.

Then, as I understand this record, after setting forth at some length those passages in the answer of Thomas Woods which relate to the deeds, it proceeds to introduce several other passages from that answer, and to charge new matter for the purpose of obviating the effect of them. With respect to the deeds it is alleged that they are now in the custody of the Defendants, which being clearly supplemental matter, is properly inserted in the bill; and, that being so, surely the Plaintiffs must have an opportunity of stating the matters in respect of which the production of those documents is material. Take, for instance, the deed of October 1789. With respect to that, the supplement bill states that it is imperfectly and insufficiently and also delusively set forth. That allegation would not have been intelligible unless so much of the answer had been set forth as shewed the way in which Thomas Woods had set out the deed, and the way in which he had spoken of it in his answer, by way of defence. The same observation appears to me to apply to the other matters.

I think, therefore, that this bill, in substance, is not impertinent. I do not mean to say that if more leisure had been allowed and more attention bestowed upon it, some of the passages might not have been stated more briefly; but I cannot think that the proper course is to call the attention of this Court to the question whether matter which has been stated in a certain number of words might not have been stated in fewer; [218] or that that is the question which I have to decide. The real question is whether the matter objected to is pertinent to the case; and I think it is pertinent, with the exception I have mentioned.

The Master has reported that, in his opinion, the bill is impertinent in all the points excepted to; and the exception to the report is in this form; that the Master ought not to have certified that the bill is impertinent in all such points. Therefore if I were of opinion that the greatest portion of the passages excepted to were impertinent, and that only a few of them were pertinent, still I must have decided that the report is wrong, for the Master has certified that all the passages objected to are impertinent. However, I think that the justice of the case will be best attained by allowing the exception of the Plaintiffs, so far as it extends to all the original exceptions except the third.

As one of the twenty-five exceptions has been sustained, the deposit must be divided between the parties in the proportion of one to twenty-five.

[219] JENNINGS v. NEWMAN. July 4, 8, 1839.

[S. C. 3 Jur. 748; varied 3 Jur. 1068.]

Will. Construction.

Testator gave £2000 to his daughter, Martha, for life, with a testamentary power to her to appoint that sum amongst her children; but if she should die without leaving a child, then he gave it to such of his children as should be living at his decease; and, if either of his said children should die before they should be entitled to receive a share, leaving issue, their shares should be distributed amongst their children. The testator left Martha and four other children living at his decease. Two of them died leaving issue, and two without issue; and, afterwards,

(1) His Honor here read the third paragraph of the Master's reasons.

Martha died without issue. Held, that her personal representatives were entitled to one-fifth of the fund.

William Newman, by his will, dated the 11th of September 1802, gave £2000 to trustees, in trust to pay the interest thereof to his daughter Martha Monk, for her separate use, for her life; and he empowered her to appoint the capital, by her will, unto and amongst her children: but, if she should happen to die without leaving any child or children lawfully begotten, then the testator gave the £2000 unto and amongst *such of his children as should be living at the time of his decease*, in equal shares and proportions: "*And if it shall happen that either of my said children shall die before they shall be entitled to receive a share or proportion of the said £2000 leaving issue*, then I will and direct that the share of such of my deceased child or children, of and in the said sum of £2000 and the stocks or funds in which the same shall or may be invested, shall be distributed equally amongst such of my grandchildren as are the children of my said deceased child; or, if there be only one such grandchild, then to such only grandchild."

The testator died shortly after the date of his will, leaving Martha Monk and four other children him surviving. In February 1839 Martha Monk died without issue, having survived her brothers and sisters, two of whom died without issue, and two leaving issue. The [220] £2000 having been paid into Court, and invested in stock under an order in the cause made in 1805, a petition was presented, on Mrs. Monk's death, by her personal representatives, praying that the stock might be sold, and one-fifth of the proceeds paid to the Petitioners.

Mr. Knight Bruce and Mr. James Parker, for the Petitioners. The representatives of Mrs. Monk are entitled to a share of the fund, under the bequest to such of the testator's children as should be living at the time of his decease. It is suggested, however, that Mrs. Monk and her representatives are excluded from participating in the fund, by reason of the words, "*And if it shall happen that either of my said children shall happen to die before they shall be entitled to receive a share or proportion of the said £2000, then I will and direct*," &c. But, in order to have that effect, the words, "*other than and except my said daughter Martha Monk*," must be inserted after the words, "*such of my children as shall be living at the time of my decease*." The Court, in construing a will, never supplies words, or limits the operation of plain words by inference or conjecture. The testator having, in a certain event, given the £2000 unto and amongst such of his children as should be living at his decease, proceeds to point out how the shares of certain of those children shall be subdivided on the happening of another event totally distinct from the former. That further event, it is true, could not happen with respect to Mrs. Monk, one of the children; but is that any ground for inferring that the testator intended to exclude her from taking any share in the £2000; and that, too, after he had given her a share in the plainest terms? Suppose that Mrs. Monk [221] had left grandchildren only; they, according to the construction contended for on the other side, would have been excluded. But what reason is there for saying that the testator did not intend to benefit them, as well as his other grandchildren for whom he has expressly provided? The representatives of each of the testator's other children who died without issue are entitled to a share; why then should the representatives of Mrs. Monk alone be excluded from participating in the fund? *Smither v. Willock* (9 Ves. 233); *Holloway v. Holloway* (5 Ves. 399); *Harrison v. Foreman* (*Ibid.* 207); *Elmsley v. Young* (2 Myl. & Keen, 82 and 780); *Pearce v. Vincent* (2 Keen, 230; and 2 Bing. N. C. 328).

Mr. Jacob and Mr. Tennant appeared for the testator's grandchildren and the representatives of his children who died without issue, except Mrs. Monk. But,

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: *Primâ facie*, the words: "*Such of my children as shall be living at the time of my decease*," will include Mrs. Monk: and the sole question is whether the meaning of those words is not, of necessity, controlled by the subsequent words, "*but if the said Martha Monk shall happen to die without leaving any child or children lawfully begotten, then I give and bequeath the said principal sum of £2000 and the stocks or funds on which the same shall or may be invested, together with the interest and dividends*"

then due thereon, unto and amongst such of my children as shall be living at the time of my decease, in equal shares and propor-[222]-tions: and, if it shall happen that either of my said children shall die before they shall be entitled to receive a share or proportion of the said £2000 leaving issue, then I will and direct that the share of such my deceased child or children of and in the said sum of £2000 and the stocks or funds in which the same shall or may be invested, shall be distributed, equally, amongst such of my grandchildren as are the children of my said deceased child, and, if there be only one such grandchild, then to such only grandchild." It seems to me, from those words, that the persons who are intended by the testator to take are such as may, by possibility, die leaving issue. The word "issue" must here mean child or children; for, in the subsequent part of the sentence, the testator speaks of grandchildren as the issue of a child; and, in my opinion, the testator is speaking of those children as a class, with regard to whom it may be predicated that any one or more of them may, by possibility, die leaving a child or children; which is utterly inconsistent with Mrs. Monk's taking under the gift over: for that gift over was to take effect only on the contingency of Mrs. Monk dying without leaving a child. In my opinion, therefore, the personal representatives of Mrs. Monk are not entitled to any portion of the fund in question, the contingency on which the gift over was to take effect (with reference to which the preceding words must be interpreted), being plainly inapplicable to her.

The Petitioners presented a petition to the Lord Chancellor, praying that the Vice-Chancellor's order might be varied, and that the Petitioners, as the personal representatives of Mrs. Monk, might be declared to be entitled to a share of the fund. On the hearing [223] of that petition *Butler v. Bushnell* (3 Myl. & Keen, 232), and *Bird v. Wood* (2 Sim. & Stu. 400), were cited for the Respondents.

The Lord Chancellor said that there could be no doubt that the bequest to such of the children of the testator as should be living at his decease would include Mrs. Monk; and the only question was whether the words that followed were of sufficient force to control the effect of that bequest and exclude Mrs. Monk. The persons who were to take under the gift over were, in the first instance, the children of the testator who should be living at his decease: but, as that gift over could not take effect until Mrs. Monk's death, it occurred to the testator that some of those persons might die in the meantime leaving children; and, therefore, he provided that the shares of those who might be dead when the gift over should take effect should go to their children. That provision was applicable to some of the children, but was not strictly applicable to Mrs. Monk: but why should it have the effect of restraining the prior gift under which she was plainly entitled to take a share of the fund? The Court was bound to give full effect, if possible, to every part of a will; and, therefore, the first rule of construction was to strive to make all the provisions in it consistent with one another. The Court was not at liberty, by conjecture or inference from some of the words in a will, to limit the operation of other words, the meaning and effect of which when taken by themselves did not admit of doubt. The will contained a gift plainly applicable to Mrs. Monk, followed by a provision which, though not strictly applicable to her, was not necessarily inconsistent with the plain and positive terms of the prior gift; and, consequently, the Court ought not to restrict in any degree the operation of that prior gift.

[224] His Lordship's order was that the Vice-Chancellor's order should be varied: that it should be referred to the Master to divide the residue of the proceeds of the stock, after payment of costs, into fifths, and that one of those fifths should be paid to the Petitioners as the representatives of Mrs. Monk.

[224] SPRY v. BROMFIELD. *March 12, 1841.*

[S. C. 9 Sim. 534; 10 Sim. 94; 7 M. & W. 545.]

On this day the demurrer came on to be further argued, on the return of the certificate.⁽¹⁾

On perusing the report, *ante*, p. 94, it will be observed that the case made for the opinion of the Barons of the Exchequer stated that a disposition had been made by Eliza Bromfield and W. A. Bromfield, under the Act for Abolishing Fines and Recoveries, and that it contained some other particulars which were not mentioned in the bill, owing to the same having been unknown to the Plaintiff when the bill was filed.

Mr. Knight Bruce and Mr. Malins, for the Plaintiff, argued against the certificate, and asked for another case to be sent to the Court of Queen's Bench.

Mr. Jacob, Mr. Wilbraham and Mr. Hodgson, for the Defendants, supported the certificate.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as the case stated the above-mentioned disposition to have been made by the [225] Defendants, and the question to be: "what estate do the Defendants take," &c.; it was not framed so as to obtain the opinion of the Barons upon the effect of the limitation, in the will, to the children of John Bromfield. His Honor then observed upon the inartificial language of the will, and added that the question seemed to be so doubtful that, as the heir asked it, he must send a case for the opinion of the Judges of the Queen's Bench, in which the statement as to the before-mentioned disposition should be omitted, and the question should be, what estate did the Defendants take, at the death of their mother, in the lands at Boldre devised by the will?

[225] WALLIS v. FREESTONE. *June 28, 1839.*

Power. Perpetuity. Remoteness.

An estate was devised to O. W. for life, with remainder to trustees to preserve, &c., with remainder to O. W.'s first and other sons successively, in tail, with remainder to the trustees and their heirs, in trust for the separate use of the testator's niece, for her life, with remainder to the use of her children, in tail, with remainder to the testator's right heirs. Held that, though the power was given for an indefinite period, yet, as either of the tenants for life might concur with his or her children in destroying it, it was not void.

This suit was instituted for the purpose of obtaining the opinion of the Court as to the validity of a power contained in the will of Thomas Clark, Esq., in pursuance of which the surviving trustee of the will, with the concurrence of the tenant for life, and all the other parties beneficially interested under the will who were of age, had agreed to grant to the Defendant, Ward, a lease of the testator's estate at Stow Lawn, in the county of Stafford, and of the mines under it.

The testator devised the estate in question, consisting of a messuage, barn and other buildings, and certain [226] pieces of land, to the use of the Plaintiff, Owen Wallis, during his life, without impeachment of waste, with remainder to the use of trustees and their heirs during the life of Owen Wallis, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of Owen Wallis, successively in tail, with remainder to the use of the daughters of Owen Wallis, as tenants in common in tail, with cross-remainders amongst them in tail, with remainder to the use of the trustees and their heirs, upon trust for the testator's nieces, Mary Morton, Ann Hayes and Eliza Wallis, as tenants in common, and to pay the rents, in equal shares, as the same should be received, during their respective natural lives,

(1) By a mistake in the certificate William Arnold Bromfield was called John Arnold Bromfield.

either into their several hands or to such other persons as each of his said nieces should, from time to time as the same should become due, and not by way of charge or anticipation, appoint to receive her share of the same, to the intent that the same might be for her separate use; and, in case any one or more of his said nieces should die without leaving issue, then the testator directed that her or their share or shares should be upon such trust for the survivors or survivor of them as were therein expressed of their respective original shares; and that, from and after the decease of any one or more of his said nieces leaving issue, then the one-third or other greater part or share of the said hereditaments to the rents, profits and produce whereof she should be entitled at the time of her death, and every other contingent share, interest or estate therein, should be to the use of all and every such one or more, exclusively of the others or other of her children or remoter issue, for such estates, &c., as such niece or nieces so leaving issue should, by her will, appoint, and, in default of such appointment, to the use of all and every the children or child of such [227] his niece equally as tenants in common in tail, with cross-remainders between them in tail; and, in default of all such issue of all the testator's said nieces, then to the use of his own right heirs: provided that it should be lawful for every person and persons who, by virtue of the will, should be tenant or tenants for life in possession, or entitled to the rents and profits of the hereditaments, and also for the trustees and the survivor of them, his executors or administrators, from time to time and at all times during the minority of any child or children who, by virtue of any of the limitations aforesaid, should be entitled to the possession of the hereditaments, to lease all or any part or parts thereof, for any term not exceeding 21 years from the making thereof, at the best yearly rent, &c.; and also that it should be lawful for such person or persons or trustees or trustee as aforesaid, in like manner, from time to time, to lease to any person or persons, for any term or terms of years not exceeding 10 years, for such price or other consideration in rent or money or otherwise as, by the trustees or trustee for the time being, should be deemed reasonable, any part or parts of the lands that might appear to them or him proper to be let, for the purpose of getting clay, brickearth, marl, sand or gravel: and the testator declared that every lease to be made pursuant to either of the powers aforesaid should contain a proviso for determining the term of years thereby demised, upon granting any lease for getting the mines and minerals under the lands, by virtue of the power thereafter contained: provided that it should be lawful for the trustees or trustee for the time being to grant, demise and lease all or any part of the messuages, lands and hereditaments for any term or terms of years, not exceeding 30 years in possession, and all or any of the mines of coal, clay and ironstone, or other mines and minerals which [228] were then known or should thereafter be discovered to be in and under all or any parts of the hereditaments, together with full power for the lessee or lessees to use all lawful means for finding, working and getting any coal, ironstone, or other mines or minerals, and for carrying away the same, so as, upon every such lease, there should be reserved the then annual surface rent at the least, and such consideration for the mines and liberties aforesaid, whether by royalties or instalments of money in gross, to be incident to the immediate reversion, as the trustees or trustee for the time being should consider to be a fair equivalent for the same; and so as there should be contained powers of distress and re-entry, and all other clauses, covenants and agreements usual or necessary in leases of mines, and so as the lessee or lessees should execute and deliver to the lessors a duplicate or counterpart of every such lease.

At the time when the bill was filed Owen Wallis was adult and a bachelor; Mary Morton was dead without issue; Eliza Wallis was married to Henry Barrett, but had no issue; and Ann Hayes was married, and had issue two infant children, who were made Defendants.

The bill stated that the Defendant, Ward, alleged that the power in pursuance of which the agreement between him and the surviving trustee was made was given, by the testator's will, for an indefinite or unlimited space of time, and therefore was void at law; but the Plaintiffs charged that, according to the true intent and meaning of the will, the power would cease so soon as the hereditaments should vest in any person or persons, for any estate of inheritance in possession, and such person or persons should attain 21, and that therefore the power was good and valid.

[229] The bill prayed that the power to lease the hereditaments for any term not exceeding 30 years in possession, and all or any of the mines and minerals in and under the same, might be declared to be good and valid, and that the agreement might be specifically performed.

Mr. Treslove and Mr. Simons, for the Plaintiffs.

Mr. Rogers, for some of the Defendants.

Mr. Amphlett, for the Defendants the infant children of Mr. and Mrs. Hayes, contended that the power to lease the Stow Lawn estate and the mines and minerals under it, being wholly unrestricted as to the time during which it was to remain in force and capable of being exercised, was void; and he referred to *Ware v. Polhill* (11 Ves. 257).

THE VICE-CHANCELLOR [Sir L. Shadwell], after stating the limitations of the estate contained in the will, said that if Owen Wallis should have a son who should attain 21, he and his son might suffer a recovery which would get rid of the estate vested in the trustees; or, if the testator's nieces should have issue who should attain 21, they also might suffer a recovery, which would entitle them to have their equitable interests clothed with the legal estate; and that, in either case, the power would be destroyed; and, consequently, that the objection to the power on the ground of perpetuity could not be sustained. (See *Waring v. Coventry*, 1 Myl. & Keen, 249; and *Biddle v. Perkins*, ante, vol. iv. p. 135.)

His Honor declared the power to be good, and decreed a specific performance of the agreement.

[230] BANNATYNE v. LEADER. July 6, 8, 1839.

[S. C. 10 Sim. 350.]

Production of Documents. Defendant.

If a Defendant denies the Plaintiff's title, and says positively that the documents in his custody, relating to the matters in the bill, will not shew the Plaintiff's title, the Court will not order him to produce them; but if he says merely that he *believes* that they will not shew the Plaintiff's title, the Court will order him to produce them.

The Plaintiffs were the assignees of John Maberly, a bankrupt, who, prior to his bankruptcy, had carried on the business of a linen manufacturer, in co-partnership with John Baker Richards, since deceased. On the 9th of May 1831 Maberly sold his share of the business and the property belonging thereto, to the Defendant Leader; but the dissolution of the partnership between Maberly and Richards, and the formation of the new partnership between Richards and Leader was not advertised in the *Gazette* until the 3d of January 1832. The advertisement, however, was dated on the 9th of May 1831. On the 26th of January 1832 the fiat issued under which Maberly was declared a bankrupt. The object of the bill was to set aside the sale on the ground that the property sold was allowed by Leader to remain in the order and disposition of Maberly at the time of his bankruptcy. The bill alleged that, from and after the 9th of May 1831, and thenceforward, up to and from and after the 1st day of July 1831, when an indenture of assignment therein set forth was executed by Maberly, and when he committed an act of bankruptcy by executing the same, the linen manufactories and business, by the consent and permission of Leader, were and continued to be carried on by Maberly and Richards, in the same manner as the same had been before carried on: and that, by the consent and permission of Leader, the same continued to be carried on under the old style or firm of Maberly & Co.; and that, by the consent and permission of Leader, the same were so carried on, until the [231] 3d day of January 1832, as thereafter mentioned, and as if Leader had no share or interest in the same. The bill charged, in the usual manner, that the Defendant had, in his custody, divers books of account, books, ledgers, &c., relating to the matters contained in the bill, and whereby the truth of them, or some of them,

would appear ; and, particularly, whereby it would appear that Maberly had committed, on the 9th of May 1831, and on the 1st of July 1831, and on other days, acts of bankruptcy, prior to the 31st of December 1831 ; and that Leader ought to set forth a list of all such documents, &c.

Leader, in his answer, positively denied all the allegations and charges in the bill, upon which the Plaintiffs founded their title to the relief prayed. He said that, during the treaty for the purchase and when the agreement for the same was come to, it was proposed by Maberly to the Defendant and John Baker Richards, that the name or style of the firm of Maberly & Co., under which the linen manufactories and the establishments therewith connected had been carried on, should not be changed, or the retirement of Maberly from the business be publicly announced or published in the *Gazette* until after the 31st of December 1831, and that the Defendant and J. B. Richards acquiesced in such proposal by reason of Maberly stating that an earlier publication of the dissolution of the partnership would be prejudicial to his return on the then expected dissolution of Parliament, for the borough of Abingdon, which he then represented, and that it might cause a run upon his banks in Scotland before he got the necessary funds to meet it, and which he should be enabled to do by means of the securities proposed to be released and the money to be paid by the Defendant ; but that, [232] on the 9th of May 1831, Maberly and Richards signed their names to the following memorandum at the foot of the agreement of the 9th of May 1831 :—"The partnership hitherto subsisting between the undersigned, as linen manufacturers, under the firm of Maberly & Co., is dissolved by mutual consent ;" that the Plaintiffs, as Maberly's assignees, brought an action of trover, in the Court of Common Pleas, against the assignees under the indenture of the 1st of July 1831, for the purpose of trying the validity of the assignment ; that at the trial of the action in July 1833 a verdict was found for the Defendants, and thereby the validity of the indenture was established as against Maberly's creditors and assignees : and it was also established that the making of the indenture was not an act of bankruptcy, and that it was not executed in contemplation of bankruptcy. Leader, in his answer, further stated that there were, in the joint custody of himself and of the other Defendants (who had become entitled to Richards's share in the partnership), several documents, &c., relating to the matters mentioned in the bill ; but that the truth of such matters, *as he believed*, did not thereby appear, further or otherwise than as they were therein stated ; and that *he believed* that it did not appear, by such documents or any of them, that Maberly had committed, on the 9th of May 1831, and on the 1st of July 1831, or on either of such days, or on any other days, any acts of bankruptcy, prior to the 1st of January 1832 ; and that he had set forth a list of such documents in the second schedule to his answer.

Mr. Jacob and Mr. G. Richards, for the Plaintiffs, now moved that those documents might be produced. They said that the books and other documents moved for were connected with the trade from 1825 down to 1837 ; that the production of them was essential to the purposes [233] of the suit, in order to shew what the trade was, and how it was carried on, and particularly to shew what was done between the date of the agreement and the time when the dissolution of the partnership between Maberly and Richards, and the formation of the partnership between Richards and Leader was announced to the world by the advertisement in the *Gazette*.

Mr. Knight Bruce, Mr. Barber, and Mr. Walford, appeared for Leader ; and Mr. Wigram and Mr. Reynolds for the other Defendants who claimed under Richards. The question is whether a person claiming to be a partner is entitled to see the books of the partnership before it has been determined whether he is a partner or not.

If the title of the Plaintiff is denied by the answer, that denial gives the Plaintiff the same benefit, with respect to all subordinate matters, as he would have had if he had pleaded to the bill. The allegation that the assignment of the 1st July 1831 was an act of bankruptcy, and all the other statements and charges on which the Plaintiffs found their title to the relief asked, are expressly denied by the answer. Besides all question as to the assignment having been an act of bankruptcy, was set at rest by the verdict in the action of trover. If the title of the Plaintiff is denied by the answer, he is not entitled to the production of any of the documents in the

Defendant's custody, except such as will shew his title. The Lord Chancellor so decided in — *v. Flint* (not reported); but a still more important case on the same subject has been lately decided by the same learned Judge; *Adams v. Fisher* (3 Myl. & Cr. 526; see p. 542, *et seq.*). If it had been [234] alleged that the documents to which the motion relates proved the act of bankruptcy, then the Plaintiffs might have been entitled to see them; but what the documents are wanted for is to shew that the property sold to Leader was in the order and disposition of Maberly on the 3d of January 1832; but until the Plaintiffs have shewn that Maberly was a bankrupt on that day, they have no right whatever to question the transaction between him and Leader.

If a person claiming to be a creditor of a testator files a bill against the executor, for the purpose of obtaining payment of his debt, and the executor in his answer denies the debt, can the Plaintiff move to have money belonging to the testator's estate, admitted by the executor to be in his hands, paid into Court?

The documents sought to be produced are in the joint custody of Leader and the other Defendants; consequently no order can be made on the motion, which will not affect those other Defendants as well as Leader: but there is no privity whatever between the Plaintiffs and those Defendants who claim under Richards.

The cases of *Taylor v. Milner* (11 Ves. 41), *Atkyns v. Wright* (14 Ves. 211), and *Fenwick v. Reel* (1 Mer. 114), were referred to by Mr. Reynolds.

Mr. Jacob, in reply, said that in *Adams v. Fisher* the Lord Chancellor proceeded on the ground that the documents were not material to be produced in order to enable the Plaintiff to get a decree; that they were not material to shew the connexion which existed between *Adams v. Fisher*; and he referred to the last paragraph of the judgment, in page 546 of the report.

[235] THE VICE-CHANCELLOR, in the course of the argument, said: I do not see any sort of admission in the answer that the documents, if they were produced, would prove one single allegation in the bill.

Let me put this case. Suppose that a person claiming to be a creditor of a testator had filed a bill against the executor, and said that he was a creditor, and that the executor had got in his possession all the papers and writings that ever belonged to the testator, and, if they were produced, it would appear that he was a creditor: and that the executor, by his answer, denied the assertion that the Plaintiff was a creditor, and, moreover, went on to state that he had all the papers of the testator in his possession, but denied that any of them would make out the fact that the Plaintiff was a creditor; could this Court order all or any of those papers to be produced? And yet it is perfectly possible that it might be all fallacious, and that the documents, if they were produced, would prove the Plaintiff's case.

July 8. THE VICE-CHANCELLOR [Sir L. Shadwell]. What influences my mind most is that passage in the answer in which the Defendant has not, in my opinion, averred with sufficient positiveness that the documents would not make out the Plaintiff's case. I confess that though, for many purposes, what a Defendant states on his belief is considered as substantially putting the fact in issue; yet, where the question depends on the materiality of the document with respect to their contents, if the Defendant does not choose to swear positively, as he might and as he would be perfectly jus-[236]-tified in doing if he had read them through and was satisfied, in his own mind, that they did not contain that which would make out the Plaintiff's case, but thinks proper to admit the documents to be in his possession, and then to state (in the manner in which this Defendant has done) that he merely believes that they will not make out the Plaintiff's case, I cannot but think that the Defendant does place the matter in such a situation as to make it consistent with the fair investigation of the truth and justice of the case that the documents should be produced. And it is, therefore, on account of the particular mode in which this answer is framed that I think the books ought to be produced.

[236] NETTLESHIPP v. NETTLESHIPP. July 5, 12, 1839.*Husband and Wife. Separate Property. Lunatic.*

A married lady, who was entitled to an income of £500 a year out of the property in the cause, being of unsound mind, the Court ordered the whole of the £500 to be paid to her husband; but directed the arrears and future payments of an annuity of £100, to which she was entitled for her separate use, to be carried to her separate account, notwithstanding the husband deposed that the expences incurred by him in her care and maintenance exceeded £500 a year.

The Defendant Mary, the wife of the Defendant William Cator, was entitled, under the settlement on her marriage with her first husband, who was the testator in the cause, to an annuity of £400, and to the dividends of a sum of stock, amounting to £108, for her life; and, under the testator's will, she was entitled to an annuity of £100 for her separate use. After her second marriage, she became of unsound mind.

On the hearing of the cause for further directions, Mr. Monro, for Mr. Cator, submitted that, under the **[237]** circumstances, the whole of Mrs. Cator's income, including the annuity of £100, ought to be paid to her husband. *Brodie v. Barry* (2 Ves. & Bea. 36).

THE VICE-CHANCELLOR ordered the annuity of £400 and the dividends of the stock to be paid to Mr. Cator, but directed that the arrears and future payments of the annuity of £100 should be carried to Mrs. Cator's separate account and accumulated.

July 12. On this day Mr. Monro renewed his application with respect to the annuity of £100, and read an affidavit made by Mr. Cator, stating that he had agreed with a physician, at Southall in Middlesex, to take the custody of and to maintain Mrs. Cator, for the annual sum of £500; and that he was liable to the payment of such further sums as might be required for providing her with clothes and other necessities: that he was frequently required to visit his wife, and was put to further expence in travelling to and from his residence at Woolwich on those occasions: that he had been advised by the physician that it would benefit Mrs. Cator's health to remove her occasionally to the seaside, which would put him to further expence: that, save as aforesaid, he was not entitled to any fortune in right of his wife, and unless the annuity of £100 was allowed to him, he might be unable to pay the annual sums chargeable to him on her account, and consequently might be under the necessity of removing her from the custody of the physician, and such removal would, as he believed, diminish her comforts, materially increase her malady, and retard her recovery.

[238] THE VICE-CHANCELLOR [Sir L. Shadwell] said that, at any rate, before he could make any order as to the annuity of £100, he must have a more positive affidavit from Mr. Cator as to his own means.(1)

Mr. Bacon and Mr. Lambert were the other counsel in the cause.

[238] SEMPLE v. PRICE. July 19, 1839.*Pleading. Supplemental Bill. Practice.*

A necessary party may be brought before the Court by supplemental bill where the cause is in such a stage that the original bill cannot be amended.

The object of the original bill in this case was to charge Gibson, who was the surviving trustee of the Plaintiff's marriage settlement, with a breach of trust in selling out a sum of stock, part of the settled property. Gibson, by his answer,

(1) It did not appear that any further affidavit was made.

submitted that the personal representative of W. Price, his late co-trustee, was a necessary party to the suit. The Plaintiff, however, did not amend her bill; but, after the cause was at issue and a commission had issued for the examination of witnesses, she filed a supplemental bill against Mary Price, the personal representative of W. Price, stating that she had lately discovered that the breach of trust was committed in Price's lifetime, and praying that his estate might be made responsible for it.

Mary Price demurred to the supplemental bill on the following amongst other grounds; namely, that she was not a party to the original bill, and that no new matter was alleged in the supplemental bill to have arisen since the filing of the original bill.

[239] Mr. Koe, in support of the demurrer, referred to Lord Lyndhurst's 15th Order, and said that the filing of the supplemental bill was an attempt to evade that order. He also cited *Baldwin v. Mackown* (3 Atk. 817).

Mr. Coleridge, in support of the supplemental bill, said that it was laid down by Lord Redesdale that a supplemental bill may be filed to put a new matter in issue, or to add parties where the proceedings are in such a state that the original bill cannot be amended for the purpose. (Treat. on Plead. 48 and 49.) He referred also to *Colclough v. Evans* (ante, vol. iv. p. 76), *Crompton v. Wombwell* (*Ibid.* 628; see ante, 209), and *Goodwin v. Goodwin* (3 Atk. 370).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In *Colclough v. Evans* the supplemental bill sought to change the issue raised by the original bill, and the demurrer to it was allowed on that ground.

But in all cases where, by inadvertence, a necessary party has not been brought before the Court, and the suit has got to that stage that the Plaintiff cannot amend his bill, the Court will allow him to file a supplemental bill for the purpose of supplying the defect. All that the 15th Order prescribes is that the new party shall not be brought before the Court by amendment.

[240] BLANSHARD v. DREW.(1) July 20, 1839.

Practice. Dismissal. Costs.

After the filing of the bill the Defendant took the benefit of the Insolvent Debtors Act, and in his schedule admitted the Plaintiff to be a creditor for the subject-matter of the suit. The Defendant afterwards moved to dismiss the bill for want of prosecution, with costs. The Court ordered the bill to be dismissed, but without costs, the Defendant having, by his own act, destroyed the subject-matter of the suit.

Mr. Hetherington, for the Defendant, moved to dismiss the bill for want of prosecution, with costs. He insisted that although the Defendant had, since the institution of the suit, become insolvent, the usual motion could be made to dismiss for want of prosecution with costs, on the authority of *Monteith v. Taylor* (9 Ves. 615).

Mr. Cooke, for the Plaintiff, said that, since the bill was filed, the Defendant had taken the benefit of the Insolvent Debtors Act: that he had in his schedule admitted the Plaintiff to be a creditor in respect of the subject-matter of this suit, and that he had no assets; and, therefore, that the Defendant having, by his own act, destroyed the subject of the suit, the bill ought to be dismissed without costs: and he cited *Knor v. Brown* (2 Bro. C. C. 186).

THE VICE-CHANCELLOR [Sir L. Shadwell], under the above circumstances, ordered the bill to be dismissed without costs.

(1) *Ex relatione.*

[241] MATCHITT v. PALMER.(1) July 20, 1839.

Practice. Amendment.

Where an order to amend may be made by the Master, as against some of the Defendants, but must be made by the Court as against another of them, the Plaintiff may obtain the order from the Court as against all the Defendants.

In this case the bill was filed against Palmer as sole Defendant, the personal representative of the testator in the cause, for payment of a legacy. Palmer put in a full answer, from which it appeared that the Defendant had applied the whole of the assets in payment of debts. The Plaintiffs, being advised that, upon the true construction of the will, the debts were charged on the real estate, and that they would have a right to have the assets marshalled, obtained an order *from the Court* (the time within which it could have been obtained from the Master having long previously expired), giving them liberty to amend; and they accordingly amended their bill by setting out the whole of the will, and making the heir at law and the several persons interested in the real estate parties Defendants, and praying that the assets might be marshalled in favour of their legacy.

The several Defendants having put in sufficient answers to the amended bill, the Plaintiffs now applied specially to the Court for leave to make further amendments (amending the Defendants' office copies of the bill), on the usual affidavit that the amendments had been settled by counsel, and were not vexatious or for the purpose of delay.

Mr. Mylne, for the motion, submitted that he was right in coming to the Court and not going to the [242] Master; inasmuch as the former amendment as against Palmer was necessarily obtained by an application to the Court; and that, having once come to the Court as against him, it was not afterwards competent to the Plaintiffs to go to the Master for any further leave to amend. *Attorney-General v. Nethercoat* (2 Myl. & Craig, 604).

Mr. James Parker, *contrà*, contended that, as against the other Defendants, this was an original bill, and the Plaintiffs, under the strict terms of the 13th Order, might and were indeed bound to apply to the discretion of the Master; the six weeks after the answers were to be deemed sufficient not having yet expired.

THE VICE-CHANCELLOR said that the order sought to be obtained was to be made, not only against those parties who had been made Defendants by amendment, but also against Palmer, the original Defendant; and, therefore, if, as he thought, the application ought to be made to the Court so far as Palmer was concerned, no distinction could be made as to the other Defendants. The motion must therefore be granted.

[243] WOODROFFE v. DANIEL. July 22, 1839.

Defendant. Exception. Insufficiency.

A bill interrogated to all the statements and charges except one, and, the Defendant having omitted to answer it, the Plaintiff excepted; but, in his exception, he set forth the statement shortly and in the form of a question. Held, that the statement being material ought to have been answered, and that the exception was sufficient, as it plainly pointed out the passage to which it applied.

The bill interrogated to all the allegations and charges contained in it, except one. The answer having been put in, the Plaintiff took several exceptions to it for insufficiency. One of the exceptions related to the allegation which was not interrogated to, and set it forth shortly and in the form of a question. The Master having allowed the exceptions, the Defendant excepted to his report.

(1) *Ex relatione*, Mr. Mylne.

Mr. Knight Bruce, for the Defendant, said that a Plaintiff had no right to complain that a statement in his bill, which he had not thought proper to interrogate to, and, therefore, had treated as immaterial, was not answered: that, at all events, he was not at liberty to abbreviate the statement or to turn it into a question; or in any manner to alter the language of the bill; but that he ought to have framed his exception thus: "For that the said Defendant hath not answered according to the best of his knowledge, remembrance, information and belief, the following charge, that is to say," &c. *Hodgson v. Butterfield* (2 Sim. & Stu. 236).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The allegation to which the exception relates seems to be material; and I have always understood the practice to be that every material allegation and charge in a bill must be answered, whether it is interrogated to or not.

[244] With respect to the other objection, namely, that the Plaintiff has not sufficiently pointed out the passage in the bill which he contends is not answered, my opinion is that the Plaintiff is not bound to set out in his exception every word of the passage which he alleges is not answered; but that he does enough if he sufficiently manifests what part of the bill his exception applies to.

I think, therefore, that the exception in question was properly allowed by the Master.

[244] CHARLOTTE REDDEL v. DOBREE. July 22, 1839.

[S. C. 3 Jur. 722. See *Solicitor to the Treasury v. Lewis* [1900], 2 Ch. 817.]

Donatio Mortis Causâ.

A. being in a declining state of health delivered to B. a locked cash-box, and told her to go at his death to his son for the key; and that the box contained money for herself, and entirely at her disposal after he was gone; but that he should want it every three months whilst he lived. The box was twice delivered to A. by his desire, and he delivered it again to B., and it was in her possession at his death. The box was broken open by B. after A.'s death, and contained a cheque for £500 drawn by C. in favour of A., and enclosed in a cover indorsed with B.'s name; and the key (which A.'s son had refused to deliver to B.) had a piece of bone attached to it with B.'s name written on it. Held, that there was no *donatio mortis causâ*.

The bill stated, amongst other things, that, some years previously to the death of John Dobree, a considerable intimacy subsisted between him and the Plaintiff; and that she was in the habit of frequently residing at his house at Brixton; and that such intimacy continued up to the time of his death; and that J. Dobree had great confidence in the Plaintiff, and always treated her with much kindness and attention, and expressed great regard for her, and frequently stated to her and also to other persons that he intended to make some pecu-[245]-niary provision for her in the event of his death: that John Dobree was considerably advanced in years, and was possessed of a large fortune; that in August 1837 John Dobree, whose health had been for some time previously, and then was, in an infirm and declining condition, was induced at the instance and by the recommendation of the Plaintiff to consult a physician; shortly after, or about which time he was desirous of making some provision or gift for the Plaintiff and also for her sister, Allison Kyle Reddel, to take effect upon the event of his death; and in September 1837 he procured a cash-box with a patent lock thereto which was opened by a key, to which was attached a small piece of bone on which the Plaintiff's name was engraved or written: that the Defendant, Vaughan, who had succeeded John Dobree in his business of a silversmith, was at the time before mentioned indebted to John Dobree in a very large sum of money: that John Dobree about the same time obtained from Vaughan two cheques drawn by him upon Ransom & Co., his bankers, payable to John Dobree or bearer, one for £500 and the other for £200; the first of which was intended for the benefit

of the Plaintiff, and the other for her sister; that John Dobree deposited the two cheques in the cash-box, and, on or about the 10th of September 1837, *delivered the box locked up with the two cheques therein to the Plaintiff*, and at the same time said to the Plaintiff: "At my death go to my son and ask him for the key, which will be found in the iron chest. If he will not give up the key, take the box to Vaughan and he will break it open. It contains money: take care of it: it will make hundreds difference to you: *it is for yourself and sister, and entirely at your own disposal after I am gone; but I shall want it from you every three months while I live:*" that at the same time John Dobree shewed the Plaintiff the [246] envelopes containing the cheques with the addresses thereon; but the Plaintiff was at that time unacquainted with the particular contents of the box or the particulars relating thereto, except so far as she was enabled to collect from what was so said to her by John Dobree; that the box having from that time remained in the Plaintiff's possession, John Dobree, some time in December 1837, called upon her and requested to have the box delivered to him, but without stating any object or purpose in that behalf; and the box was accordingly delivered to him in the same state as when originally delivered by him to the Plaintiff; and the same was carried away by him, and on the same day he delivered back the box, locked as before, to the Plaintiff, but without saying anything whatever on the subject; that, at the latter end of March 1838, John Dobree again called upon the Plaintiff and left a message for her to go to his house with the box; and she, accordingly, on the following day, took and delivered the box to him; when he informed her that he expected the Defendant Vaughan down on that or the following day, but did not make any other statement or give any explanation to the Plaintiff on the subject of the box or its contents; and the Plaintiff, thereupon, left the box in his possession; that Vaughan, about this time, came to visit the testator; and that it was alleged by the Defendants that it was at that time that the two cheques after mentioned were together with several others made by Vaughan: that John Dobree having then obtained from Vaughan the two cheques after described, the same were at the same time by John Dobree, or by Vaughan by his direction, inclosed in covers, the cheque for £500 in a cover with the Plaintiff's name thereon, and the cheque for £200 in a cover with her sister's name thereon; and that the two envelopes with the cheques [247] inclosed therein respectively were then, either by John Dobree or by Vaughan, by his direction, deposited in the box; and such two cheques were in the place of or in substitution for the two before-mentioned cheques, or two other cheques of the same amount, and which had, up to that time, continued in the box, and which were then withdrawn: that, a day or two afterwards, John Dobree called at the Plaintiff's residence, and, she being absent, left the box with her sister, with directions that the same should be delivered to the Plaintiff; which was accordingly done, and the same, together with the two cheques deposited and locked up therein, remained in the possession of the Plaintiff until the death of John Dobree: that the key of the box, with the label thereto, was, at or about the time aforesaid, sealed up by the direction of John Dobree in a paper, on which was written at his request some direction to the effect that the key should, at his death, be delivered to the person whose name was engraved or written upon the label attached to it: that John Dobree, at the time of the last-mentioned deposit and delivery of the box, was in a state of complete blindness and in a weak and languishing condition, and afflicted with the malady of which he afterwards died, and was in a dying state, and was well aware of his approaching death; and he departed this life on the 1st of June 1838: that he made his will with a codicil thereto, dated respectively the 1st of March and the 23d of May 1838, but did not, thereby, make any bequest or provision in favour of the Plaintiff, and, by his will, he bequeathed to his son, the Defendant Robert John Dobree, amongst other things, his iron chest; and he appointed executors of his will, who renounced the probate thereof, and administration to his effects was, on the 1st of September 1838, granted to R. J. Dobree: that R. J. Dobree, upon his father's death, [248] possessed himself of the paper containing the key of the box, to which key was then attached the piece of bone with the name of the Plaintiff engraved or written thereon: that the Plaintiff, after the death of John Dobree, applied to Robert John Dobree, and requested him, according to the directions of the testator, to deliver to her the key

of the box, but he refused to comply with such request, saying that the cheques were of no use to her and that she could break open the box: that the box having been opened by the direction of the Plaintiff, there were found therein two covers with the names of the Plaintiff and her sister written on the same, and, in each of the two covers was contained a cheque of the Defendant Vaughan in favour of John Dobree; the cheque in the Plaintiff's cover being for £500, and the cheque in the other being for £200: that the cheque for £500 was as follows:—"2d April 1838. Messrs. Ransom & Co.: pay Mr. Dobree or bearer £500.—C. Vaughan:" that the cheques having been presented at the bankers', payment of the same was refused: that the Plaintiff was advised that John Dobree intended to make, and did, by the means and in the manner before mentioned, make a valid and effectual disposition or gift, to or in favour of the Plaintiff, of the sum of £500, to take effect upon the event of his death, which he, at the time, contemplated as an event likely soon or shortly to take place, in case he should not, at any time before his death, do any act to recall or defeat the gift.

The bill prayed that it might be declared that John Dobree had made a valid gift in contemplation of death, to or in favour of the Plaintiff, to take effect upon the event of his death, of the sum of £500; and that Robert John Dobree, as his father's personal representative, was bound to give effect to that gift; and that he [249] might be decreed to pay to the Plaintiff the sum of £500 out of his late father's personal estate, or out of the amount due to his late father, at his death, from Vaughan.

Robert John Dobree demurred to the bill for want of equity.

Mr. Jacob and Mr. Swinburne, in support of the demurrer. The facts stated in the bill do not amount to a *donatio mortis causâ*. The testator, when he first delivered the box to the Plaintiff, did not do it in contemplation of death, but spoke of living from three months to three months. Secondly: there was no absolute delivery of the box: for the testator reserved to himself the right of reclaiming it; and, when he exercised that right, he wholly put an end to the gift, if there was any. Nothing was said by him on any subsequent delivery: and, as the testator resumed possession of the box after the first delivery, the words used by him on that occasion cannot be applied to any subsequent delivery. Besides, the cheque which was found in the box after the testator's death was dated the 2d of April 1838, and therefore was not in existence at the time of the first delivery: and, consequently, the first delivery could not be a gift of that cheque. By retaining possession of the key, the testator shewed that he intended to reserve to himself the dominion over the contents of the box. *Tate v. Hilbert* (2 Ves. jun. 111; and 4 Bro. C. C. 286), *Bunns v. Markham* (7 Taunt. 224), *Hawkins v. Blewitt* (2 Esp. N. P. C. 663).

[250] Mr. Knight Bruce and Mr. Anderdon supported the bill on the allegations of fraudulent conduct on the part of the Defendants, which were contained in it, but which it was thought unnecessary to notice in the report.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It seems to me that there is quite a mistake in this case: for I do not think that, as the matter is stated on the face of this bill, there was any *donatio mortis causâ*, or anything like a *donatio mortis causâ*: but, in my opinion, it was nothing more than a gift of that which might happen at any time to be in the box; and which gift was always liable during the lifetime of the testator to be recalled by him: and, therefore, the very essence of a *donatio mortis causâ* is wanting in this case.

It is stated that, in September 1837, John Dobree deposited the two checks or drafts in the cash-box, and that, on or about the 10th of that month, he delivered the box locked up, with the two checks or drafts inclosed therein, to the Plaintiff, and, at the time of his so delivering the same, he said to her: "At my death go to my son and ask him for the key, which will be found in the iron chest. If he will not give up the key take the box to Vaughan and he will break it open. It contains money: take care of it. It will make hundreds difference to you. It is for yourself and sister, and entirely at your own disposal after I am gone. But I shall want it from you every three months while I live."

The testator appears, either by himself or his son, to have kept possession of the key. The box was twice [251] delivered up to the testator, and redelivered by him

to the Plaintiff; but there is nothing stated in this bill which leads one to suppose that when it was delivered to the Plaintiff for the last time it was not to be held by her upon precisely the same terms as when it was first delivered to her. And it seems to me that the plain inference from the transactions, as they are stated, is that, all along, the testator meant to retain to himself the complete dominion over whatever might be placed in the box; and that it was a mere accident that he happened to die shortly after the third delivery, and did not redemand the box from the Plaintiff. My opinion is that, from the beginning to the end, there was nothing more than, to a certain extent, putting the Plaintiff in possession of the box, but retaining to himself the absolute power over its contents: and the Plaintiff seems to have so understood the transaction; and her acts were in accordance with such understanding. That being so, there was no *donatio mortis causa*, nor anything in the nature of a *donatio mortis causa* in respect of which this Court can act. There was no gift. The Plaintiff held the box and its contents in trust for the testator; and, if he did not happen to execute that trust in favour of himself, then, and in that case only, it was to be for the benefit of the holder; and I apprehend that that is not such a trust as this Court can execute.

Demurrer allowed.

[252] *In re FAUNTLEROY.* July 26, 1839.

[Followed, *In re Foxhall*, 1847, 2 Ph. 281; 41 E. R. 951.]

Trustees. Construction of 11 Geo. 4 and 1 Will. 4, c. 60.

The Court may appoint new trustees under 11 Geo. 4 and 1 Will. 4, c. 60, s. 22, although the instrument creating the trust contains a power to appoint new trustees.

This was a petition presented, under 11 Geo. 4 and 1 Wm. 4, c. 60, for the appointment of new trustees of a deed, the surviving trustee being out of the jurisdiction of the Court.

Mr. Turner, in support of the petition, said that the deed creating the trust contained a power to appoint new trustees, which was now vested in the surviving trustee; that the 22d section was the only section of the Act which authorized the Court to appoint new trustees upon petition; and it seemed to be doubtful, from the language of the recital, whether that section authorized the Court to appoint new trustees in any case, except where the instrument creating the trust contained no power to appoint new trustees.(1)

(1) The section above referred to is as follows:—"And whereas cases may occur upon applications by petition under this Act for a conveyance or transfer, where the recent creation or declaration of the trust or other circumstances may render it safe and expedient for the Lord Chancellor, intrusted as aforesaid, or the Court of Chancery (as the case may require), to direct, by an order upon such petition, a conveyance or transfer to be made to a new trustee or trustees, without compelling the parties seeking such appointment to file a bill for that purpose, *although there is no power in any deed or instrument creating or declaring the trusts of such land or stock to appoint new trustees*: Be it, therefore, further enacted that, in any such case, it shall be lawful for the Lord Chancellor, intrusted as aforesaid, or the said Court of Chancery, to appoint any person to be a new trustee by an order to be made on a petition to be presented for a conveyance or transfer under this Act, after hearing all such parties as the said Court shall think necessary; and, thereupon, a conveyance or transfer shall and may be made and executed, according to the provisions hereinbefore contained, to or so as to vest such land or stock in such new trustee, either alone or jointly with any surviving or continuing trustee, as effectually and in the same manner as if such new trustee had been appointed under a power in any instrument creating or declaring the trusts of such land or stock, or in a suit regularly instituted."

[253] THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is clearly within the 22d sect. of the Act.

That section refers to the case of an instrument containing no power to appoint new trustees as one of the strongest instances of difficulty; but it is not thereby meant that the existence of that circumstance is to be the condition upon which the power thereby given to the Court is to be exercised.

If the Court may make the appointment where the instrument creating the trust contains no power for that purpose; it surely may do so where the instrument does contain such a power.

[254] MOLONY v. KENNEDY. July 26, 1839.

[S. C. 3 Jur. 793. See *In re Lambert's Estate*, 1888, 39 Ch. D. 633.]

Husband and Wife. Separate Property.

A husband and wife lived separate from each other. At the death of the wife she was possessed of cash and bank notes arisen from property settled to her separate use. Held, that the husband was entitled to them in his marital right.

In 1817 the Plaintiff intermarried with his late wife, who was then the widow of W. C. Jackson; on their marriage an annuity of £800, to which Mrs. Molony was entitled under her first husband's will, was settled to her separate use. In 1821 a separation took place between the Plaintiff and his wife, which continued until the death of the latter. In 1830 Mrs. Molony purchased, out of the savings of her separate property, a sum of £2188 stock in the names of the Defendants Kennedy and Shee, in trust for such persons as she should by deed or will appoint, and, subject thereto, in trust for herself for life, and, after her death, in trust for her next of kin, as if she had died intestate and unmarried. Shortly afterwards she made a will by which she disposed of that sum of stock, and appointed the Defendants her executors. In 1838 Mrs. Molony died. At the time of her death she had in her possession £3255 in cash and bank notes, part of the savings of her separate property, which the Defendants took possession of, and for safety lodged at a banker's, and afterwards purchased with it £3505 stock in Kennedy's name.

The Defendants having refused to transfer the £3505 to the Plaintiff, until he had enabled himself to give them a proper discharge by taking out administration to his wife, the bill in this cause was filed, praying for an account of the property which was in Mrs. Molony's possession at her death; and that the Defendants might be decreed to hand over the same to the Plaintiff.

Mr. Wigram and Mr. Glasse, for the Plaintiff, said that the Plaintiff was clearly entitled, in his marital [255] right, to the property which was in his wife's possession at her death, and that he might maintain an action of trover for it.

Mr. Teed, for the Defendants, said that the property in dispute was admitted to have arisen from the wife's savings; that the Plaintiff's right to it was the same as if Mrs. Molony had been his daughter and not his wife, and had died intestate; that there was no personal representative to her except as to the stock purchased in the names of the Defendants; that, as she was living separate from her husband with an adequate allowance, the property was subject to her debts; and, if the Plaintiff took it subject to paying the debts of his wife (it did not appear that Mrs. Molony left any debts) he must clothe himself with the character of administrator to her. *Fettiplace v. Gorges* (1 Ves. jun. 46; and 3 Bro. C. C. 8).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Mrs. Molony's annuity of £800 and everything that arose from it was exempt from the controul of her husband during her life; and as the cash and bank notes which were found in her possession at her death arose from that annuity, they were part of her separate property, and she might have disposed of them either by deed or by her will. But, as she made no disposition of them, the quality of separate property ceased at her death; and if it

ceased at her death, the consequence is that Mr. Molony is entitled to them, in his marital right.

Declare that the Plaintiff is entitled to the £3505 subject to the payment of his wife's funeral expenses and the expenses properly incurred by the Defendants in taking care of the property.

[256] WELLESLEY v. WELLESLEY. July 24, 1839.

[For subsequent proceedings, see S. C. 4 My. & Cr. 554; 41 E. R. 213; 9 L. J. Ch. (N. S.) 21; 4 Jur. 2.]

Lien. Construction. Husband and Wife. Articles of Separation. Consideration.

By articles of separation between A. and his wife, dated in June 1834, A. covenanted that he would, on or before the 1st Feb. 1835, either by a charge on freehold estates of inheritance, or by investing an adequate sum in the purchase of stock, or by the best means which might be then in his power, secure an annuity of £1000 to a trustee for his wife. In December 1834 A. and his son joined in limiting freehold and copyhold estates, of which A. was tenant for life with remainder to his son in tail male, to trustees, in trust to raise £462,000, and, thereout, to pay off incumbrances on the estates, and to pay the surplus to A.; and, subject thereto, to stand possessed of the estates, in trust for such persons as A. and his son should jointly appoint; and, subject thereto, in trust for A. for life, with remainder in trust for his son in fee if he should survive A., but, if he should die in A.'s lifetime, then, in trust for him in tail male, with remainder in trust for A. in fee; and A. was empowered, subject to the raising of the £462,000, to charge the estates with a jointure of £1500 a year, for his then or any future wife. Held that the articles and the deeds of December 1834 formed but one transaction, and that the wife was entitled to have the covenant in the articles performed by means of the provisions, for A.'s benefit, contained in the deeds of December 1834.

By articles of separation, the husband covenanted with his wife's trustee to secure to her an annuity of £1000, on or before a certain day; and the trustee covenanted with the husband that, on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts. Held that the latter covenant, though conditional, was sufficient to support the articles.

The bill was filed by Mrs. Wellesley against her husband and certain other parties. It stated that, by articles of separation between the Plaintiff and her husband, dated the 21st of June 1834, Mr. Wellesley for himself, his heirs, executors and administrators, covenanted with Colonel Paterson, the Plaintiff's father, to pay to W. L. Bicknell, the Plaintiff's solicitor, for her separate use, the sum of £1000, by instalments, the last instalment to be paid on or before the 14th of November then next: [257] that, in consequence of the covenant thereafter agreed to be entered into by Colonel Paterson, Mr. Wellesley would, *on or before the 1st day of February 1835, well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Britain, or by the best means which might then be in his power, secure the payment of an annuity of £1000 to Colonel Paterson, his executors or administrators, in trust for the separate use of Mrs. Wellesley during her life; the first payment to be made on the 14th of November 1834: and it was thereby further agreed that, upon the annuity of £1000 being so secured as aforesaid, such deeds should be executed by all necessary parties for carrying into effect the agreement and the intention of the parties therein expressed, with such covenants, on the part of Mr. Wellesley, for permitting the Plaintiff to live separate from him; and with such covenants, on the part of Colonel Paterson, or (in case of his death in the meantime) of some other responsible person, for indemnifying Mr. Wellesley against all debts contracted by the Plaintiff after the annuity should have been so secured as aforesaid and during the then remainder of her life, as counsel should advise.*

The bill then stated that Mr. Wellesley had paid £850 in respect of the £1000 agreed to be paid on or before the 14th of November 1834; but that £150 still remained due in respect thereof: that Mrs. Wellesley and Colonel Paterson had frequently requested Mr. Wellesley specifically to perform the agreement on his part; but he had refused so to do, pretending that he had not, since the 21st of June 1834, either before or on or since the 1st of February 1835, been seised of, entitled to or [258] interested in any freehold estate or estates of inheritance in England or Wales, or had any power or authority to charge any freehold estate or estates of inheritance in England or Wales of the value or to the extent of £1000 a year or of any value or to any extent, and that he had not, from the 21st of June 1834, possessed the means of investing an adequate or any sum in any of the stocks or funds of Great Britain for or towards securing an annuity of £1000, and that he had not, on the 1st of February 1835, nor had he, at any time since, had in his power any means of securing the payment of an annuity of £1000; whereas the Plaintiff charged that Mr. Wellesley, before and on the 1st of February 1835, had, and had ever since, and still had full power and authority to charge freehold estates in England and Wales and other freehold estates with an annuity of £1000 during the Plaintiff's life. The bill then charged that, on the 21st of June 1834, Mr. Wellesley was seised of an estate for his life, without impeachment of waste, of and in freehold and copyhold estates in the counties of Essex, Southampton and Herts, with remainder to the Defendant Wm. Richard Wellesley, his eldest son by a former marriage, in tail male, and that he was seised as tenant in tail in remainder expectant on the decease of his father, Lord Maryborough, of estates in the counties of Cavan and Westmeath, and in King's and Queen's Counties in Ireland; and that the estates of which he was so seised were subject to charges of sums in gross amounting, in the whole, to £270,775, 8s. 10d. besides arrears of interest, and to annuities amounting to £6430, 14s. besides the arrears thereof. The bill then set forth indentures of the 12th, 13th and 15th of December 1834, made between Mr. Wellesley and his eldest son and other parties, by which the son's estate in tail male in the lands and hereditaments in the [259] counties of Essex, Southampton and Herts was barred, and those lands and hereditaments were limited to the use of the Defendants, Wright and Greenley, in fee, in trust to raise £462,000, and, thereout, to pay off the annuitants and other incumbrancers on the estates whose names were mentioned in the schedules, and to pay the residue of the £462,000 to such person or persons as Mr. Wellesley should, in writing, appoint, and, subject thereto, to him, his executors, &c.; and it was declared that in case the trustees should have ascertained, at any time previously to the complete execution of the before-mentioned trusts, that there would be eventually a surplus or residue of the £462,000 which would be applicable according to the appointment or for the benefit of Mr. Wellesley, then it should be lawful for them, at any time or times and from time to time, to pay so much of the £462,000 as should, for the time being, be ascertained to be the amount of such surplus, according to the appointment or for the benefit of Mr. Wellesley as was thereinbefore directed of and concerning such ultimate surplus or residue; and that no person, except Mr. Wellesley, his executors, &c., to whom any sum of money was thereinbefore directed to be paid out of the £462,000 and who had not, before the execution of the deed of the 12th of December 1834, a lien or charge upon the hereditaments therein comprized, should have any lien or charge thereon or upon the £462,000, or any claim or demand upon the trustees, under or by virtue of the three last-mentioned deeds or any of them; and that, subject to the raising of the £462,000, the trustees should stand seised of the hereditaments in trust for such person or persons as Mr. Wellesley and his son should jointly appoint, and, subject thereto, in trust for Mr. Wellesley during his life, and, after his decease, in trust for his son in fee, in case he should survive his [260] father, but in case he should die in his father's lifetime, then in trust for him and the heirs male of his body, and, in default of such issue, in trust for Mr. Wellesley in fee. And it was thereby further declared that it should be lawful for Mr. Wellesley at any time during his life, but subject to the trust for raising the £462,000, to appoint, to or in trust for his then wife or any woman whom he might marry after her decease, for her or their life or lives, and for her or their jointure or jointures, any annual sum or yearly rent-charge, not exceeding £1500,

to be issuing out of and charged upon the hereditaments, and to limit the same to a trustee for a term of years, in trust for better securing such yearly rent-charge.

The bill then stated that the freehold hereditaments in the counties of Essex, Southampton and Herts, which were comprised in the deeds of December 1834, were of the annual value of £23,000; that Mr. Wellesley had, on the 1st of February 1835, and still had, power to charge the annuity of £1000 upon the interest reserved to him in the surplus of the £462,000, and upon a charge of £31,731, 5s. agreed to be kept up and sustained for his benefit as therein mentioned, and also upon the estate limited to him in the lands and hereditaments comprised in the deeds of December 1834, *and by exercise of the power thereby reserved to him, of appointing and creating a yearly rent-charge of £1500 in favour of the Plaintiff, and that he ought to exercise that power in her favour, to the extent necessary for securing to her the annuity of £1000 for her life: that, if necessary for the same purpose, the residue of the £462,000 ought to be raised, and, after paying off the incumbrances upon the lands and hereditaments comprised in the deeds of December 1834, the residue, or a sufficient portion thereof, ought to be invested either in [261] the purchase of freehold estates of inheritance in England or Wales, or of a competent amount of the stocks or funds of Great Britain; but that Mr. Wellesley pretended that he had, under the articles of separation, a right to elect either to secure that annuity by a charge on freehold estates, or by purchase of stock in the public funds, or in such other manner as he might think proper; but the Plaintiff charged that she was entitled to have the annuity effectually secured by the best means which were, on the 1st of February 1835, or had been since in Mr. Wellesley's power, at her election; that Mr. Wellesley then had, and still had, in his power the means of charging the annuity on freehold estates of inheritance in England in manner before mentioned; that, of the £462,000, the sum of £260,000 only had been raised and duly applied towards the payment of the incumbrances and debts mentioned in the deeds of December 1834; and that Mr. Wellesley and his son and the trustees, instead of raising so much of the residue of the said £462,000 as was necessary for paying the remainder of those incumbrances and debts, had already raised and were about to raise considerable sums of money upon security of the charge of £462,000 and of Mr. Wellesley's interest in the lands and hereditaments, and had paid the sums so raised, and threatened to pay the sums about to be raised, to Mr. Wellesley; and that the trustees had also paid to him the rents of the estates, in derogation of the Plaintiff's rights; that Mr. Wellesley had paid only £850 of the £1000 which he had contracted to pay to Bicknell for the Plaintiff's use; and that the annuity of £1000 was wholly in arrear.*

The bill prayed that Mr. Wellesley might be decreed to pay the residue of the £1000 to Bicknell for the [262] Plaintiff's use: and specifically to perform the articles of separation on his part: and effectually to charge the annuity of £1000 upon the interest reserved to him in the surplus of the £462,000, and also upon the charge of £31,731, 5s. agreed to be kept up and sustained for his benefit as before mentioned, and upon the estate limited to him in the lands and hereditaments comprised in the deeds of December 1834, and to effectuate such charge by exercising, to a sufficient extent, the power thereby reserved to him, of appointing a yearly rent-charge of £1500 in favour of the Plaintiff; that, if necessary for the purpose of effectually securing the annuity of £1000, the residue of the £462,000 might be raised, and a sufficient part thereof applied in payment of the incumbrances on the lands and hereditaments comprised in the deeds of December 1834; and that a sufficient portion of the residue thereof might be invested either in the purchase of freehold estates of inheritance in England and Wales, or of a competent amount of some of the stocks or funds of Great Britain, for effectually securing the annuity of £1000; and that Mr. Wellesley might be decreed to pay to the Plaintiff the arrears of that annuity, or that they might be raised out of the before-mentioned interests of Mr. Wellesley; and that he might be restrained from creating any mortgage, charge, or incumbrance upon the hereditaments in the counties of Essex, Southampton and Herts, or upon any estate, right or interest secured to or provided for him by the deeds of December 1834, and from receiving the rents and profits of the said hereditaments; and that the trustees might be restrained from paying the same to him, or to

any person or persons on his account; and that a receiver might be appointed thereof.

[263] The trustees demurred to the bill for want of equity, and because it appeared thereby that divers persons or some person therein mentioned or referred to were or was necessary parties or a necessary party thereto; but such person or persons were not or was not made parties or a party thereto.

Mr. Knight Bruce and Mr. Toller, in support of the demurrer, contended, first, that the covenant entered into by Mr. Wellesley in the articles of separation, to secure an annuity of £1000 in favour of his wife, did not create any lien or charge upon any particular estates or other property belonging to him; but was a mere personal covenant on his part; that the bill did not state that Mr. Wellesley had not power to charge any other estates than those which were mentioned in it, or that he could not invest money in the funds for the purpose of securing the annuity; that the words, "the best means which may then be in his power," were introduced into the covenant in order to shew that Mr. Wellesley was not to be sued on it, if he should not charge the annuity either on land or on stock in the funds; *Freemoult v. Dedire* (1 P. W. 429), *Williams v. Lucas* (2 Cox, 160), *Gardner v. Marquis of Townshend* (Coop. C. C. 301), *Carleton v. Leighton* (3 Mer. 667).

Secondly, that the bill, in fact, prayed that the trusts of the deed of the 15th of December 1834 might be carried into execution; and, therefore, all the persons in whose favour any trust was declared by that deed ought to have been made parties to the suit. *Munch v. Cockerell* (*ante*, vol. viii. p. 219), *Goolson v. Ellisson* (3 Russ. 583; see 593 and 594).

[264] And, thirdly, that there was no positive covenant in the articles of separation to indemnify Mr. Wellesley against his wife's debts; and, consequently, there was no consideration to support the articles.

Mr. Jacob and Mr. Willcock, in support of the bill, said that, under the articles, Mrs. Wellesley was entitled to have her annuity secured either on the estates vested in the trustees, or, if she preferred it, by an investment in the funds of an adequate portion of the surplus of the £462,000; that the words, "the best means that may be then in his power," meant that Mrs. Wellesley was to have the best security for her annuity that her husband could give; that no words of similar import were used in the cases cited in support of the demurrer; that there was another important difference between those cases and the present, namely, that no time was fixed for the performance of the covenants; but, in the present case, the annuity was to be secured on or before a specified day; that the provision, in the deed of the 15th of December 1834, that no person should have a lien or charge upon the estates or upon the £462,000, meant, merely, that persons who previously had liens on the estates should have no additional lien under that deed; that the provision enabling Mr. Wellesley to appoint and secure a rent-charge of £1500 a year in favour of his wife could not have arisen from his affection for her, as they then were and had been, for some months before, living separate from each other; but, as that power was given to him subsequently to his entering into the covenant, it must be considered to have been inserted in the deed for the purpose of enabling him to perform his covenant. *Prebble v. Boghurst* (1 Swanst. 309), *Ravenshaw v. [265] Hollier* (*ante*, vol. vii. p. 3), *Roundell v. Breary* (2 Vern. 482), *Deacon v. Smith* (3 Atk. 323), *Girling v. Lee* (1 Vern. 63), *Tooke v. Hastings* (2 Vern. 97), *Glegg v. Glegg* (4 Brown, P. C. 614), *Corbet v. Corbet* (1 Sim. & Stu. 612; see 621), *Burn v. Carvalho* (*ante*, vol. vii. p. 109).

Mrs. Wellesley, being the assignee of her husband, has the same rights as he had; and if either Mr. Wellesley or his son had filed a bill for the purpose of compelling the trustees to account for what they had received under the trust deed, there would have been no occasion to make the incumbancers parties to the suit: *Lord Dillon v. Plaskett* (2 Bligh N. S. 239), *Walwyn v. Coutts* (3 Mer. 707; and *ante*, vol. iii. p. 14).

The demurrer is wrong in point of form: it ought to have specified the absent parties.

Mr. Knight Bruce, in reply. The first and main question is whether the covenant in the articles created any lien upon the property comprised in the deeds of December 1834: for, if no lien was created upon that property, no account or injunction can be sought for as against the demurring parties.

Several cases have been cited in support of the bill ; but, as far as I am aware, there is no instance in which a covenant, such as is now sought to be enforced, has been enforced against the covenantor himself with respect to any specific property. Where a covenantor has agreed to purchase and settle land, and afterwards does purchase land which may answer the purpose, and [266] dies seised of it without having performed his covenant, the presumption of law is, in the absence of any evidence to the contrary, that he acquired the land for the purpose of executing his covenant ; but, where there is any evidence of a contrary intention, that presumption does not arise ; and, consequently, when a covenant of such a nature is sought to be enforced against the covenantor in his lifetime, all that he has to say is that he did not acquire the property with the intention of settling it. There is a passage in Lord Hardwicke's judgment in *Deacon v. Smith* which fully supports my argument. His Lordship says : " I think no purchaser, or mortgagee who is a purchaser *pro tanto*, will be affected ; for, if the husband had sold them or mortgaged them, it would have been evidence of a different intention, and would, therefore, have taken off all evidence of his intention to bind them by the articles." (See 3 Atk. 327.) That passage proves, most decisively, that the lien does not attach upon the acquisition of the property, but upon the presumed intention to devote it to the purposes of the covenant. The argument on the other side is that the mere acquisition, the mere possession of the property, gives the lien : but that is contradicted by all the decided cases. I admit, however, to the fullest extent, that, if there be a covenant to purchase and settle land, and the covenantor does purchase land and dies seised of it, then, in the absence of evidence to the contrary, it will be held that he purchased the land with the intention of performing his covenant. In *Freemoult v. Dedire* the distinction was taken between a covenant to settle certain specified lands and a covenant to settle lands generally ; and the Lord Chancellor said : " With regard to the lands in Rumney Marsh, the marriage articles being a specific lien upon them, make the covenantor, as to them, but a trustee ; and, therefore, during the life of [267] the wife, they are not to be affected by any of the bond debts. But the covenant for settling lands of the value of £60 per annum on the wife, for her life, does not specially bind any lands : wherefore, as touching that, the wife must come in only as a specialty creditor with the other specialty creditors." In *Williams v. Lucas*, the testator had borrowed of James Lane £300, and, by his note of hand, he promised to pay the same on demand, and to give a security, by mortgage of lands, for the same when required. The testator had no real estate at the time, except an advowson and some tithes ; and the question was whether the note gave the creditor any lien on the real estate, or whether it was a mere simple contract debt. The Lord Chief Baron said that the case could not be distinguished from *Freemoult v. Dedire* : that the creditor had taken a personal security, reserving to himself the power of calling for a real security ; which, however, he had not done ; and, therefore, it was impossible to say that this debt was a charge on any particular lands. In *Gardner v. The Marquis of Townshend*, Sir William Grant was of opinion that, though a person who purchased lands, having entered into a prior covenant to convey and settle lands, might be presumed so to purchase in discharge of his covenant ; yet that Lord Townshend could not be considered as in the light of a purchaser so liable, but was, in fact, entitled in equity to the lands in question at the time of his entering into the covenant, and that his afterwards getting a decree for an actual conveyance from the trustees could make no difference. This demurrer cannot be overruled without, at the same time, overruling the cases which I have cited. [THE VICE-CHANCELLOR. In this case Mr. Wellesley covenants to secure the annuity to his wife on or before a given day ; but, in the cases to which you have referred, the covenant was general as to the time of its performance, and, therefore, the [268] covenantor was allowed the whole of his life to perform it in.] Where no time is fixed for the performance of a covenant, the covenantor is bound to perform it, either upon request or within a reasonable time. In *Ravenshaw v. Hollier*, which was cited in support of the bill, your Honor held that a covenant to settle the estate, or £4000 in lieu of it, created no lien or charge on any of the father's estates : and that the subsequent agreement between the father and son was merely voluntary and was fairly abandoned by them. That case, therefore, was decided on the same principle as the cases to which I have before referred.

The question then is whether the circumstance that a certain time was appointed for performing the covenant in this case makes any difference. The articles of separation were dated in June 1834. The covenant was to be performed on or before the 1st of February 1835. Now, the deeds under which the interests arose, which are sought to be affected by this bill, are dated in December 1834, and, consequently, before the time appointed for performing the covenant had arrived. When the deeds of December 1834 were executed, Mr. Wellesley was tenant for life of the estates comprised in them; and, according to the argument for the Plaintiff, he had no right to enter into those deeds, for all his property was bound by the covenant. He did not covenant to acquire property in order to perform his covenant, or to charge any specific property; but, according to the Plaintiff's construction, the covenant bound all his property in every part of the kingdom and of every description. A receiver might have been appointed over the whole of it; and no purchaser or mortgagee, having notice of the covenant, could have dealt with him safely. Under the covenant, Mr. Wellesley has a right to elect whether he will secure the annuity on free-[269]-hold estates, generally, or by an investment in the funds, or by the best means in his power; and, unless the Court is prepared to hold that a simple obligation creates a lien upon all the covenantor's property, it is quite impossible to support the present bill, which seeks to establish a lien upon specific estates selected, not by the covenantor, but by the party with whom he has contracted, and against his consent and the consent of the trustees; and that, too, in a case in which it is not suggested that he has no other freehold estates than those mentioned in the bill, or that he has no stock in the funds, or that the means pointed out by the bill are the best means in his power of securing the annuity.

It was said that the power reserved to Mr. Wellesley, under the deed of the 15th of December 1834, was acquired by him for the purpose of enabling him to fulfil his covenant; but there is no allegation in the bill to that effect; and I submit that the Court cannot, without overruling all the authorities, hold that the covenant in question created a lien upon any particular portion of the covenantor's property. It must either create a lien upon the whole of his property, or upon none at all. The consequences of holding that it creates a lien on the whole of his property, which I have endeavoured to point out, are too monstrous to be contemplated for a moment.

With respect to the objection for want of parties, it is impossible for anyone to read the prayer of the bill without seeing that it is filed for the purpose of carrying the trusts of the deed of the 15th of December 1834 into execution. It alleges that a portion of the £462,000 has been raised and, in part, misapplied; and then it prays that the residue of that sum may be raised, and that a sufficient part thereof may be applied in discharge of the incumbrances on the lands com-[270]-prised in the deed of the 15th of December 1834; and that the surplus, or a sufficient portion thereof, may be invested, either in the purchase of estates or of a competent amount of stock, for effectually securing the Plaintiff's annuity; and that the arrears of her annuity may be raised out of Mr. Wellesley's interest in the estates. The trustees have a right to account, once for all; and therefore all the *cestui que trusts* must be before the Court. The demurrer, too, is right in point of form; for it points out, with sufficient clearness, who the necessary parties are.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Upon the first point in this case it seems to me that there is an equity.

The Court can, of course, know nothing of any property that Mr. Wellesley has, except as the bill states it; and there I find it alleged that, on the 21st of June 1834, Mr. Wellesley was seised, for his life, without impeachment of waste, of freehold and copyhold lands and hereditaments in Essex, Hampshire and Hertfordshire, with remainder to his eldest son, William Richard Wellesley, in tail male. That being the state of the property, and the only property which, it appears, Mr. Wellesley was interested in, (1) he did, on the 21st of June 1834, enter into the articles of separation, for which the covenant on the part of Colonel Paterson, though, to a certain extent, it was a conditional one, was, in my opinion, a sufficient consideration. By those

(1) Mr. Wellesley was tenant in tail in remainder of estates in Ireland, and was interested in the charge of £31,731, 5s.

articles Mr. Wellesley covenanted that he would, on or before the 1st of February 1835, well and effectually, either by a charge on freehold estates of inheritance to be situate in England or Wales, or by an investment of an adequate sum of money in some of the stocks or funds of Great Bri-[271]-tain, or by the best means which might be then in his power, secure the payment to Colonel Paterson, his executors, &c., during the life of Mrs. Wellesley, of an annuity of £1000. Then, by deeds of the 12th, 13th and 15th of December 1834, those estates of which Mr. Wellesley was seised for life, with remainder to his son in tail male, were limited to the two trustees, who are the demurring parties, upon trust to raise a sum of £462,000, which was to be applied in the manner specified, in great detail, but with an ultimate trust for the benefit of Mr. Wellesley himself. And then, by the same instrument, power was expressly given to Mr. Wellesley to limit to his then present wife, or any woman or women he might marry after her decease, a jointure of £1500 a year.

Now I cannot but think, seeing the precise manner in which the benefits are given to Mr. Wellesley by the deeds of December 1834 (benefits which he could not have had out of his life-estate) so as to enable him to comply with the provisions of the articles of separation, that it is quite according to legal principles to hold that those articles, and the deeds of December 1834, were parts of the same transaction, that is to say, that the articles and the deeds ought to be taken in connection with each other, and that the powers and benefits, which were given to Mr. Wellesley by the deeds of December 1834, were given to him for the purpose of enabling him to perform the covenant which was contained in the articles. When, in June 1834, we find Mr. Wellesley contracting to secure an annuity to his wife, and when, before the close of the same year, we find him and his son dealing, the one with his life-estate and the other with his inheritance, so as to enable Mr. Wellesley to fulfil his covenant contained in the articles, I think that it is right to hold that the deeds of December 1834 are to be taken in connection with the articles of June 1834, [272] so as to be nothing more than carrying on one and the same transaction.

Having regard, therefore, to the particular manner in which these deeds are framed, I am of opinion that Mrs. Wellesley has an equity to have the covenant specifically performed in the way in which it can be actually performed by virtue of the provisions which Mr. Wellesley caused to be introduced into the deeds of Dec. 1834.

In my opinion, however, as the bill is framed, it is almost impossible for the suit to proceed without adding other parties to the bill. The bill, as I understand it, does, in effect, ask that the trusts declared in December 1834 may be carried into execution; and I do not very well see how that can be done, without having some at least of the other persons interested under those trusts parties to the suit. Therefore it seems to me that what I ought to do is to overrule the demurrer, so far as it is a demurrer for want of equity, but to allow it for want of parties. At the same time, however, I think that the Plaintiff ought to have leave to amend the bill generally.(1).

(1) The Plaintiff, accordingly, amended her bill by introducing a statement that the arrangement of December 1834 was entered into by Mr. Wellesley for the purpose of providing for him the means of securing the annuity of £1000, and in part performance of the articles of separation. The trustees demurred to the amended bill for want of equity. On the 30th November 1839 the Lord Chancellor overruled the demurrer; his Lordship's opinion being founded on the construction which he put on the articles, namely, that they amounted to a contract to charge the annuity upon such lands as Mr. Wellesley might have power to charge in February 1835; and that the demurring Defendants were trustees of property which he had, at that time, power so to charge; and that the Court would, therefore, by its decree, if necessary, secure to the Plaintiff the annuity so contracted for, out of the property so vested in the Defendants.

[273] CARTHEW v. BARCLAY. August 1, 1839.

[*Cf. Browne v. Lockhart*, 1840, 10 Sim. 420.]

Advancing Cause. Costs.

Costs of an opposed application to advance a cause directed to be costs in the cause, upon the application being granted.

Mr. K. Bruce and Mr. Wood, for the Plaintiffs, moved that this cause (which was a foreclosure suit) might be advanced under the 4th Order of the 9th of May 1839.

Mr. Jacob, Mr. Richards, Mr. Chandless and Mr. Thompson opposed the application on behalf of several Defendants.

Affidavits were made on both sides.

THE VICE-CHANCELLOR [Sir L. Shadwell] having granted the application, the counsel for the Defendants applied for the costs of the motion, on the ground that it was an indulgence granted to the Plaintiffs.

The counsel for the Plaintiffs contended that it was in the ordinary course of justice to advance causes which, from their nature, were entitled to be heard as short causes, and that the application having succeeded, the costs ought to be costs in the cause; and the Vice-Chancellor so decided.

[274] EASUM v. APPLEFORD. August 2, 1839.

[S. C. affirmed, 5 My. & Cr. 56; 41 E. R. 292 (with note).]

Will. Construction. Appointment. Residuary Bequest.

A testator directed that, in case of one of his daughters having no child, his trustees should stand possessed of a sum of £3000 and the stock upon which it should be invested, including the accumulations of the surplus dividends which should not have been applied in manner in the will mentioned during the daughter's minority, upon such trusts as the daughter should by will appoint; and, in default of appointment, or in case of appointment as to such parts of the £3000 as should not be effectually comprised therein, or whereof the trusts to be thereby limited should either never take effect, or should determine, upon the trusts by his will declared of his own residuary estate.

The daughter having no child, by her will, after reciting that the £3000 and the accumulated dividends had been blended with funds to which she was absolutely entitled, in a sum of £6700 consols standing in the names of trustees, proceeded in express execution of the power to direct that the £3000 and the stock upon which that sum or the surplus dividends should have been invested should be transferred to certain trustees named in her will, upon trust as to £2700 consols for her mother, and as to £250 consols for another person, and as to the residue upon the trusts after declared of her residuary estate. She then proceeded to give what she described as "all the residue of *my* stock in the public funds, and all *my* monies and securities for money, and all the residue of *my* estate and effects" to the same trustees, upon trust to convert and to invest in the funds such part as should not already be so invested, and to stand possessed of all such funds, and also of the residue of the said trust funds which should remain after paying and satisfying the several legacies of stock before directed to be paid or transferred thereout to her mother and the other person referred to upon certain trusts which she proceeded to declare.

The mother died in the daughter's lifetime.

Held, that the £2700 consols was not well appointed, and that it was subject to the trusts declared by the testator of his residuary estate.

Matthew Easum, by his will, dated the 18th of January 1816, after giving certain legacies, devised and bequeathed all his real and personal estate to his trustees and executors, upon trust to convert the same [275] into money; and he directed that, out of the produce thereof, they should invest £3000 in their names on real or Government securities, and should stand possessed thereof upon trust to apply the whole or such part as they should think fit, of the interest and dividends thereof, for the maintenance and education of his daughter Mary Ann Easum, until she should attain 21 or be married; and to invest the surplus (if any) of the interest and dividends on like security in their names, and to stand possessed thereof upon the trusts thereafter declared of the £3000: and he directed his trustees to stand possessed of the £3000 after his daughter should attain 21 or be married, in trust for her separate use, during her life, and after her decease upon certain trusts for the benefit of her children; and if she should have no child who, being a son should attain 21, or being a daughter should attain that age or be married, then that the £3000 should be and remain upon and for such trusts, intents and purposes as his daughter (whether sole or married) should by her will appoint: "And in default of any such direction or appointment, the said sum of £3000 shall be and remain (or in case any such direction or appointment shall be made, then such parts of and interests in the said sum of £3000 as either shall not be well and effectually comprised therein, or as shall be comprised therein, but whereof the trusts and estates to be thereby limited shall either never take effect or shall determine, shall be and remain) upon such and the same trusts, and for such and the same intents and purposes, and with, under and subject to such and the same powers, provisos and declarations as are hereinafter declared and contained of and concerning the residue of the said trust monies, or as near thereto as the circumstances of the case will permit." And as to all the residue of the trust monies so as aforesaid referred to by the testator, [276] he declared that the trustees should, as soon as conveniently might be after his decease, lay out and invest the same in their joint names upon real or Government security, and stand possessed thereof upon trust for all and every of the children which he might have living at the time of his decease (exclusive of his daughter Elizabeth), equally to be divided among them, share and share alike. The testator died on the 20th of February 1816. He left six children who attained 21, exclusive of his daughter Elizabeth.

Mary Ann Easum made her will, dated the 12th of August 1835, which, after reciting her father's will so far as it related to the £3000, proceeded as follows: "And whereas the said trustees, after the decease of my said late father, laid out and invested not only the said sum of £3000, and the surplus of the dividends which accrued, from time to time, during my minority, but also my share of the said testator's residuary estate to which I was absolutely entitled under his said will, on attaining my age of 21 years, indiscriminately in the purchase of various sums of stock in the public funds, so that it is now difficult to ascertain how much of such stock was purchased with the said sum of £3000 and the surplus dividends thereon, and how much with my said share of the said residuary estate and the surplus dividends thereon; but the stocks or funds which have arisen from both the said sources, and which are now standing in the names of my trustees in the bank books, consist of the sum of £6700 or thereabouts in the three per cent. consolidated annuities. And whereas I attained my age of 21 years several years ago, and thereby became entitled and am now desirous to exercise the power of appointment given or reserved to me by the said will of my said late father. Now, in pursuance of the said power and authority, and of all other powers and authorities enabling me in this behalf, I do, by this my last will and testament in writing, direct and appoint that the said sum of £3000, or the stocks or funds in or upon which the same or any part thereof, or the surplus dividends thereof, now are or is or shall or may, at the time of my decease, be laid out or invested, and all other monies, stocks or funds over which I have any power of appointment given to me by the said will, shall go and be transferred by the trustees or trustee in whose names or name the same may happen to stand at my decease, unto John Henry Burnall and Isaac Sheffield the younger, upon trust that they do and shall, thereout, assign and transfer the sum of £2700 three per cent. consolidated annuities, or so much of any other

stocks or funds constituting any part of the said trust funds as shall be equal in value thereto at the day of my decease, unto my dear mother, Ann Easum, for her own absolute use and benefit; and do and shall also, thereout, in the same way and manner, transfer and assign the sum of £250 three per cent. annuities, or a like amount in value of any such other stocks or funds as aforesaid, unto Sarah Williams, the wife of James Williams, for her own sole and separate use and benefit, independent of her present or any future husband; and do and shall stand and be possessed of the residue of the said stocks or funds and securities as aforesaid, constituting the remainder of the said trust funds, upon the trusts and to and for the intents and purposes hereinafter declared and expressed of and concerning my residuary estate and effects. And, as to all the residue of my stock in the public funds, and all my monies and securities for money, and all the rest, residue and remainder of my estate and effects, whatsoever and wheresoever, not hereinbefore bequeathed and disposed of, and whether in [278] possession, reversion, remainder or expectancy under the will of my said late father, Matthew Easum, or my late grandfather, John Green, or otherwise howsoever, I give and bequeath the same and every part thereof unto the said J. H. Burnall and J. Sheffield the younger, their executors, administrators and assigns, upon trust to get in, receive and convert into money all such parts of my said residuary estate and effects as shall not consist of money or stock in the public funds, or of money out upon Government or real securities at interest, and to lay out and invest the same in the purchase of stock, in their names, in the public funds, in addition to such residuary stock as may belong to me at the time of my decease, or upon Government or real securities at interest, and do and shall stand and be possessed of all such stocks, funds and securities, and also of the residue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid or transferred, thereout, unto my said mother and the said Sarah Williams, upon the trusts and for the intents and purposes following, that is to say, upon trust, thereout, to appropriate and set apart the sum of £1000 three per cent. consolidated annuities, or so much of other stock as shall be equal thereto in value, and to pay the dividends and annual produce thereof unto Sarah Easum, the widow of my late brother, Edward Easum, deceased, for and during the term of her natural life, for her separate use, independent of any husband with whom she may intermarry, and for which her receipt, not by anticipation, shall be a sufficient discharge: and, from and after the decease of the said Sarah Easum, upon trust to transfer one-third part or share of the said last-mentioned stocks or funds unto my said dear mother, or to her executors, administrators, or assigns in case of her decease in the [279] lifetime of the said Sarah Easum, to and for her or their own absolute use; and, as to one other third part or share thereof, upon trust to pay, apply and dispose of the dividends and interest thereof in, for and towards the maintenance and education of Robert Easum, the eldest son of Robert Hayes Easum, until he shall attain the age of 21 years, and, when and as soon as he shall attain that age, then upon trust to transfer and make over the said one-third part of the said stocks or funds unto him, the said Robert Easum, for his use and benefit, if the said Sarah Easum shall be then dead (but, if not, then the actual transfer thereof shall be postponed till after her decease), but in case the said Robert Easum shall not live to attain the age of 21 years, then upon trust to stand possessed thereof for the benefit of the several persons and for the several intents and purposes next hereinafter mentioned and declared concerning the remainder of the stocks, funds, securities and monies constituting my said residuary estate: and, as to the remaining one-third part or share of the said sum of £1000 three per cent. consolidated annuities so directed to be appropriated as aforesaid, and also as to the remainder of the said stocks, funds, securities and monies constituting my said residuary estate, upon trust to pay the dividends, interest and annual produce thereof, respectively, unto Joseph Appleford, for and during the term of his natural life; and from and after his decease, then upon trust to stand possessed thereof for all and every the children or child of the said Joseph Appleford, who, being a son or sons, shall live to attain the age of 21 years, or, being a daughter or daughters, shall live to attain the same age or be married, which shall first happen, equally to be divided between them, if more than one, share and share alike." . . . "And I do hereby declare that [280] none of the legacies or sums in stock hereinbefore given shall be considered as a specific legacy; and, in case of any

misdescription or change or deficiency of any of the said stocks or funds, or of the trustees' names in which the same are or may be standing, or any other mistake or alteration, then the said legacies or sums in stock shall be made up and payable by and out of any other stocks or funds belonging to me equal thereto in value, or out of any other part or parts of my personal estate and effects."

Mary Ann Easum survived her mother, and died on the 30th of January 1839.

The bill, after stating as above, alleged that the £1000 three per cents. referred to in the will of Mary Ann Easum was appropriated and set apart by her executors, wholly out of the personal estate to which she was absolutely entitled, and not out of any trust funds over which she had a power of appointment under Matthew Easum's will; that all the debts and funeral and testamentary expenses of Matthew Easum, and all the legacies and bequests given by his will, had been paid, and the whole of his personal estate had been duly administered and distributed, except the sum of £2700 consols, which was then standing in the names of the Plaintiffs, and which was part of the securities upon which the sum of £3000 mentioned in the wills of Matthew Easum and Mary Ann Easum was invested, and had been retained and set apart by the Plaintiffs for the purpose of satisfying the appointment, by the will of Mary Ann Easum, expressed to be made of the sum of £2700 three per cent. consols therein mentioned, if any effectual appointment thereof should appear to have been thereby made; and the Plaintiffs were anxious to [281] transfer and administer the £2700 consols upon the trusts to which it was subject; but disputes had arisen between the parties to whom the £3000 was given, by the will of Matthew Easum, in default of appointment on the one hand, and the parties claiming under the residuary bequest contained in the will of Mary Ann Easum on the other, whether any effectual appointment of the £2700 consols had been thereby made.

The bill prayed that the rights and interests of all parties in the £2700 consols might be ascertained and declared by the Court; and that the trusts of Matthew Easum's will, so far as related to that sum, might be carried into execution under the decree of the Court.

The Plaintiffs, who were two in number, were the present trustees of the will of Matthew Easum. One of them was his surviving personal representative; and the other of them was one of the children of Matthew Easum, and was also the personal representative of several of his other children who had died. The Defendants were Joseph Appleford and his children, the trustees and executors of Mary Ann Easum's will, and other children and representatives of children of the testator Matthew Easum.

The facts of the case as stated in the bill were not disputed: and the only question was whether, in the event which had happened of the death of Mary Ann Easum's mother, the £2700 consols had been well appointed, or had fallen into the residue of the testator's estate.

The cause now came on to be heard.

Mr. Jacob and Mr. Craig, for the Plaintiffs, submitted that the £2700 consols had not been well appointed by [282] Mary Ann Easum, and that it now formed part of the residuary personal estate of the testator Matthew Easum.

Mr. Wigram and Mr. Sheffield, for Joseph Appleford and his children, contended that the £2700 consols had been well appointed by Mary Ann Easum to the trustees mentioned in her will, and that they were now entitled to receive that sum, for the purpose of its being applied upon the trusts which she had, by her will, declared of her personal estate; and that, in fact, she had made it part of her personal estate. They cited *Falkner v. Butler* (Amb. 514), *Oke v. Heath* (1 Vez. 135), *Duke of Marlborough v. Lord Godolphin* (2 Vez. 61).

Mr. Knight Bruce, Mr. Coleridge and Mr. Piggott, for other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case seems to me perfectly plain. As I understand it, the testatrix meant to dispose of the £3000 over which she had a power of appointment by her father's will. There would be a considerable part of that £3000, including the surplus dividends, beyond the £2700 consols and £250 consols, which she gives out of it; and, taking that to be so, there really is no doubt; for, after reciting that the £3000 and its surplus dividends, and the property to which she was absolutely entitled, had been blended in the £6700 consols then standing in

the names of the trustees, she, expressly in execution of the power, directs that the £3000 or the stocks upon which that sum or its surplus dividends might be invested should go to her [283] trustees upon trust to transfer £2700 consols or stock of equal value to her mother, and £250 consols or stock of equal value, to Sarah Williams, and directs that her trustees, "do and shall stand possessed of the residue of the said stocks or funds and securities as aforesaid, constituting the remainder of the said trust funds, upon the trusts and to and for the intents and purposes hereinafter declared and expressed of and concerning my residuary estate and effects."

I am clearly of opinion that no other sensible construction can be put on these words than that she directs all to go to her trustees on the trusts of her residuary estate, except the £2700 consols and £250 consols. Then she says: "As to all the residue of *my* stock in the public funds and all *my* monies and securities for money, and all the rest, residue and remainder of *my* estate and effects, I give and bequeath the same to the same persons, upon trust to convert and invest in stock such parts as shall not consist of money or stock." And she directs that they "do and shall stand and be possessed of all such stocks, funds and securities." And then follow words which appear to me to be surplusage, namely, "and also of the residue of the said trust funds which shall remain after paying and satisfying the several legacies of stock hereinbefore directed to be paid or transferred thereout unto my said mother and the said Sarah Williams, upon the trusts and for the intents and purposes following." Now these words I admit are surplusage; but they appear to me clearly to shew that what she meant to dispose of was all the trust fund *after* satisfying the legacies of stock, namely, the legacies of £2700 consols and £250 consols; whereas it is said in argument that what she meant [284] was all the trust funds, excluding the legacies of stock, whether disposed of or not.

Upon these grounds it appears to me that the £2700 consols must be considered to be unappointed and to be now subject to the trusts declared by Matthew Easum's will of his residuary personal estate.(1)

[284] MONCK v. THE EARL OF TANKERVILLE. August 8, 10, 1839.

Amendment. Costs. Practice.

A bill was filed for a foreclosure of a mortgage and for a transfer of a sum of stock.

On the answer being filed, disclosures were made which rendered it advisable to amend the bill by striking out all that related to the mortgage; and, thereby, nearly one-half of the bill and answer was rendered useless. The Court, however, refused to order, on motion, the Plaintiff to pay the Defendant's costs occasioned by the amendment; as it appeared that the amendment was made under the advice of counsel and not for the purpose of vexation or oppression.

The object of the bill, as originally filed, was to obtain a foreclosure of two mortgages and also a transfer of a sum of stock. After the answer had been put in, the Plaintiff amended his bill and struck out of it all that related to the mortgages, and so reduced it to a bill for a transfer of the stock.

Mr. Knight Bruce and Mr. G. L. Russell, for the Defendant, now moved that the Plaintiff might be ordered to pay to the Defendant his costs of the suit up to the time of filing the amended bill, or so much of the Defendant's costs of the original bill and of his answer thereto, and of the other proceedings thereon, as had been occasioned by the relief sought with respect to the mortgages. They said that nearly one-half of the bill [285] had been struck out, and that more than one-half of the answer had been rendered useless: that the bill, as it originally stood, was multifarious; and that the objection for multifariousness was taken by the answer, whereupon the order to amend was obtained: that, if the Plaintiff had gone to a hearing with the bill as it originally stood, he would have been obliged to pay the costs to the Defendant; that if, at the hearing, the amended bill should be dismissed with costs,

(1) Affirmed by the Lord Chancellor. [5 My. & Cr. 56.]

the Defendant would not be able to obtain the costs occasioned by the amendment; and the effect would be that a Plaintiff might dismiss his bill, partially at least, without payment of costs. They referred to Lord Lyndhurst's 30th Order, and to *Watts v. Manning* (1 Sim. & Stu. 421); *Mavor v. Dry* (2 Sim. & Stu. 113); *Bullock v. Perkins* (1 Dick. 110); *Dent v. Wardel* (*Ibid.* 339); and 1 Daniell's Pract. 517 and 518.

Mr. Jacob and Mr. Purvis, for the Plaintiff, said that the 29th of Lord Lyndhurst's Orders was against the motion; for that, under that order, the Court at the hearing would have power to deal with all the costs that had been incurred in the cause; that the cases cited had no application; for it was sworn, in the Plaintiff's affidavit, that the amendments were not made for the purpose of vexation or oppression; but were rendered necessary by the disclosures made in the answer.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In two of the cases which have been cited in support of the present motion the Court proceeded on the ground that the bill had been vexatiously amended. In [286] *Bullock v. Perkins* the Lord Chancellor said: "It would be a matter of great consequence and of great injustice to a Defendant if a Plaintiff should be permitted to act in this manner. For the Plaintiff might bring a vexatious bill, and put the Defendant to a great expense in taking a copy of it, in answering it and examining witnesses; and then, after publication is passed, upon seeing the depositions and finding thereby that he hath no equity, might, under pretence of amending his bill, strike out such parts as he cannot expect relief from, and thereby prevent the Court from doing that equity to the Defendant by ordering him his costs, which the Plaintiff hath not in himself." It appears also that, in that case, the cause had gone off at the hearing for want of parties, and then it was that the amendment was made. In *Mavor v. Dry* the Master of the Rolls says: "The rule that the Plaintiff shall pay 20s. costs only on amending his bill does not bind the Court where there has been great oppression and vexation. This appears to me to be a case of that nature;" and the same ground seems to have existed for the order in *Dent v. Wardel*, namely, that the Plaintiff, in amending his bill, had acted vexatiously and oppressively.

In the present case the bill connects the sum of stock with the two mortgages; and it is stated in the Plaintiff's affidavit that, at the time when the instructions for preparing the bill were given, it was impossible to obtain the information which rendered the amendments necessary, without having access to documents which were in the Defendant's possession; and that, on the answer being put in, an inspection of those documents was obtained, and the amendments were then made under the advice of counsel. And it fur-[287]-ther appears, by the same affidavit, that the expense which the Defendant has been put to in consequence of the amendments has been very trifling. Consequently, the amendments in this case do not appear to have been vexatious or oppressive; as they were in the cases before Lord Hardwicke and Lord Gifford.

I must, therefore, say that this does not appear to me to be a case in which I can grant the motion.

Motion refused, without costs.

[287] SOAMES v. MARTIN. August 9, 1839.

[S. C. 8 L. J. Ch. (N. S.) 367; 3 Jur. 1144. Overruled, *Gardner v. Barber*, 1854, 18 Jur. 509. Followed, *Frewen v. Hamilton*, 1877, 47 L. J. Ch. 393; *Wilkins v. Jodrell*, 1879, 13 Ch. D. 564. See *Williams v. Papworth* [1900], A. C. 567.]

Will. Construction. Legacy.

Testator directed the interest of a sum of money to be applied for the maintenance and education of his infant nephew, but made no disposition of the principal. Held, that the nephew was entitled to the interest during his life.

The testator in this cause directed the interest of a sum of money to be applied for the maintenance and education of his nephew (who was an infant), but made no

disposition of the principal. The question was whether the nephew was entitled to the principal, or to the interest during his life, or during his minority only.

The case of *Badham v. Mee* (1 Russ. & Myl. 631), in which Sir J. Leach, M.R., said that the words, "maintenance, education, and bringing up," standing by themselves had reference to minority, was cited as an authority that the nephew was entitled to the interest of the sum of money during his minority only.

THE VICE-CHANCELLOR [Sir L. Shadwell]. My opinion is that the child is entitled to the interest during his life; and that the principal is undisposed of.

[288] In the case cited the words were, "maintenance, education and *bringing up*." Those words necessarily apply to the infant state. But all persons who have attained 21 are not in a state in which they do not want education; and there is no period of life in which a person does not require maintenance. (See *Kilvington v. Gray*, *post*, p. 293.)

Mr. Knight Bruce, Mr. Wakefield, Mr. Jacob, Mr. Jeremy and Mr. Coleridge were counsel in the cause.

[288] STROTHER v. DUTTON. August 5, 1839.

Practice. Preliminary Accounts. Fifth Order of May 1839.

Under the 5th Order of May 1839 the Court will order preliminary accounts to be taken, although the cause has been set down for hearing.

Mr. Jacob and Mr. Geldart, for the Plaintiff, moved, under the Fifth Order of the 9th of May 1839, for a reference to the Master to take an account of the personal estate and of the rents and profits of the real estate of the testator in the cause, come to the hands of two of the Defendants, the executors and trustees of the will, and for various inquiries relating to the real and personal estate.

Mr. Knight Bruce, *contrà*, said that witnesses had been examined and publication had passed, and that the cause had been set down for hearing; and that the order in question was not meant to apply to a cause in so advanced a stage.

THE VICE-CHANCELLOR said that it might be useful to have the preliminary accounts and inquiries taken and made, although the cause had been set down for hear-[289]-ing; and that that circumstance did not prevent the application of the order under which the motion was made.

Motion granted. (See next case.)

[289] MEINERTZHAGEN v. DAVIS. Nov. 2, 1839.

Practice. Preliminary Inquiries. Fifth Order of May 1839.

The Court will not direct preliminary inquiries to be made under the 5th Order of May 1839, unless it is plain that they would be directed at the hearing, and would be binding on the parties to the suit.

In this cause a motion for certain preliminary inquiries under the 5th Order of May 1839 was made by Mr. Knight Bruce and opposed by Mr. Jacob and Mr. Lee.

The grounds on which the motion was opposed were, first, that two of the Defendants were resident out of the jurisdiction of the Court, and had not appeared to the bill; secondly, that the inquiries sought to be obtained might prove to be unnecessary when the cause should be heard.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This notice of motion is certainly not consistent with either the terms or the legitimate construction of the Fifth Order; for, in the first place, that order was not meant to apply except to plain cases, that is, to cases in which it is reasonably clear that the inquiries sought to be obtained would have been directed at the hearing, and will be binding on the parties. Now, in the present case, two of the Defendants are out of the jurisdiction of the Court,

and have not appeared to the bill; and it is said that, as they are alleged by the bill to be out of the [290] jurisdiction, they are to be considered as not being parties to the suit. It is obvious, however, that, before the cause is heard, they may appear and put in their answers, and thereby, perhaps, render all that may have been done under the reference entirely useless.

The order under which the present motion is made does not authorize the Court to direct inquiries to be made before the hearing of the cause, unless it shall appear to the Court that the order will be beneficial to such of the parties to the cause as may not be competent to consent thereto, and that the same is consented to by such of the Defendants as, being competent to consent, have not put in their answer to the bill, and that the same is consented to by, or is proper to be made upon, the statements contained in the answers of such of the Defendants as have answered the bill. It is evident, therefore, that, in a case like the present, the Court has no power to make the order. (See the preceding case.)

[291] *In re TAYLOR.* Nov. 4, 8, 1839.

[S. C. 11 Sim. 178.]

Construction of 2 & 3 Vict. c. 54. Vice-Chancellor. Jurisdiction. Infant.

The Vice-Chancellor has jurisdiction to make orders under 2 & 3 Vict. c. 54 (for amending the law relating to the custody of infants), although the Lord Chancellor and Master of the Rolls are alone mentioned in the Act.

This was a petition addressed to the Lord Chancellor by a married lady, the mother of several infant children, under 2 & 3 Vict. c. 54 (to amend the law relating to the custody of infants), which enacts that it shall be lawful for the Lord Chancellor and the Master of the Rolls in England, and for the Lord Chancellor and the Master of the Rolls in Ireland respectively, upon hearing the petition of the mother of any infant or infants being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, if he shall see fit, to make order for the access of the Petitioner to such infant or infants, at such times and subject to such regulations as he shall deem convenient and just; and, if such infant or infants shall be within the age of seven years, to make order that such infant or infants shall be delivered to and remain in the custody of the Petitioner until attaining such age, subject to such regulations as he shall deem convenient and just.

Mr. Knight Bruce and Mr. Simpson appeared for the Petitioner, and said that a doubt was entertained as to whether the Vice-Chancellor had jurisdiction under the Act, inasmuch as only the Lord Chancellor and the Master of the Rolls were mentioned in it.

Sir W. Follett, Mr. Jacob, Mr. Wigram and Mr. Roundell Palmer appeared for the Respondent, the father of the infants.

[292] THE VICE-CHANCELLOR [Sir L. Shadwell]. By the Act of Parliament by which the office of Vice-Chancellor was created (53 Geo. 3, c. 24) the Vice-Chancellor is empowered to hear and determine all causes, matters and things, which shall be, at any time, depending in the Court of Chancery in England, either as a Court of law or as a Court of Equity, or incident to any ministerial office of the said Court, or which have been or shall be submitted to the jurisdiction of the said Court, or of the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal for the time being, by the special authority of any Act of Parliament, as the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal shall, from time to time, direct; and that all decrees, orders and acts of such Vice-Chancellor so made or done shall be deemed and taken to be respectively, as the nature of the case shall require, decrees, orders and acts of the said Court of Chancery, or of such incident jurisdiction as aforesaid, or under such special authority

as aforesaid, and shall have force and validity and be executed accordingly. It seems to me, therefore, that this case is plainly within the terms of the 53 Geo. 3.

Besides, I have been informed by the best authority that, when the Act of the 2d & 3d of Her present Majesty was introduced into the House of Lords, it did contain the words, "The Vice-Chancellor;" but that those words were afterwards struck out, because jurisdiction was expressly given by the Act to the Lord Chancellor; and that jurisdiction would be exerciseable, by the Vice-Chancellor, as a matter of course; and, therefore, it was deemed unnecessary to mention the Vice-Chancellor. For these reasons I have no doubt that I have jurisdiction in this case.

[293] KILVINGTON v. GRAY. Nov. 12, 1839.

Will. Construction. Infant. Maintenance.

Testator made a certain provision for the infant son of his relation, M. W., until the age of 16, and then left the infant to the care of his trustees, to provide for him in some business or profession, and his future maintenance, out of the testator's funded property. Held that the infant, on attaining 16, was entitled to receive, out of the testator's funded property, a sum sufficient to provide for him in some business or profession, and to an annual allowance for his future maintenance during his life; and it was referred to the Master to inquire and state what sums were proper to be allowed for those purposes.

Thomas Kilvington, the testator in the cause, by his will, dated the 13th of August 1822, devised his freehold estates in the county of York to William Gray and Francis Barroby, their heirs and assigns, to the use of Thomas Bramley and John Haddon Askwith, their executors, administrators and assigns, for the term of 1000 years next ensuing his decease, upon trust, by mortgage or out of the rents and profits thereof, to raise and pay to Thomas Kilvington, Lamb Walker and William Walker an annuity of £100 each during their respective lives, if Edward Kilvington should so long live, or there should be issue male of his body so long in existence; and, after the decease of Edward Kilvington and failure of issue male of his body, then to pay to Thomas Kilvington, Lamb Walker and William Walker an annuity of £200 each in lieu of the annuity of £100 each, during the then remainder of their respective lives: and the testator directed that the same annuities should, during the respective minorities of the annuitants, be applied by Bramley and Askwith, their executors, &c., for their maintenance, education and benefit, in such manner as Bramley and Askwith, their executors, &c., should think proper: and he appointed William Gray, Francis Barroby and Edward Kilvington executors of his will. The testator made a codicil, dated the 29th of August 1823, which was as follows: "Whereas my relation Mrs. Walker, in York, has been [294] delivered of a son since I made my will; to the maintenance of this child I allow £10 a year to Mrs. Walker, till it arrives at the age of 10 years; and, after that time, £20, till he is 16 years old. *I then leave him to the care of my trustees, to provide for him in some business or profession, and his future maintenance out of my funded property.*"

The testator died on the 13th of September 1823.

By the decree at the hearing of the cause, on the 27th of November 1824, the will and codicil were established, and the trusts thereof were ordered to be carried into execution.

By the order on further directions, made on the 17th of August 1825, the executors were ordered to transfer so much £3 per cent. consols, standing to the credit of the cause, as the Master should ascertain to be set apart to answer the provision, by the codicil, given and directed to be made for the son of Mary Walker, into the name of the Accountant-General in trust in the cause, "Mary Walker's Infant Son's Annuity Account:" and it was ordered that, out of the dividends thereof, the sum of £5 should be paid half-yearly to Mary Walker, on the 13th of September and the 13th of March in each year, until further order. On the 8th of May 1829 the executors transferred £333, 6s. 8d. consols as directed by the before-mentioned order; and the dividends

thereof, amounting to £10 per annum, were paid to Mary Walker, until the infant attained the age of 10 years: and, on his attaining that age, the executors, in obedience to another order in the cause, made a similar transfer of the further sum of £333, 6s. 8d. consols, out of the funds in the cause, and the dividends [295] of that sum as well as of the before-mentioned sum of stock, amounting to £20 per annum, were paid to Mary Walker.

On the 5th of August 1839 the infant attained the age of 16; and, shortly afterwards, presented a petition stating to the effect before mentioned, and that in March 1834 £23,500 was raised by sale of £25,817 stock standing to the credit of the cause, and, pursuant to an order of the Court, was invested in the purchase of a freehold estate under the trusts of the testator's will respecting his funded property, and that the residue of such funded property, other than the £666, 13s. 4d. stock standing to "Mary Walker's Infant Son's Account," consisted of £5888 three per cents., £48,153 three and a half per cents., which were standing in the name of the Accountant-General in trust in the cause, "The Residuary Personal Estate Account": that the Petitioner was advised that, on his attaining the age of 16, he became entitled to receive, out of the testator's funded property, a sum sufficient for the purpose of providing for him in some business or profession, and to an annual allowance for his future maintenance. The petition prayed for a declaration to that effect, and that it might be referred to the Master to inquire and certify what sum would be proper to be allowed for the purpose of providing for the Petitioner in some and what business or profession, and also what yearly sum would be proper to be allowed for his future maintenance from the said 5th day of August 1839, for the time to come, and out of what funds and to whom the same ought to be paid during his minority.

Mr. Jacob, in support of the petition, said that the trustees were bound by the codicil to provide for the [296] Petitioner, in some business or profession, and also for his maintenance during the remainder of his life: but that the amount of the provision was not specified, and, therefore, it must be determined by the Court. *Foley v. Parry* (ante, vol. v. p. 138; and 2 Myl. & Keen, 138).

Mr. Girdlestone and Mr. Koe, for the Plaintiff and other parties, said that there was no gift to the Petitioner, but only a vague discretionary power, in the trustees, to provide for him; and that, as the matter was left entirely to the discretion of the trustees, the Court would not take upon itself the exercise of that discretion. *Pink v. De Thuissey* (2 Madd. 157); *Walker v. Walker* (5 Madd. 424).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator has imposed it as a duty on the trustees to take care of the infant, and to provide for him in some business or profession, and his future maintenance; and the question is whether the Court, when it sees that the testator has done so, and has pointed out the fund out of which the provision is to be made, does not take upon itself the exercise of the discretion which the testator has reposed in the trustees. Unless that be so, I do not see on what principle my decision in *Foley v. Parry* could have been affirmed by the Lord Chancellor.

With respect to the time during which the maintenance of the child is to continue, it seems to me that the word "future" comprehends all time; and it is probable that the child may be put into some business or [297] profession which will not afford him a maintenance until after he has attained the age of 21.

My opinion, therefore, is that the provision for the maintenance of the Petitioner ought to continue during his life; and I am confirmed in that opinion by seeing that, in the prior part of the will, the provision for the maintenance of the three infants there named is expressly circumscribed by the words "during their minorities." (1)

Declare that the Petitioner is entitled under the codicil to receive, out of the testator's funded property, a sum sufficient for the purpose of providing for him in some business or profession, and to an annual allowance for his future maintenance, from the 5th day of August last: and refer it to the Master to inquire and state whether it will be fit and proper and for the benefit of the Petitioner to place him out to any and what trade or profession, and with whom, and what sum of money will be fit and proper to be advanced on such occasion, and out of what fund the same ought

(1) See *Soames v. Martin*, ante, p. 287.

to be paid : and let the Master also inquire and state what yearly sum or sums will be proper to be allowed for the future maintenance of the Petitioner from the 5th day of August last for the time to come, and out of what fund, and to whom during his minority the same ought to be paid.

[298] *Ex parte OMMANEY. May 8, 1841.*

[S. C. 10 L. J. Ch. (N. S.) 315 ; 5 Jur. 647.]

Costs. Mortgagor and Mortgagee. Infant Heir.

The infant heir of a mortgagee in fee having been found by the Master to be a trustee of the mortgaged estate for the executor of the mortgagee, the executor petitioned that the infant might be ordered to convey the estate to the mortgagor, on payment of the principal and interest due on the mortgage, and costs. Held, that the costs of the proceeding before the Master must be paid by the mortgagor.

This was a petition presented under 11 Geo. 4 and 1 Will. 4, c. 60, by the executor of a mortgagee in fee, praying that the infant heir of the mortgagee (who had been found by the Master to be a trustee of the mortgaged estate for the executor), might be ordered to convey the estate to the mortgagor, on payment of the principal and interest due on the mortgage, and of the costs of the proceeding before the Master. The mortgagor had offered to pay the principal and interest, on the estate being reconveyed to him ; and the only question was whether the costs of the proceeding before the Master ought to be paid by the mortgagor, or out of the assets of the mortgagee.

Mr. Dickinson, for the Petitioner, cited *Wetherell v. Collins* (3 Madd. 255).

Mr. Lloyd, for the mortgagor, who had been served with the petition, cited *Ex parte Richards* (1 Jac. & Walk. 264), and *The Midland Counties Railway Company v. Wescomb* (2 Railway Cases, 211).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the costs in question were not costs of the conveyance, but were incurred in order to give the infant the capacity of reconveying the mortgaged estate ; and that he thought that they ought to be paid by the mortgagor.

[299] *ARKELL v. FLETCHER. Nov. 13, 1839.*

[S. C. 3 Jur. 1099.]

Will. Construction. Leaseholds.

Testator devised to trustees all his messuages or tenements, farms, lands, hereditaments and premises, with the appurtenances, situate in C. and W., and all other his freehold lands and tenements whatsoever ; to hold all such his said real estate, with the appurtenances, to the trustees and their heirs, upon trust for the use of his wife for life, with limitations, after her decease, which were applicable to freeholds only. And he gave all his household goods, implements of husbandry, farming stock, monies, securities for money, and all other his personal estate and effects whatsoever, to his wife for her own sole use. The testator was seized in fee of freehold lands in C., W. and S., but there was no messuage or other building on any of those lands, except a wooden barn and stable on the land in S. He was also possessed of land in C. for a long term of years, on which there were a messuage and farm buildings ; and, at his death and for six years before, he occupied the freehold and leaseholds as one farm, but they did not adjoin each other. Held, that the leaseholds did not pass under the devise of all the testator's messuages or tenements, farms, &c., but under the bequest of the testator's personal estate.

In October 1818 Richard Fletcher, deceased, the first husband of the Plaintiff Phœbe Arkell, purchased of Joseph Price and took an assignment from him of a messuage, with the outbuildings, barn, stables, yards and orchards thereto belonging, and of a piece of pasture land, situate in the parish of Cowhoneyborne in Gloucestershire, for the remainder of a term of four thousand eight hundred years, which commenced in 1719; and he continued in possession thereof until his decease; and, at the time of making his will and thenceforth until his decease, he was seized in fee of freehold estates in the same parish, and in the parishes of Welford and Saintbury in Gloucestershire. On the 17th of April 1824 he made his will in the following words:—

“I give, devise and bequeath, unto my cousin, Richard Fletcher, of Charringworth, and William Fletcher, of Stoke, and to my friend William Cornell, of Mickleton, *all my messuages or tenements, farms, lands, hereditaments and premises, with the appurtenances, situate, lying and [300] being in the several parishes of Cowhoneyborne and Welford in the county of Gloucester, and all other my freehold lands and tenements whatsoever and wheresoever*, to hold all such *my said real estate* and any part thereof, with the appurtenances, unto my said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor for ever, upon the following trusts, viz., upon trust and to and for the use of my wife Phœbe and her assigns for and during the term of her natural life, and, from and immediately after her decease, then upon trust and to and for the use of the eldest son of the body of my sister Muriel, now the wife of Robert Fletcher, of Aston Magna, in the county of Worcester, and the heirs male of her body lawfully begotten, and, for want and in default of such issue male of my said sister Muriel, then I devise the said real estates, with the appurtenances, to and for the use of all and every the daughters and daughter of my said sister Muriel by her present or any future husband, to be equally divided between them as tenants in common and not as joint-tenants; and, in default of all such issue as aforesaid, then I give and devise the same estates and every part thereof to my right heirs for ever. Provided always, and I do hereby charge all my said real estates with the payment of an annuity of £10 to my old and faithful servant Elizabeth Darke, to be paid to her quarterly for and during the term of her natural life; and I also charge all my said real estates with the payment of £20 each to my nieces, Elizabeth Muriel and Ann Susannah Fletcher, daughters of the said Robert Fletcher, to be paid and payable to them within 12 months after the decease of my said wife; which legacies I do hereby give and bequeath to my said nieces accordingly. I give and bequeath to my said wife *all my household goods, implements of husbandry, farming [301] stock, monies, securities for money, and all other my personal estate and effects whatsoever and wheresoever*, to and for her own sole use and benefit, subject nevertheless, and I do hereby charge the same with the payment of all my just debts, funeral and testamentary expenses, and also with the following legacies. I give and bequeath the sum of £100, to be by them, my said trustees, put and placed out at interest as they may think proper, and to and for the use and benefit of my said niece, Elizabeth, until she shall attain the age of 21 years; at which time I direct the same shall be paid to her, with the interest thereon; and I hereby give and bequeath the same to my said nieces accordingly; and I do also charge my said estate with the payment of £100 each to my said cousins, Richard and William Fletcher, and £50 to the said William Cornell, to whom I bequeath the same accordingly, to be paid and retained by them, in 12 months after my decease, in consideration of their accepting the trusts of this my will;” and the testator appointed Richard Fletcher, William Fletcher and William Cornell joint executors of his will.

The testator died in 1824, leaving Richard Fletcher the younger, the eldest son of his sister Muriel Fletcher, him surviving; and, on the 18th of November 1824, his will was proved by Richard Fletcher the elder, William Fletcher and William Cornell.

In December 1825 the Plaintiff married the Defendant Joseph Arkell; and, by the settlement on her marriage, she assigned all her household goods, plate, linen, china, implements of husbandry, farming stock, monies, securities for money, and all other her personal estate and effects to Richard Fletcher the elder and [302] William Cornell, in trust for her separate use. William Cornell afterwards died, and thereupon William Fletcher was appointed a trustee of the settlement in his place.

The bill, after stating as above, alleged that the Plaintiff, being desirous of raising £1000 upon the security of the leasehold premises in Cowhoneyborne, which one Izod was willing to advance to her upon such security, a proper mortgage deed was prepared for that purpose, to which Richard Fletcher the elder was made a party; but he declined to execute it, alleging, as did also Richard Fletcher the younger, that the leasehold premises did not pass by the will to the Plaintiff absolutely; but that she took only a life interest therein under the devise of the real estate contained in the will; and that Richard Fletcher the younger, as the only son of Muriel Fletcher, was entitled to those premises in tail male or absolutely after the Plaintiff's decease; but the Plaintiff charged that, under the bequests contained in the will in her favour, she became absolutely entitled, on the testator's death, to the leasehold premises for the residue of the term of 4800 years, and that Richard Fletcher the younger had not any interest therein.

The bill prayed that the Plaintiff might be declared to be absolutely entitled, for her separate use, under the will and the trusts of the settlement, to the leasehold premises for the remainder of the term of 4800 years, and that Richard Fletcher the elder and William Fletcher might be directed to execute a mortgage of those premises to Izod for securing the £1000.

It appeared, by the answers of Richard Fletcher the elder, William Fletcher and Richard Fletcher the [303] younger, which, it was agreed, should be read as evidence, and also by the admissions agreed upon between the parties, that the testator was, at the date of his will and at his death, seised in fee-simple of certain pieces of freehold land, containing about 15 acres, situate in the parish of Welford in the county of Gloucester; and also of certain pieces or parcels of freehold lands containing 39 acres or thereabouts, situate in the parish of Cowhoneyborne: and also of certain pieces of freehold land containing 28 acres or thereabouts, situate in the parish of Saintbury in the same county: and that the before-mentioned freehold lands were, at the date of his will and at the time of his death, totally devoid of any messuages or tenements, erections or buildings of any kind whatsoever, except a small barn and stable built with boards upon the land in the parish of Saintbury: and that the testator, at his death, was possessed of two pieces of land containing together 7a. 0r. 4p. or thereabouts, situate at Cowhoneyborne aforesaid, which he purchased in June 1817 of John Halford, for the remainder of three several terms of 5000, 5000 and 2000 years: and also of the leasehold premises at Cowhoneyborne which the testator purchased of Joseph Price in 1818 for the remainder of the term of 4800 years, as before mentioned; and that the last-mentioned premises consisted of a messuage, tenement or farmhouse, with outbuildings, barn, stables, yard and orchards, and also of certain pieces of land thereto adjoining, containing 15 acres or thereabouts, and of a cottage and garden: and that the before-mentioned freehold and leasehold premises did not adjoin each other, but were, some years prior to the death of the testator, occupied together by him as one farm, and the same continued to be so occupied by him down to and at the time of his death, and that the same were always denominated [304] by him, in his lifetime, as his farm: that the testator was not, at the respective times of making his will and of his death, seised, possessed of or entitled to, nor had he any disposing power over any messuages, tenements or buildings except those before mentioned to have been purchased by him of Joseph Price: nor was he seised, possessed or entitled to, nor had he any disposing power over any farm, or any real or leasehold property whatever, except the freehold and leasehold premises before mentioned.

Mr. Jacob and Mr. Koe, for the Plaintiff. The testator begins with devising all his messuages, lands, tenements and hereditaments. If he had stopped there, then, according to *Rose v. Bartlett* (Cro. Car. 292), his freehold estates only would have passed. He goes on, however, and says, "and all other my *freehold* lands and tenements whatsoever and wheresoever: to hold all such *my said real estate*," &c. There are, therefore, stronger grounds in this case for holding that the leaseholds do not pass than there were in *Rose v. Bartlett*. Besides it appears, from the answers and the admissions, that the testator had only one messuage and one farm; and, therefore, there is nothing to answer the words, "messuages and farms." In fact, the words now under consideration are words which testators generally use in

devising their real estate. Moreover, the limitations in the will are applicable to freeholds only. *Whitaker v. Ambler* (1 Eden, 151). Then, in a subsequent part of the will, the testator gives to his wife all his household goods, implements of husbandry, farming stock, monies, securities for money, and all other his personal estate and effects whatsoever and wheresoever. It is observable [305] that this is not a gift of the *residue* of the testator's personal estate; but it comprises every article of a personal nature; and, therefore, there is no ground for saying that the testator had, in the prior part of his will, disposed of any part of his personal property.

Mr. Anderdon, for Joseph Arkell, the Plaintiff's husband.

Mr. Knight Bruce and Mr. Rudall, for Richard Fletcher the elder and William Fletcher, and Mr. W. R. Ellis, for Richard Fletcher the younger. A devise of messuages, lands, &c., will pass leaseholds if the Court can collect an intention to pass them from other parts of the will or from extrinsic circumstances. Now, the leaseholds were held for unusually long terms. They were occupied by the testator, together with the freeholds, as one farm; and the testator had no other farm: nor had he any messuage except the leasehold one; nor any building upon any part of his freehold property, except the wooden barn and stable on the land at Saintbury. Can it be reasonably imputed to the testator that he intended to split the farm; or to sever from it the farmhouse, barn, stables, &c., without which it could not be occupied as a farm? There is no incorrectness in the expression, "all other my freehold lands and tenements;" for freeholds are indisputably included in the first branch of the sentence, and the words "real estate" are not inapplicable to leasehold property; for a leasehold interest is an interest in realty, though of a chattel nature. The long unity of possession of the leaseholds with the freeholds is, of itself, sufficient to justify the Court in holding that they were intended to pass together: in addition to which, it must be remembered that any other construction would render the word "messuages" inoperative. *Lane v. Earl Stanhope* (6 T. R. 345), *Hobson v. Blackburn* (1 Myl. & Keen, 571), *Day v. Trig* (1 P. W. 286), *Addis v. Clement* (2 P. W. 456), *Doe v. Martin* (2 Black. 1148), *Lowther v. Cavendish* (1 Eden, 99).

It cannot be reasonably supposed that the testator intended to pass long and valuable terms for years under the words, "household goods, implements of husbandry, farming stock, monies and securities for money:" and by the words, "all other my personal estate and effects," he must be held to have meant things of the same nature as those which he had before mentioned, and not lands.

Mr. Jacob, in reply. This case goes much further than *Rose v. Bartlett*; for the question is not whether leaseholds pass under a devise of "all my lands and tenements;" but whether they pass under a devise of "all my *freehold* lands and tenements." In *Day v. Trig* the testator devised all his freehold houses in Aldersgate Street, having no freehold but only leasehold houses there; and it was held that the plain intention of the testator being to pass some houses, and he having no freehold houses in Aldersgate Street, the word "freehold" should rather be rejected than the will be inoperative; and, therefore, that the leaseholds should pass; but it was likewise said that if there had been any freehold houses to satisfy the words of the will, the leasehold houses would not have passed. In *Lane v. Stanhope* the testator devised all his manors, messuages, houses, [307] farms, lands, woodlands, hereditaments and real estate whatsoever; and not, as in the present case, all his messuages, &c., and all other his *freehold* lands, &c. Besides, the decision in that case has been disapproved of by Lord Eldon and other Judges. (See *Thompson v. Lady Lawley*, 2 Bos. & Pull. 303.) In *Hobson v. Blackburn* the decision turned on the words, "with their appurtenances;" and the leasehold parts of the houses in Ludgate Hill and Ludgate Street were held to be appurtenant to the freehold parts. Here the argument rather is that the leaseholds are not appurtenant to the freeholds, but that the freeholds are appurtenant to the leaseholds. In *Doe v. Martin*, also, the word "appurtenances" was used. In *Addis v. Clement* the testator devised all his messuages, lands and tenements in a certain parish, which he then stood seised or possessed of, or in any way interested in: and the Lord Chancellor held that the leaseholds passed, because the words possessed of or interested in were applicable to property of that nature: no such words, however, are found in this will. In *Lowther v. Cavendish* Sir James Lowther made a devise of all his manors,

messuages, lands and tenements; but those words were followed by "mines of coal, lead," &c.; and in a subsequent part of his will the testator bequeathed all his goods, chattels and personal estate not otherwise disposed of: and Lord Keeper Henley held that leasehold mines passed under the first devise. But in *Whitaker v. Ambler* the same learned Judge, on the case of *Lowther v. Cavendish* being cited to him, said that if Sir James Lowther had devised all his personal estate whatsoever to the residuary legatee, and had afterwards given all his lands, &c., he should have thought, even though he had used the words "mines, collieries," &c., that nothing would [308] have passed except the freeholds. The words of the devise now in discussion have no distinct meaning or effect, but are mere words of general description.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have often had occasion to consider the effect of the decision in *Rose v. Bartlett*; and I have always understood that it amounts to this, namely, that if you find words which import a devise of lands simply, freehold lands only will pass; but if those words are joined with others then you must consider what effect ought to be given to the whole of the words taken collectively.

Here the testator had an estate in the parishes of Cowhoneyborne, Welford and Saintbury, consisting of eighty-two acres of freehold land; and in 1817 he purchased seven acres in Cowhoneyborne of John Halford; and in 1818 he purchased fifteen acres in the same parish with a messuage, barn, stables, &c., of Joseph Price. These two properties contained together twenty-two acres, and were held for long terms of years. Now there could not have been any very long unity of possession of the freeholds with the leaseholds; for I find, by the copy of the will which has been handed up to me, that it was proved on the 18th of November 1824. It appears also that, on the twenty-eight acres in Saintbury, there was a barn and stable. That being the situation of the property, the question, so far as I have been able to collect it from the bill and the admissions, is whether there is on the face of the will a clear intention to give the freeholds and the leaseholds, collectively, as one farm. The words are, "all my messuages or tenements, farms, lands, hereditaments and premises, with the appurtenances, situate, lying and being in the several parishes of Cowhoneyborne and Welford in the [309] county of Gloucester, and all other my freehold lands and tenements whatsoever and wheresoever." Now the first observation which strikes my mind is that the gift in question is a mere gift, in general terms of a most vague nature. If the word "messuages" were found alone, there might be some ground for saying that the words of the devise would not be satisfied without including the fifteen acres of leasehold land upon which the messuage stood: but the words are messuages or tenements, and not messuages only; and therefore they would be applicable to the barn and stable on the twenty-eight acres in Saintbury: for the testator does not mention any particular parish. Consequently, those words, taken in conjunction with the subsequent words, are, I think, mere vague words of general description. It is also observable that the testator uses the word "farms" in the plural number; but it has not been contended that he had more than one farm. Then he says, "and all other my freehold lands and tenements whatsoever and wheresoever; to hold all such my said real estate and any part thereof, with the appurtenances, unto my said trustees, and the survivors and survivor of them, and the heirs and assigns of such survivor for ever, upon the following trusts;" and then he proceeds to declare uses which are applicable only to freehold estate. In my opinion, therefore, the fair construction of those general words, "all my messuages or tenements, farms, lands, hereditaments and premises," is to make them applicable to freehold estates alone.

Then, having declared uses of his real estates, which exhaust the whole of his interest, he proceeds to say: "I give and bequeath to my wife all my household goods, implements of husbandry, farming stock, monies, [310] securities for money, and all other my personal estate and effects whatsoever and wheresoever, to and for her own sole use and benefit." It is to be observed that the first use which the testator declared of his freehold estates was for his wife and her assigns during her natural life: and there is no incongruity in saying that his intention was to give his freehold estates in one way and the rest of his property in another way.

My opinion, therefore, is that this will cannot be construed so as to give the freeholds and the leaseholds collectively; but that the true construction of it is that

the wife is entitled to the freehold estates for her life only, and that she takes the leasehold estates together with the household goods, implements of husbandry, &c., absolutely.(1)

[311] THE ATTORNEY-GENERAL v. NETHERCOTE.(2) Nov. 6, 1839.

Evidence. Depositions.

Depositions were suppressed for irregularity in the order under which they had been taken. The Examiner, on the witnesses again going before him for examination under an order for that purpose, read over to them their depositions taken under the former order, and inquired whether they were correct; and on being answered in the affirmative, he caused them to be signed by the witnesses. The Court suppressed the depositions as having been irregularly taken.

On the 11th of February 1839 an order for enlarging publication, which the Defendants had obtained in January of the same year, was discharged for irregularity, on the application of the informant; and, on the 21st of March following, the depositions of the Defendants' witnesses, which had been taken under it, were suppressed. On the 27th of the same month the Court ordered that the Defendants should be at liberty to examine witnesses, and that publication should be enlarged until the last day of Trinity term.

The depositions taken under the last-mentioned order having been published, the informant now moved that they might be suppressed for irregularity.

In support of the motion, affidavits were made by a clerk to the informant's agents, and by one of the witnesses: from which it appeared that, upon the witness going before the Examiner, none of the interrogatories were read over to him, but his deposition taken under the order of January 1839 was produced to him, and he was asked by the Examiner whether it was not his deposition; and upon his answering in the affirmative, the Examiner altered the date of the deposition, and the witness went over his signature to it with a dry pen.

A clerk to the Defendants' agents deposed that he had applied to the Examiner to learn the precise way in [312] which the depositions had been taken under the order of March; and that the Examiner had informed him that, in examining the witnesses, he had read over to each witness the interrogatories to which he was to depose, and which had been left under the last-mentioned order, and that he had afterwards read over to the witness his answers to the same interrogatories taken under the order of January; and that he had, at the same time, asked the witness if he had anything to add to his deposition, and if the same was correct; and that, on receiving a reply in the affirmative, he had altered the date of the deposition, and had caused the witness to re-sign it; and that, if any alteration became necessary, he had made such alteration, and then had the deposition re-signed: that the depositions of two of the witnesses were entirely new, and had been altogether rewritten; and that the deposition of another of the witnesses, or the greater part of it, was new and had to be rewritten.

Mr. Knight Bruce, Mr. Jacob, and Mr. Anderdon, for the motion, contended that the depositions had been irregularly taken, and that the passing a dry pen over the witness's name did not amount to a signing of the new depositions. *Shaw v. Lindsey* (15 Ves. 380).

Mr. Wakefield and Mr. Coleridge, against the motion, submitted that, as there was a material discrepancy in the statements contained in the affidavits as to what had taken place in the Examiner's office, the Court, before deciding on the motion, ought to require a certificate from the Examiner himself: that the manner in which the depositions were stated to have been taken was [313] not the same as in *Shaw v.*

(1) A case was afterwards directed to be sent for the opinion of the Court of Common Pleas; but the parties subsequently acquiesced in the Vice-Chancellor's decision.

(2) *Ex relatione*

Lindsey; the witnesses not having come to their examination with a ready written statement, which might be the dictation of others; but having simply re-affirmed the answers which, a few weeks before, they had themselves, in the usual manner, given to the same interrogatories.

THE VICE-CHANCELLOR said he thought that there was no necessity, in the present case, for requiring a certificate from the Examiner; that, if it was irregular to take the witness's own ready prepared statement in writing as a deposition, it was still more irregular to adopt depositions which the witnesses had made some months previously; and that, the manner in which the depositions had been taken being wholly repugnant to the principles of the Court, an order for suppressing them must be made with costs.(1)

[314] ROBERTSON v. THE GREAT WESTERN RAILWAY COMPANY. Nov. 13, 1839.

[S. C. 9 L. J. Ch. (N. S.) 17; 1 Rail. Cas. 459.]

Pleading. Parties. Specific Performance. Trespass.

A. agreed to sell to B. a piece of land in the occupation of his tenant, and to buy up the tenant's interest. B. having entered on the land before payment of his purchase-money, A. and his tenant served him with notices not to trespass: and afterwards A. filed a bill against B. for a specific performance and to restrain the trespass. Held, that the tenant was not a necessary party to the suit.

The Plaintiff had agreed to sell to the Defendants a piece of land in the occupation of his tenant, and to buy up the tenant's interest. The Defendants having entered on the land before payment of their purchase-money, the Plaintiff and his tenant served them with notices not to trespass on the land; and, afterwards, the Plaintiff filed a bill against the Defendants for a specific performance of the contract and to restrain the trespass. The Defendants demurred to the bill, because the tenant was not a party to it.

Mr. Knight Bruce, Mr. Jacob and Mr. Stephens, in support of the demurrer, said that the tenant was a necessary party; as one object of the bill was to restrain an act by which he was affected; and, therefore, he might file another bill against the Defendants.

Mr. Wigram and Mr. Keene, in support of the bill, said that, as the tenant was not a party to the contract, it was unnecessary to make him a party to the suit. *Humphreys v. Hollis* (Jac. 73): *Tasker v. Small* (3 Myl. & Craig, 63).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The subject is one, and the injury is one, and the parties who have committed the injury are one and the same; but, the subject being one and the injury being one, it happens that two persons are affected by it; and, [315] in my opinion, the Court cannot very well administer justice in the case, without having before it both the persons who are affected by the act which is made the subject of complaint.

Demurrer allowed.

In December 1839 the above decision was reversed by the Lord Chancellor; his Lordship being of opinion that none but the parties to the contract were necessary parties to the suit. (See *Seddon v. Connell*, ante, p. 84.)

(1) The Defendants having intimated their intention of appealing from the above decision, it was arranged that the order should not be drawn up, but that the cause should be advanced and the depositions read; and an order to that effect was afterwards made.

[315] LAING v. LAING. Nov. 15, 1839.

[S. C. 9 L. J. Ch. (N. S.) 48; 3 Jur. 1119.]

Will. Construction. Legacy.

Testator gave £5000 stock to a female infant, to be paid or transferred to, or settled on her, by his executors, by such deed or instrument in writing, as they should think most prudent and proper, on her attaining 21. The infant married in the testator's lifetime, and afterwards attained 21. The Court ordered the stock to be transferred to her, on her sole receipt.

Thomas Black, by his will, dated the 17th of June 1837, gave to the Plaintiff, Charlotte, the wife of the Defendant, Henry Laing, then Charlotte Miller, spinster, £5000 stock, to be paid or transferred to or settled upon her, by his trustees and executors, by such deed or instrument in writing, as they, in their judgment, should think most prudent and proper, upon her attaining the age of 21.

The testator died in May 1839. The Plaintiff married Henry Laing in the testator's lifetime; and, in July 1839, she attained 21.

[316] The bill prayed that the Plaintiff might be declared to be entitled to have the £5000 stock paid or transferred either to her and her husband, or to herself alone for her separate use, as the Defendants, the trustees and executors of the will, should, in their judgment, think most prudent and proper, or as the Court should direct.

The trustees and executors, in their answer, said that they considered that it would be most prudent and proper that the stock should be settled upon such trusts that the Plaintiff might be entitled to receive the dividends thereof for her life, to her separate use, and that, after her death, her husband might receive the dividends during his life, in case he should survive her, and upon trust, after the death of the survivor, as to the capital, for all the Plaintiff's children, subject to a power of appointment by her among such children.

Mr. Knight Bruce and Mr. Rolt, for the Plaintiff, cited *Burrell v. Crutchley* (15 Ves. 544).

Mr. Jacob, for the executors and trustees.

Mr. Prior, for the Plaintiff's husband.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The settlement suggested by the trustees is not consistent with the words of the will. I see no reason why the fund should not be settled on the Plaintiff for her separate use, or transferred to her, on her sole receipt, if she prefers it.

[317] Decree the fund to be transferred to the Plaintiff, for her separate use, on her separate receipt; and the costs of the suit to be paid out of the testator's general residuary estate.

[317] BUTLER v. LOWE. Nov. 15, 1839.

[S. C. 3 Jur. 1143. See *Dias v. De Livera*, 1879, 5 App. Cas. 134.

Cf. *In re Mervin* [1891], 3 Ch. 197.]

Will. Construction.

Testator gave legacies of £200 to each of the children of his nephews and nieces begotten or to be begotten, and directed that the legacies should be paid to them at the usual periods. Held, that the children of the nephews and nieces who were born after the testator's death were not entitled to participate in the legacies.

John Lowe, by his will, dated the 22d of July 1835, gave all his freehold, copyhold and real estates and all his personal estate to the Plaintiffs, in trust, as to his personal estate, to convert into money such part thereof as should not consist of

money, and to stand possessed thereof in trust, in the first place, to pay his debts and funeral and testamentary expenses, and to invest the remainder on the usual securities, and to stand possessed of the same in trust to pay certain annuities and legacies. The will then proceeded as follows:—

“I give to each of the children of my nephew, William Lowe the younger, son of my brother, William Lowe, *begotten or to be begotten*, the sum of £200; to each of the children, *begotten or to be begotten*, of my nephew, Henry Lowe, another son of my said brother, William Lowe, £200; to each of the children of Catherine Healey, £200; to Ann Parkes, sister of the said Catherine Healey, £200; to each of the children of my nephew, Josiah Lowe, *begotten or to be begotten*, £200; to each of the children of William Murcott (except his son, Jonathan Murcott), £200; to Charles Hopkins, of Dorlaston in the county of Stafford, £200; to each of the children of my niece, now the wife of Edwin [318] Abraham Butler, as well those by her former husband as by her present husband, *begotten or to be begotten*, £200; to each of the children of Sarah, formerly Sarah Lowe, now the wife of Richard Thompson, a daughter of my brother, William Lowe, £200; and provided there be no child of the said Sarah Thompson living at my death, then I give to the said Sarah Thompson the sum of £500 for her own separate use and benefit, and not to be subject, in any way, to the debts or engagements of her said husband. I also give to John Parkes, son of the late Catherine Parkes, formerly of Birmingham, and brother of the said Catherine Healey, £200; also the like sum of £200 to each of his children, *begotten or to be begotten*; and I direct that the said legacies, which I have given to the children of my nephews, the said William Lowe the younger and Henry Lowe, and of the said Catherine Healey and of the said Josiah Lowe, and of the said William Murcott, and to Charles Hopkins, and to each of the children of my said niece, the wife of the said Edwin Abraham Butler, as well those by her former husband as by her present husband, and to each of the children of the said Sarah, formerly Sarah Lowe, the wife of the said Richard Thompson, and also to the children of the said John Parkes, shall be paid to them respectively, who, being a son or sons, shall attain the age of 21 years, or, being a daughter or daughters, shall attain the age of 21 years, or marry under that age, with the consent of her or their parents or parent, guardians or guardian; and that all interest and dividends, with all accumulations on the said respective sums of £200, shall be added to and paid over as part of the said legacy itself; and, in the meantime and until such legacies shall be paid or applied, I direct that the same be laid out in the purchase of Government or Parliamentary stocks or [319] public funds, or upon real security in England or Wales, so that the same may accumulate. Provided always, and I do hereby declare my will to be, that in case any of the said children and the other persons to whom I have respectively given the sum of £200 each shall be under age at the time of the decease of their said parents, or shall have no parents living at the time of my decease, it shall and may be lawful to and for my said executors and the survivors and survivor of them, his executors or administrators, to pay and apply, for and towards their maintenance, education and advancement in the world respectively, all or any part of the said sum of £200, and of the interest and dividends thereon, to which such child or children or other persons respectively shall, for the time being, be entitled in expectancy under the trusts of this my will; and also to advance any part of the residue of my real and personal estate to such an amount, and at such time or times, as my said executors, or the survivors or survivor of them, his executors or administrators shall, in their or his discretion, think right and most advantageous for the benefit of such child or children and the said other persons, any or either of them respectively, or out of the trust monies, stocks, funds or securities to which such child or children or other persons respectively shall, for the time being, be entitled in expectancy, for and towards the advancement and placing out in the world, or establishment of any such child or children, or the said other persons respectively: and, in case there shall be, at any time or times, a suspense or vacancy of the person or persons for the time being entitled to a vested interest in the trust monies, stocks, funds or securities under this my will, or to the interest, dividends and annual produce thereof, then and in such case, and so often as the same shall happen, the interest, [320] dividends and annual produce of the said trust monies, stocks, funds or securities respectively, or so much

thereof respectively as shall so, for the time being, be suspended from vesting and not applied for maintenance and education or advancement in the world as aforesaid, shall, during such suspension, be laid out and invested in the purchase of a competent share or competent shares of the public stocks or funds of Great Britain, or at interest upon Government or real securities in England or Wales, so that the same may accumulate; and that the said last-mentioned trust monies, stocks, funds or securities, and the accumulations thereof respectively, shall belong to or be in trust for such person or persons as, under or by virtue of the trusts of this my will, shall become entitled to a vested interest in the trust monies, stocks, funds and securities from the annual produce of which the said accumulations shall be respectively provided. And I do hereby give, subject to the payment of my debts, funeral and testamentary expenses, and the said two annuities, and the several legacies hereby given, all the rest and residue of my property, estate and effects whatsoever, and all the rents, profits and produce of my real and copyhold estates, and the monies to be produced by sale thereof, unto and to be equally divided among *all and every the children* of my said nephew, William Lowe the younger, of my said nephew, Henry Lowe, of the said Catherine Healey, of the said Ann Parkes, to each of the children of my said nephew, Josiah Lowe, of the said William Murcott (except his said son Jonathan), the said Charles Hopkins, to each of the said children of my said niece, now the wife of the said Edwin Abraham Butler, as well those by her former husband as by her present husband, and to each of the children of the said Sarah Thompson, formerly Sarah Lowe, share and share alike, as tenants in com-[321]-mon, *and to be paid and payable to them respectively, as and when they shall respectively attain the age of 21 being sons, or being daughters, when they shall attain that age or respective days of marriage under that age, with consent as aforesaid.* Provided always, and I do hereby declare my will and mind to be that, in case any of the said persons to whom I hereby give the residue of my property, both real and personal, shall depart this life before their or any or either of their respective shares shall become payable (that is to say) before they respectively attain the age of 21 years or days of marriage under that age as aforesaid, and without having any lawful issue, then my will and mind is that the share of the person or persons so dying shall sink into and become part of the general residue of my estate and effects, always allowing whatever may have been advanced, under the power hereinbefore given, for the maintenance, education or advancement in the world of any of the said children hereinbefore mentioned, and to be divided equally among all and every of those that shall live and become entitled to the share." And the testator directed the Plaintiffs to sell his freehold and copyhold estates, and to stand possessed of the money arising therefrom, upon the trusts thereinbefore declared; and, until the same should be divided and paid over to the several persons thereinbefore directed, to invest the same in the usual securities, and to stand possessed of the same, and the interest, dividends and annual produce thereof, in trust for the several persons and in manner therein mentioned.

The testator died in March 1836. All the persons to whose children legacies of £200 each were given by the will were still alive; and all of them, except Sarah Thompson, had children living at the testator's death; [322] and some of them had children born afterwards. Some of the children born in the testator's lifetime had attained 21.

Doubts having arisen as to whether the children born and to be born after the testator's death were entitled to legacies of £200, the bill was filed by the executors and trustees, praying that the trusts of the will might be carried into execution under the decree of the Court, and that the persons entitled, according to the true construction of the will, to receive legacies of £200 each, might be ascertained and declared.

Mr. Spence and Mr. Anderdon, for the Plaintiffs.

Mr. Knight Bruce and Mr. Campbell, for the children of the persons named in the will who were born before the testator's death. The question is whether a bequest to the children of A. begotten or to be begotten includes children born after the testator's death. In *Storrs v. Benbow* (2 Myl. & Keen, 46) the testator directed his executors to pay, out of his personal estate, the sum of £500 apiece to each child that

might be born to either of the children of either of his brothers, lawfully begotten, to be paid to each of them on his or her attaining the age of 21 years, without benefit of survivorship: and it was held that a child born after the testator's death was not included in the bequest. The present case is stronger than that; for there is an express direction in this will under which the residue is to be distributed as soon as the eldest of the children attains 21. But it cannot be [323] distributed at that period, if children born after the testator's death are to take. The gifts of the legacies and of the residue are in words which are, as nearly as possible, similar to each other: consequently, the same effect must be given to both those gifts. If the after-born children are held to be entitled, the consequence will be that the residue will be locked up until all the persons to whose children legacies are given are dead. In *Defflis v. Goldschmidt* (1 Mer. 417), which probably will be cited by the counsel for the after-born children, the testator gave to all the children of his sister, whether then born or thereafter to be born, the sum of £200 each, payable at 21; and directed that, until the shares of the said children should become payable, the interest thereof should be paid to his sister: and he requested his executors, as soon as might be after his decease, to set apart a sufficient fund for paying the legacies to his sister's children, as they became due, and in order that his sister might receive the interest thereof in the meantime: and, in case his sister should die before all her sons attained 21, and before all her daughters attained that age or married, then he directed that the interest of the legacies provided for them should be applied for their education and maintenance. It was in consequence of this last clause that Sir W. Grant, Master of the Rolls, held that the after-born children were entitled to legacies; as it shewed that the testator conceived his sister could not die leaving any child that would not be provided for by him. In *Scott v. The Earl of Scarborough* (1 Beavan, 154) the testator directed his trustees to accumulate the rents and interest of his real and personal estate for 20 years after his death, and then to stand possessed of the accumulated fund, in trust for all and every the [324] children and child of three of his children whom he named, then born or who should thereafter be born during the lifetime of their respective parents: and it was in consequence of those last words, which are not found in this will, that the present Master of the Rolls held that children born after the end of the term of 20 years were entitled to share in the fund.

Mr. Jacob and Mr. Wood, for the children born after the testator's death, relied on *Balm v. Balm* (ante, vol. iii. p. 492), and *Defflis v. Goldschmidt*, as precisely in point. They cited also *Sprackling v. Ranier* (1 Dick. 344). The decision in *Storrs v. Benbow* is rather a strong one. The Master of the Rolls said that, in that case, there was an immediate gift at the death of the testator: but here there is no gift which confers a vested interest immediately upon the death of the testator. In *Scott v. Lord Scarborough* all the cases on the subject are collected; and all of them except three are cases of residuary bequests. In this case the testator has used two modes of expression: one is, "children begotten or to be begotten," and the other, "children" simply, as in the gift to the children of Catherine Healey and Sarah Thompson. The fair inference, therefore, is that, when he used the latter expression, he meant to exclude after-born children: for the Court cannot hold that the word "children," standing by itself, means the same as "children to be begotten;" for, in that case, it would, in effect, strike the words, "to be begotten," out of the will.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The principle upon which the Courts both of law and equity act in construing wills is to give the pre-[325]-ference to that construction which is in favour of the vesting of the gift. Thus a devise to A. and his children, if he has no children at the death of the testator, has been held to give him an estate tail: *Wild's case* (6 Rep. 16): but, if he has children living at the testator's death, then it has been held that he and his children take as joint-tenants. So, if there is a bequest to the children of A., begotten and to be begotten, it has been generally held that the words "to be begotten" shew only that the testator contemplated children to be born after the date of his will and before his death.

The only question then is, whether there is anything in this will which prevents the general rule from applying. With respect to the gifts to the children of Catherine Healey and Sarah Thompson, I have to observe that we do not know what were the ages or other circumstances of those individuals at the time when the will was made.

Perhaps they might have been such as to induce the testator to think that neither of those ladies would have children after the date of his will.

When I first looked at the will, I thought that there might be something in the clause which provides for the maintenance of the legatees, which might prevent the general rule from applying: but, on further consideration, I am of opinion that it is quite as applicable to the case of children living at the death of the testator as to any other case. I do not, therefore, see anything in the language of this will which prevents the general rule from applying.

[326] JACKSON v. CASSIDY. *May 8, June 15, 1841.*

Practice. Affidavits. Injunction.

Special injunction dissolved with costs, office copies of the affidavits in support of it not having been obtained when it was moved for.

Motion by the Defendant to discharge a special injunction obtained by the Plaintiff on the 27th of March last, on the ground that the affidavits on which the injunction had been obtained were not filed, or, at all events, that office copies of them were not procured at the time when the injunction was applied for.

THE VICE-CHANCELLOR ordered the motion to stand over, in order that the precise time at which the affidavits were filed and the office copies delivered might be ascertained from the clerk of the Affidavit Office.

June 15. It did not distinctly appear, from the statement made by the clerk of the Affidavit Office, whether the affidavits were filed at the time when the injunction was moved for; but it clearly appeared that office copies of them were not obtained till after that time; and, on that account,

THE VICE-CHANCELLOR [Sir L. Shadwell], dissolved the injunction, with costs. (1) Mr. Wigram and Mr. Hetherington, for the Defendant.
Mr. Knight Bruce and Mr. Goodeve, for the Plaintiff.

[327] JONES v. GOODRICH. *Nov. 14, 21, 22, 1839.*

[S. C. 9 L. J. Ch. (N. S.) 120; 4 Jur. 98.]

Receiver.

Pending a contest between the Plaintiff and Defendant in the Ecclesiastical Court, as to the validity of two wills made by the testatrix, the Plaintiff filed a bill for a receiver of the testatrix's estate, and to set aside an assignment made by her to the Defendant. The Court declined to appoint a receiver of the property comprised in the assignment, that property being claimed by the Defendant, independently of either will.

The Plaintiff was the executor and residuary legatee under a will made by Harriett Lloyd, the testatrix in the cause. The Defendant was the executor and residuary legatee under a subsequent will of the same testatrix. The object of the bill was to have a receiver appointed of the testatrix's personal estate, including certain leasehold houses, pending a contest between the parties in the Ecclesiastical Court, as to the validity of the two wills; and also to set aside an assignment of the houses which the testatrix had made to the Defendant, on the ground that the Defendant had obtained it by the exercise of undue influence over the testatrix's mind.

(1) See Beam. Ord. 56, 57.

Mr. Knight Bruce and Mr. James Russell, for the Plaintiff, now moved for the receiver. They relied upon *Edmunds v. Bird* (1 V. & B. 542).

[328] The motion was opposed by Mr. Wigram and Mr. Bethell, for the Defendant. They cited *Dent v. Bennett* (*ante*, vol. vii. p. 539).

THE VICE-CHANCELLOR [Sir L. Shadwell] granted the motion.

THE LORD-CHANCELLOR [Lord Cottenham] afterwards discharged His Honor's order so far as it related to the rents and profits of the leasehold houses, on the ground that the Defendant claimed those houses adversely to both the wills. His Lordship declined to follow the order made in *Edmunds v. Bird*, and relied upon the following passages in Lord Hardwicke's judgment in *Wills v. Rich* (2 Atk. 285).

"If both parties in this case had not brought their bills and submitted the matters in dispute to Chancery, I should have been inclined to have left the whole to the discretion of the Spiritual Court who, in cases of controverted wills, appoint an administrator, *pendente lite*, to take care of the estate.

"Where a person, let him be heir at law or next of kin, or any other man whatever, keeps possession of the testator's real or leasehold estate, such an administrator is entitled to bring ejectments for the recovery of the possession; indeed, this did admit of a doubt in Courts of law for a considerable time, but is now fully settled, ever since the case of *Walker v. Woollaston*, in the Court of King's Bench" (2 P. W. 576).

[329] BENTLEY v. FOSTER. Nov. 18, 19, 1839.

Copyright. Alien.

If an alien resident abroad composes a work there, but publishes it first in this country, he is entitled to the protection of the laws of this country relating to copyright: *semble*.

Motion to dissolve an injunction restraining the Defendant from pirating a work the copyright of which the Plaintiff, in July 1833, purchased of the author, who was a citizen of the United States of America, and was domiciled and resident there.

Mr. Wigram and Mr. K. Parker, in support of the motion, referred to the Acts of Parliament by which copyright in books was vested in and secured to the authors (8 Anne, c. 19; 12 Geo. 2, c. 36; 41 Geo. 3, c. 107; 54 Geo. 3, c. 156); and also to the Acts of Parliament (which they said were *in pari materiâ*) by which the copyright in prints, engravings and other works of art was vested in and secured to the inventors (8 Geo. 2, c. 13; 7 Geo. 3, c. 38; 17 Geo. 3, c. 57; 34 Geo. 3, c. 23; 38 Geo. 3, c. 71; 54 Geo. 3, c. 56): and they contended, from the language of those Acts, that no works were protected thereby, except such as were *composed* or *invented*, as well as printed and published in this country; and, consequently, that the author of the work in question being an alien resident abroad, and having written the work there, could have no property in it, and, therefore, could assign none to the Plaintiff: that if international copyright existed under the before-mentioned Acts, the 1st & 2d Vict. c. 59 (for securing to authors in certain cases the benefit of international copyright) was unnecessary.

[330] The following cases were cited in support of the motion; *Delondre v. Shaw* (*ante*, vol. ii. p. 237); *Page v. Townshend* (*ante*, vol. v. p. 395); *Clementi v. Walker* (2 Barn. & Cress. 861); *D'Almaine v. Boosey* (1 Youn. & Coll. 288).

Mr. Knight Bruce, Mr. Jacob and Mr. Adams, for the Plaintiff, said that there was nothing in the Acts of Parliament relating to copyright which prevented an alien friend from having the benefit of them wherever his work was composed, provided it was first published in this country.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, in his opinion, protection was given by the law of copyright to a work first published in this country, whether it was written abroad by a foreigner or not: that if an alien friend wrote a book, whether abroad or in this country, and gave the British public the advantage of his industry and knowledge by first publishing the work here, he was entitled to the protection

of the laws relating to copyright in this country : but as the question which had been discussed was a legal one, he should direct the Plaintiff to bring an action within three weeks, for the purpose of trying his right, and should continue the injunction in the meantime.(1)

[331] LIVESEY v. LIVESEY. Nov. 20, 1839.

Exception.

Where an exception to a report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found ; the Court, if it allows the exception and refers it back to the Master to review his report, intends not to adopt the conclusion suggested, but that the whole subject of the reference shall be reconsidered by the Master, either upon the old evidence, or upon that and any other evidence which may be brought before him.

In this case, THE VICE-CHANCELLOR ruled that, where an exception to the Master's report not only states that the Master ought not to have reported as he has done, but suggests what he ought to have found, the Court, if it allows the exception and refers it back to the Master to review his report, does not adopt the conclusion which the exception suggests that the Master ought to have come to ; but intends that the whole subject of the reference shall be reconsidered by the Master, either upon the old evidence alone, or upon that and any other evidence which the parties may think proper to bring before him.

Mr. Knight Bruce, Mr. Jacob, Mr. Bethell, Mr. Anderdon and Mr. Greene were counsel in the case. The cases of *Twylford v. Trail* (3 Myl. & Cr. 645) and *Church v. King* (2 Myl. & Cr. 220) were referred to in the course of the argument.

[332] BEADLES v. BURCH. Nov. 20, 22, 23, 27, 1839.

[S. C. 9 L. J. Ch. (N. S.) 57 ; 4 Jur. 189. As to parties, see *Phelp v. Amcotts*, 1869 ; 17 W. R. 703 ; *Baker v. Loader*, 1872, L. R. 16 Eq. 57. Cf. *Burstall v. Beyfus*, 1884, 26 Ch. D. 35.]

Parties. Solicitor. Fraud. Administrator.

A solicitor who has joined with his client in practising a fraud may be made a Co-defendant to a suit to set aside the transaction.

A. died intestate, having *bona notabilia* in two dioceses ; and B. took out a prerogative administration to him. One of A.'s next of kin afterwards died intestate, and C. took out administration to him in the Diocese of P. Held, on demurrer, that a bill by C. against B. relating to A.'s estate was sustainable ; as it did not appear that B. was not residing within the Diocese of P.

The Defendant, Burch, having possessed himself of the personal estate of Knightley Adams, late of Paddington in Middlesex, deceased, under a pretended will, some of the next of kin instituted proceedings against him in the Court of Chancery for the purpose of securing the deceased's property, and also in the Prerogative Court of the Archbishop of Canterbury for the purpose of setting aside the pretended will. The Court of Chancery appointed a receiver of the estate, and the Prerogative Court adjudged the will to be fraudulent, and that Knightley Adams had died intestate ; and it appointed Lydia Coleman, the wife of the Defendant, T. Coleman, one of the next of kin, administratrix to the deceased.

An agreement for compromising the above-mentioned suits was afterwards made

(1) An action was accordingly commenced, but the Defendant consented to a verdict being taken against him.

between the next of kin and Burch; one of the terms of which was that the draft of it should be settled by counsel on behalf of all parties, and, as so settled, should be finally approved of and adopted by them. The draft was settled accordingly; but, pending a discussion which afterwards took place between the parties and their solicitors, relative to the particulars and value of the intestate's property as stated in the draft, a fraudulent scheme, as the bill alleged, was resorted to by Burch and his solicitors in collusion together and in collusion with T. Coleman and Lydia, his wife, and their solicitors, for procuring the agreement to be completed on terms more favourable to Burch than those contained in the draft settled by [333] counsel, by relieving Burch from a portion of the costs, charges and expenses which, according to the draft, he was to pay: and, in order to carry such scheme into effect, Messrs. James & Sons, Burch's solicitors, without any communication to the Plaintiffs (who were two of the surviving next of kin, and the administrator of one of the deceased next of kin of the intestate) caused the draft to be altered in certain material respects, and an engrossment, made by them therefrom, to be executed on the 17th of May 1838 by the Plaintiffs and the other parties to the agreement. The bill then set forth the deed of compromise as executed by the parties, and pointed out in what respects it differed from the draft settled by counsel: and it alleged that the Plaintiffs were prevailed on to execute the deed so improperly and fraudulently altered upon the faith of assurances made to them, that the engrossment corresponded with the draft settled by counsel, and in ignorance that any alteration had been made therein: that Sarah Robinson, one of the intestate's next of kin and one of the parties to the deed of compromise, died on the 5th of July 1839, and *letters of administration of all and singular her goods and chattels were granted by the Consistory Court of Peterborough to the Plaintiff, William Robinson, her husband; and he thereby became her legal personal representative.* The bill charged that although Messrs. James & Sons and the solicitors of T. Coleman and Lydia, his wife, acted only as solicitors in respect of the matters mentioned in the bill, yet the Plaintiffs were entitled to sue them in respect thereof, and to have a discovery from them of the means by which, and of the circumstances under which, the before-mentioned alterations were inserted in the deed of compromise; and to charge them personally with the costs of the suit; and the more especially as Coleman and wife and [334] Burch pretended that they left the entire management of the aforesaid matters to their solicitors respectively, and, consequently, they could not personally make any answer or give any discovery in respect thereof. The bill prayed that the alterations made in the deed of compromise might be declared to be fraudulent and void; and that the deed might be rectified and made conformable to the draft settled and approved of as aforesaid; and that the compromise might be carried into effect on the footing of and as provided by the draft; and that the Defendants, Burch, Coleman and wife, and their solicitors might be decreed to pay the costs of the suit, and the costs of rectifying the deed of compromise.

Messrs. James & Sons and Burch separately demurred to the bill for want of equity and because the legal personal representative of Sarah Robinson was not made a party to the suit.

Mr. Wakefield and Mr. Koe, in support of the first cause of demurrer, said that Messrs. James & Sons were not personally interested in procuring the deed of compromise to be executed by the Plaintiffs, but acted merely as agents in the business; and that a bill to obtain discovery and payment of costs could not be sustained against an agent; *Mitf. Treat.* 3d edit. p. 152. *Bennet v. Vule* (2 Atk. 324; see 328), *Le Texier v. The Margravine of Anspach* (15 Ves. 159), *Fenton v. Hughes* (7 Ves. 287).

In support of the second cause of demurrer they said that it appeared by the recitals in the deed of compromise that the intestate died possessed of *bona notabilia* [335] in Middlesex and Hampshire, and that a great portion, if not the whole, of his property remained in specie and unadministered; that there was no suggestion in the bill that he left any debts; that as administration to his effects had been granted to Lydia Coleman by the Prerogative Court, his estate must have been administered in that Court if the Court of Chancery had not interfered; that the person to whom letters of administration were granted by a Consistory Court was not thereby constituted the personal representative of the deceased, except within the diocese;

and, consequently, the Plaintiff, Robinson, could not cite Lydia Coleman to exhibit an inventory of the intestate's effects, or take any other proceedings against her in the Prerogative Court. *Hilliard v. Cox* (1 Lord Raym. 562; and 2 Salk. 746), *Young v. Elworthy* (1 Myl. & Keen, 215), *Newman v. Hodgson* (7 Ves. 409), *Thomas v. Davies* (12 Ves. 417), *Challnor v. Murhall* (6 Ves. 118), *Scarth v. The Bishop of London* (1 Haggard's Eccles. Rep. 625).

Mr. Knight Bruce, Mr. Girdlestone and Mr. R. W. E. Forster, in support of the bill. The argument in support of the demurrer has confounded the case of the personal representative of an original intestate with the case of the personal representative of one of his next of kin.

There is a total absence of any statement in the bill that Mrs. Robinson had *bona notabilia* out of the Diocese of Peterborough: and it cannot be fairly inferred that the deed of compromise created *bona notabilia* out [336] of that diocese; for there may be nothing to be received by the next of kin under that deed. The whole of the intestate's property may be exhausted in paying his debts. The allegation as to the representation, which must be taken to be true, is that letters of administration of all and singular the goods and chattels of Sarah Robinson were, on the 5th day of July 1839, granted by the Consistory Court of the Bishop of Peterborough unto the Plaintiff William Robinson; and that he thereby became and is now the sole, legal personal representative of the said Sarah, his late wife. That allegation, according to all fair intendment, must be taken to mean the legal personal representative of his late wife for the purposes of the suit. It is one thing to require a prerogative administration to be taken out before the money, which is the subject of the suit, is paid out of Court; and another thing to say that the suit shall not go on until a prerogative administration has been taken out. That distinction was taken by the present Master of the Rolls in *Metcalfe v. Metcalfe* (1 Keen. 74). His Lordship says: "It does not appear to me that this demurrer can be sustained. It is very true that a prerogative probate or administration must be obtained before money can be paid out of Court; and, in *Young v. Elworthy*, Sir John Leach was of opinion that it was necessary to produce a prerogative probate before the decree could be drawn up: but no case has ever gone to the extent that a party cannot commence a suit without a prerogative administration, or that, if he does so, the suit may be stopped by demurrer. Whether the intestates, to whose estates the Plaintiff has taken out administration, had any goods out of the province of York does not appear upon these proceedings. The Plaintiff has obtained such adminis-[337]-tration as constitutes him the legal personal representative of each of the deceased parties; and, though it may become necessary, in the progress of the suit, that the Plaintiff should obtain a prerogative administration out of the Court of the Archbishop of Canterbury, that does not appear to me to be a sufficient reason for saying that this suit should not be permitted to proceed: for the Defendants will have the opportunity of raising the objection by their answer."

There is no case in which the Court has adjudicated that an agent, charged with having been personally guilty of a fraud, cannot be made a party to a suit against his principal. Moreover, in this case, distinct and substantive relief is prayed against Messrs. James & Sons. We ask that they may pay not only the costs of the suit, but also the costs of rectifying the deed of compromise, which is distinct and substantive relief: and it never has been decided that a Plaintiff cannot make an agent a party to a suit for the purpose of having specific relief against him in respect of the part which he has taken in the transaction which forms the subject-matter of the suit. Mitf. Treat. 4th edition, 162. *Bulkeley v. Dunbar* (1 Anst. 37), *Bowles v. Stewart* (1 Scho. & Lef. 209).

Nov. 27. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case I have read through the whole of the bill, and am of opinion that it states such a case as requires an answer.

It was said that it was improper to file the bill against Messrs. James & Sons: but there can be no doubt of the propriety of filing such a bill, if what is stated [338] by Lord Redesdale, in the 2d edition of his work on Pleading, and repeated word for word, in the 4th edition, is correct. There his Lordship states in the most explicit

language that: "Where bills have been filed to impeach deeds on the ground of fraud, attornies who have prepared the deeds, and other persons concerned in obtaining them, have been frequently made Defendants, as parties to the fraud complained of, for the purpose of obtaining a full discovery; and no case appears, in the books, of a demurrer by such a party, because he had no claim of interest in the matter in question by the bill." This is stated by Lord Redesdale without any authority. Then he goes on in the next sentence: "Indeed an attorney, under such circumstances, being brought as a party to the suit to a hearing, has been ordered to pay costs, apparently on the same ground as costs were awarded against arbitrators in the cases of their misconduct before noticed." For this his Lordship does give an authority, but with a wrong reference.⁽¹⁾ In the 4th edition, published by Mr. Jeremy, the sentence is preserved as it stood in the 2d edition. I cannot suppose that a person of his Lordship's experience would have stated in his book that attornies had been made parties to such bills if there could be any doubt that such had been the case. In the case of *Le Terrier v. The Margravine of Anspach* the opinion of Lord Eldon is thus expressed: "Where an attorney or other agent is so involved in the fraud charged by the bill, that, though a reconveyance or other relief cannot be prayed against him, a Court of Equity will, rather than that the Plaintiff should not have his costs, order that agent to pay them; if he is made a [339] party, the Plaintiff must pray that he may pay the costs; otherwise a demurrer will lie." From this passage in Lord Eldon's judgment it is clear that his Lordship took it for granted that the practice was as Lord Redesdale had laid it down. In *Bowles v. Stewart* Lord Redesdale himself acted on what he had stated in the second edition of his work; for there he says: "As to Mr. Bowles's solicitor, he was acting for his client; but his duty as a solicitor did not bind him to assist his client in an act of injustice. I am sorry a man who has had so ample a testimonial to his character should have been led into such a mistake; but his zeal for his client has led him too far: he has properly been made a party. He was an acting party in the transaction, and properly brought to a hearing, and ought to be chargeable with the costs, so far as they relate to the release, in case they cannot be recovered from Richard Bowles." So that here is a judicial recognition of the doctrine stated by Lord Redesdale in his Treatise on Pleading.

I wish it to be understood that I am now merely proceeding upon the footing of the statements contained in the bill, and desire that Messrs. James & Sons will not suppose I have the least suspicion of the purity of their intentions in acting as they have done. I have known them too long to suppose that they would be guilty of any impropriety of conduct. But, from what is stated in the bill, I think that they have been properly made parties, and that what is prayed against them is properly prayed.

The point raised by the second demurrer is more important. It seems to me to be an astonishing proposition that, in no case, is a person who has obtained a [340] diocesan probate or administration capable of being a Plaintiff in equity. I always thought it was a rule that such a party could bring an action in any of the Courts in Westminster Hall; and, if he may bring any action, of course, equity, which follows the law, would permit him to file a bill. The case of *Hilliard v. Cox* clearly proves that a diocesan administrator can support an action at law. There a special plea was put in, not on the ground that a diocesan administrator could not support the action, but because the letters of administration ought to have been taken out in another diocese: and if, in the present case, it had appeared on the face of the pleadings that there could not properly have been an administration from the Consistory Court of Peterborough, that would have been a good ground of demurrer.

But the case stands differently. Here Knightley Adams had died intestate; and, after some contest, a prerogative administration to his effects was granted to Lydia Coleman. Sarah Robinson was one of the next of kin of the intestate; and the right which she had was a right to sue the administratrix for her portion of the clear residue, after all the property had been turned into money, and the debts and funeral expenses of the intestate satisfied. It is of no importance that the first intestate was possessed of property in different dioceses, as the right of his next of kin was not

(1) The authority cited is 2 Atk. 234, instead of 324; see Treat. on Plead. 3d edit. 153; 4th edit. 189.

to the specific chattels of which he died possessed, but to the clear surplus of the proceeds of his personal estate, after payment of all the demands upon it. Now there is nothing, on the face of the bill, to shew that Lydia Coleman was not residing in the Diocese of Peterborough: and, therefore, my opinion on this part of the case is that it may very well be that the diocesan administration [341] which was granted to T. Robinson, the husband of Sarah Robinson, was properly granted. Consequently, that ground of the demurrer fails; and, in my opinion, it must be altogether overruled with costs.

[341] MORRIS v. MORGAN. Nov. 23, 25, 1839.

Demurrer. Commission to Examine Witnesses Abroad.

If a demurrer to a bill praying relief and a commission to examine witnesses abroad is good as to the relief, it is good as to the commission.

The Plaintiff was the surviving partner and the personal representative of his deceased co-partner in a mercantile house in the island of Java; and the house having stopped payment, the creditors, in March 1839, entered into an agreement or arrangement by which they authorized and directed the Plaintiff to proceed to England to get in the debts which were due to the firm from various persons there, and to remit the amount to Java, in order that the same might be divided rateably amongst the creditors. The Plaintiff accordingly proceeded to England; and shortly after his arrival the Defendant, who resided in Java, and was one of the parties to the agreement or arrangement, caused an action to be brought against the Plaintiff in the Court of Queen's Bench, for the recovery of the debt due to him. The bill was thereupon filed, praying that it might be declared that the agreement was binding on the Defendant, and that the commencement and prosecution of the action was inconsistent therewith, and a fraud upon the Plaintiff and the other creditors of the firm; and that the Defendant might be enjoined from carrying on or prosecuting any proceedings in violation thereof; and that, in the meantime, the Defendant might be restrained from all further proceedings in the action, and from commencing or prosecuting any [342] other proceeding at law touching the matters contained in the bill; and, if necessary, that the Plaintiff might be at liberty to sue out one or more commissions for the examination of witnesses in Batavia and elsewhere, as there might be occasion, touching such matters. The Defendant demurred to the bill for want of equity, and because all the parties to the agreement of March 1839 ought to have been made parties to the suit.

Mr. Jacob and Mr. Tennant supported the demurrer, for want of equity, on the following grounds: first, that there was no consideration for the agreement; and, secondly, if there was, that it was not one of the terms of the agreement that the Defendant, or any of the other parties to it, should abstain from suing the Plaintiff; that the bill was not for a discovery and a commission to examine witnesses abroad in aid of the Plaintiff's defence to the action; but for equitable relief, and for a commission to examine witnesses abroad in aid of the Plaintiff's title to that relief; and, consequently, if the Plaintiff was not entitled to the relief, he was not entitled to the commission, which was incidental to the relief.

Mr. Knight Bruce and Mr. Walker, in support of the bill, said that it was not necessary that any consideration for the agreement should flow from the debtor; that it was entered into by all the creditors for their mutual benefit; and the signature of one was a consideration for the signature of every other creditor; that the object of the agreement was to obtain an equal distribution of the debts to be got in amongst all the creditors; and therefore it was contrary to the spirit of the agreement that one of the creditors should sue the Plaintiff; that a commission to examine wit-[343]-nesses abroad was relief; and that it was sought, by the bill, to obtain evidence in support, not only of the equitable relief, but of the Plaintiff's defence to the action; and, therefore, the demurrer, which extended to the commission, covered

too much. *Thorpe v. Macauley* (5 Madd. 218), *The Earl of Suffolk v. Green* (1 Atk. 450), Mitf. Treat. 149, 4th edition.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In *The Earl of Suffolk v. Green* the bill seems to have been filed for a discovery and also to perpetuate the testimony of witnesses; and the Court held the objection to the discovery to be good; but overruled the demurrer, on the ground that the Plaintiff was entitled to perpetuate the testimony of the witnesses; and, in *Thorpe v. Macauley*, the Court gave the Plaintiff the commission, although it thought that there was sufficient ground for refusing him the discovery. These cases are not opposed to the general rule that, where a bill prays anything besides relief, if the Court allows the demurrer to the relief, it covers everything, and the bill is out of Court.

Now this bill prays, &c.—[His Honor here read the prayer]—and, for the purpose of obtaining that relief, it represents that the Plaintiff had carried on business in Java, in co-partnership with a gentleman named Haswell; that Haswell died in 1838, and shortly afterwards the Plaintiff stopped payment; that in March 1839 the creditors of the firm entered into an agreement by which they agreed to sanction the Plaintiff's departure for England, he undertaking to act as their agent in collecting the assets of the firm in that country; [344] but the agreement does not contain any stipulation that the creditors should not sue the Plaintiff. Then, towards the end of the bill, there is an allegation that the Defendant pretends that there never was any agreement or understanding, between the Plaintiff and the creditors, that the creditors or any of them should suspend any proceeding which they might be entitled to take against the Plaintiff for the recovery of their debts; and then the bill charges the contrary of such pretence to be true; and that there was a distinct *understanding*, between the Plaintiff and the creditors, that the assets which might be recovered in pursuance of the agreement or authority of March 1839 should be divided amongst them rateably and in proportion to their debts, and without any preference; and that the Plaintiff, while acting by virtue thereof, should not be sued for such last-mentioned debts. The Plaintiff, therefore, does not charge that there was such an *agreement*, but only that there was such an *understanding*; and, therefore, as I understand him, he admits that there was no such agreement. I think, therefore, on the Plaintiff's own shewing, that this demurrer must be allowed.

[345] LANGLEY v. FISHER. LANGLEY v. OVERTON. Nov. 28, 1839.

Impertinence. Answer to a Bill of Revivor.

After the Defendants had answered the bill, one of the Plaintiffs died; upon which a bill of revivor was filed, praying that the Defendants might answer it. The Defendants, in their answer, admitted the right to revive, and stated that, since answering the original bill, they had become bankrupt, and obtained their certificates. Held, that those statements were not impertinent.

After the cause of *Langley v. Fisher* had been set down for hearing, one of the male Plaintiffs died, and one of the female Plaintiffs married; in consequence of which the surviving Plaintiffs in the suit, together with the husband of the female Plaintiff, filed a bill of revivor against the personal representative of the deceased Plaintiff and the Defendants to the original suit, stating the above-mentioned facts, and praying that the Defendants might answer the premises, and that the original suit and the proceedings therein might be revived, or that the Defendants might shew good cause to the contrary.

G. D. Fisher and N. G. Prideaux, two of the Defendants to the original bill, put in a joint and several answer to the bill of revivor, in which they admitted the facts stated in that bill, and added that, shortly before they put in their answer to the original bill, a fiat was issued against Fisher, under which he was declared a bankrupt, and G. Beard and C. Fisher were appointed assignees of his estate; that after the two Defendants had put in their answer to the original bill, G. D. Fisher obtained his certificate, and a fiat issued against Prideaux, under which he was declared a bank-

rupt, and F. G. Prideaux and R. M. Williams were appointed assignees of his estate ; that N. G. Prideaux afterwards obtained his certificate ; that the Defendants were advised that by their bankruptcies the proceedings in the original suit became defective ; but, nevertheless, the [346] Plaintiffs in that suit did not file any supplemental bill for the purpose of making the Defendants' assignees parties to the suit, nor had they made the assignees Defendants to their bill of revivor, although they were well aware that the Defendants had become bankrupt, as before mentioned. The Defendants submitted that, previous to the marriage of the female Plaintiff and to the death of the deceased Plaintiff, the suit had become defective by the bankruptcies of the Defendants, and that their assignees were necessary parties to the original suit, and also to the bill of revivor ; and they prayed the same benefit of the objection as if they had pleaded it in bar to the bill of revivor ; and they insisted on their bankruptcies and certificates, and on the 6th Geo. 4th, c. 16 (to amend the laws relating to bankrupts), and 1st & 2d Will. 4, c. 56 (to establish a Court in bankruptcy), in bar to the bill of revivor, and to so much of the original bill as sought an account against them or either of them, or to make them or either of them personally liable in respect of the matters in the original bill stated ; and they prayed the same benefit of the matters thereby insisted on, as if they had pleaded the same to the bill of revivor or to the original bill.

The Plaintiffs excepted, for impertinence, to all the passages in the answer, except those in which the facts stated in the bill of revivor were admitted ; and the Master having overruled the exceptions, they excepted to his report.

Mr. Knight Bruce, Mr. G. Richards, and Mr. Anderdon, for the Plaintiffs. The bill to which this answer has been put in is a simple bill of revivor ; the sole object of it is to restore [347] the original suit to the position in which it stood before it became abated ; and the order to revive was obtained before the answer was filed. All the passages comprised in the exceptions before the Master are wholly immaterial, and altogether foreign to the office of an answer to a bill of revivor. If a Defendant disputes the Plaintiff's right to revive, he cannot do so by answer, but must either plead or demur. The mere putting in of an answer is an admission of the right to revive. In *Wagstaff v. Bryan* (1 Russ. & Myl. 28), Sir John Leach, Master of the Rolls, says : "The question is whether long statements introduced for the purpose of shewing that there has been irregularity and misconduct in the proceedings of the Plaintiff are impertinent, because the Defendant can have no advantage of them with reference to the order of revivor, which is the only order that can be made on this bill. In my opinion it would lead to great oppression if a Defendant were at liberty to introduce into his answer matter of which he can have no advantage with reference to the proceeding which he is called on to answer." His Honor then points out, very pointedly, the principle on which his judgment proceeds ; he says, "The principle on which I proceed is that nothing ought to remain in the answer, except that which is called for by the bill, or would be material to the defence with reference to the order or decree which may be made on the bill. This answer, therefore, is impertinent, in so far as it brings forward a case which can have no effect on the order of revivor." In *Devaynes v. Morris* (1 Myl. & Craig, 213 ; see 225) the Lord Chancellor says : "The sole question is whether the present Plaintiff is entitled to put the cause in a proper state to carry on the decree." In this [348] case it would be, *to be carried on to a decree*. "I am of opinion that, according to the practice of the Court, he is clearly so entitled without any reference to the merits of the decree or of the facts. It follows, therefore, that all the statements in the answer as to such facts, proceedings and merits, are irrelevant. If the proper time for making the defence has been permitted to pass, the omission cannot be supplied in this manner ; and, if new matter has arisen, varying the situation of the parties, other means exist of bringing it forward ; but the right of a party to prosecute the decree, and, therefore, to do what is necessary for that purpose, cannot depend upon the merits of the decree." No issue can be joined upon anything contained in this answer ; and all the statements in it which are comprised in the exceptions are wholly irrelevant to the object of the bill, that is, to restore the suit to the condition in which it was before the abatement took place : and, consequently, the Master ought to have reported every one of those statements to be impertinent.

The other cases cited were *Lewis v. Bridgman* (*ante*, vol. ii. p. 465), *Codrington v. Houlditch* (*ante*, vol. v. p. 286), *Metcalfe v. Metcalfe* (1 Keen, 74), and *Merrewether v. Mellish* (13 Ves. 161).

Mr. Jacob and Mr. Puller appeared for the Defendants, in support of the Master's report ; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said : None of the cases which have been cited have any application to the question which has been raised on the argument of these exceptions.

[349] The rule is that, if a Plaintiff files a bill of revivor, and the Defendant objects to his right to revive the suit, he must do so by demurrer, where the ground of objection appears on the face of the bill ; but, if the objection is founded on matter extraneous to the bill, he must state that matter by way of plea. If the Defendant does not either plead or demur to the bill of revivor, an order to revive may be obtained, as of course, at the expiration of eight days after appearance.

In this case the right of the Plaintiffs to revive the suit is not denied by the Defendants ; but what the Defendants mean to represent is that they have become bankrupt and have obtained their certificates since putting in their answer to the original bill ; and that, although the Plaintiffs are entitled to revive the suit, yet they cannot have a decree against the Defendants in the same form as they might have had if there had been no such bankruptcies and certificates. It appears, too, from the office copy of the bill, that the *subpoena* which it prays for is one which requires the Defendants to answer the bill of revivor, as well as to shew cause, if they can, why the suit should not be revived. These Defendants, by their answer, do represent what they had a right to represent, namely, that the Plaintiffs cannot have a decree made against them in the same form as it might have been made at the time when they put in their answers to the original bill. And, though it is true that the objection might have been stated at the Bar at the hearing ; yet I think that it is by no means incumbent on Defendants who are called on to answer a bill of revivor to omit any facts which materially concern the decree. In my opinion, the Defendants to such a bill, in case they are required to answer it, have the same right as all other Defendants have, that [350] is, to state in their answer such facts as are favourable to them, as shewing that the same decree as might have been originally made cannot be obtained against them ; notwithstanding those facts do not tend to shew that the Plaintiffs are not entitled to revive the suit.

My opinion, therefore, is that the exception to the Master's report must be overruled.

[350] BANNATYNE v. LEADER. Jan. 18, 19, 20, 22, 23, 24, June 24, 1841.

[S. C. 10 Sim. 230 ; 5 Jur. 573.]

Act of Bankruptcy. Fraudulent Preference. Order and Disposition.

On the 9th of May 1831 M., being a partner with R. in a linen manufactory, sold and assigned his share in the partnership to L. ; but M. being apprehensive that the transaction, if made public, would cause a run on certain banks in which he was engaged, and might prevent his being re-elected for the borough of A., which he then represented, the dissolution of the partnership between him and R., and the formation of the new partnership between R. and L. was, at his request, not announced in the *Gazette* or otherwise made public until the 3d of January 1832. On the 2d of that month M. stopped payment, and, on the 26th, a fiat issued, on a debt incurred in 1830, under which he was found a bankrupt. On the 11th of July 1831 M., being indebted, on bond, to the trustees of his son's marriage settlement, assigned, at his son's request, a house and furniture, to the trustees, as a security for the bond debt. At the time of the assignment M. was in some pecuniary difficulties arising from the failure of stock transactions and other speculations in which he had been engaged. Held, that under all circumstances of the case the assignment was not a fraudulent conveyance by M., with intent to defeat or delay

his creditors, and, therefore, not an act of bankruptcy; and that his share in the linen business was not in his order and disposition up to the 3d of January 1832.

In and prior to the month of May 1831 John Maberly carried on the business of a linen manufacturer, in co-partnership with John Baker Richards, at Aberdeen [351] and other towns in Scotland, and in London, under the firm of Maberly & Co. On the 9th of May 1831 Maberly sold his share and interest in the business and the property belonging thereto to the Defendant John Temple Leader: but, being apprehensive that the transaction, if made public, might be prejudicial to his return, on the then expected dissolution of Parliament, for the borough of Abingdon, which he then represented, and might cause a run on certain banks in Scotland in which he was engaged, he stipulated that the name of the firm should not be changed nor the transaction be publicly announced, until after the 31st of December 1831. The business was accordingly carried on by Richards and Leader under the old firm, but without any interference on the part of Maberly, until the 3d of January 1832. On that day the dissolution of the old partnership and the formation of the new one were advertised in the *Gazette*: the advertisement, however, was dated on the 9th of May 1831.

On the 1st of July 1831 Maberly, being indebted, on bond, to the trustees of his son's marriage settlement in the sum of £12,300, and being possessed of a leasehold house and furniture in the Regent's Park, assigned that property, at his son's request, to the trustees, in trust to sell and apply the proceeds in satisfaction of the debt, and to pay the surplus, if any, to him.

On the 26th of January 1832 a fiat in bankruptcy issued against Maberly, under which he was declared a bankrupt. The petitioning creditor's debt was contracted in 1830.

The bill was filed by Maberly's assignees, for the purpose of setting aside the sale to Leader, on the [352] ground that the assignment of the 1st of July 1831 was an act of bankruptcy within the third section of the late Bankrupt Act (6 Geo. 4, c. 16), and that the property, the subject of the sale, was in Maberly's order and disposition at the time of his bankruptcy. (1)

Mr. Jacob, Mr. Richards and Mr. James Russell appeared for the Plaintiffs.

Mr. Knight Bruce, Sir William Follett, Mr. Sharpe and Mr. Walford appeared for Leader: and

Mr. Wigram and Mr. Reynolds, for the other Defendants who claimed under J. B. Richards.

The cases cited were, for the Plaintiff, *Ryall v. Rowles* (1 Atk. 165; and 1 Vez. 348): and for the Defendants, *Simpson v. Sikes* (6 M. & S. 295), *Flook v. Jones* (4 Bing. 20), *Poland v. Glyn* (4 Bing. 22, note), *Newton v. Chantler* (7 East, 138), *Belcher v. Prittie* (10 Bing. 408), *Fidjeon v. Sharp* (1 Marsh. 196), *Hartshorn v. Slodden* (2 Bos. & Pull. 582), *Morgan v. Brundrett* (5 Barn. & Adol. 289), *Atkinson v. Brindall* (2 Bing. N. C. 225), *Baxter v. Pritchard* (1 Adol. & Ell. 456), *Rust v. Cooper* (2 Cowp. 629), *Harwood v. Bartlett* (6 Bing. N. C. 61), and *Crosby v. Crouch* (11 East, 256; and 2 Camp. N. P. C. 166).

[353] THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case a bill has been filed by the assignees of John Maberly, a bankrupt, against John Temple Leader and other parties, under the following circumstances:—

Before and in 1825, John Maberly carried on linen manufactories at Aberdeen and Montrose, with branch establishments at Edinburgh, Glasgow and Dundee, and in Bread Street, London, under the firm of "Maberly & Co." At the same time he carried on a banking business at Aberdeen and Montrose, with branches at Edinburgh, Glasgow and Dundee, and in Bread Street, under the firm of John Maberly & Co. He carried on the banking business till January 1832, when he became bankrupt.

On the 12th of March 1825, articles of agreement were made between John Maberly and John Baker Richards, whereby Richards, in consideration of £100,000,

(1) For a more detailed statement of the facts of the case, see *Bannatyne v. Leader*, ante, p. 230; *Belcher v. Prittie*, 10 Bing. 408; and the Vice-Chancellor's judgment in this case.

was admitted a partner, for a moiety, in the linen business. The partnership was to continue for 21 years; and it was agreed that deeds should be executed containing a provision for vesting the tenements in which the business was carried on, with the fixtures, plant, engines and machinery, in trustees, for the benefit of the partners, according to their interests in the partnership. Nothing was mentioned in the articles about the name of the partnership firm; and, in fact, the business was carried on under the name of Maberly & Co. In 1829 certain heritable and moveable properties in Scotland, constituting all or the greatest part of the property in the manufactories, were vested, by Scotch conveyances, in James William Freshfield and Robert Langford, as trustees for Maberly and Richards: and, [354] in the same year, a lease of a house, No. 47, in Bread Street, for 34 years and upwards, in which the London establishments of the linen manufactories and banking business were carried on, was made to Maberly and Richards. A part of the house used by Maberly for his banking business was let by the partnership to him. On the 19th of December 1825 an indenture of that date was made between John Maberly of the first part, Robert Langford of the second part, and William Leader, the father of the Defendant, John Temple Leader, of the third part, which recited that, on the 12th of the then instant month, Langford advanced £10,000 to Maberly; and on the 19th Langford transferred into Maberly's name £17,800 consols and £15,000 Reduced; and W. Leader transferred into Maberly's name £25,000 three and a half and £14,000 four per cents.; and Maberly covenanted to pay and transfer to Langford and to Leader, respectively, the money and Bank annuities so lent, and, by way of security, to mortgage all his lands in Addington and Croydon (except the Springpark estate) and his leasehold tenements in Marylebone, and his share in the linen business of Maberly & Co., and certain policies of assurance and other personal estate. W. Leader afterwards lent to Maberly two other sums, one of £12,000, which was secured by an equitable mortgage of Maberly's leasehold house in the Regent's Park and a deposit of the lease, and another of £25,000, which was secured by bills of exchange.

On the 13th of January 1828 Wm. Leader died, having by his will appointed John Masterman, Colonel William Leader Maberly, the son of John Maberly, Edward Temple Booth and Robert Langford, his executors; and made his son, the Defendant John Temple [355] Leader, his residuary legatee, who thereby became entitled to the debts due to his father's estate from J. Maberly.

In 1830 Robert Langford died. On the 7th of May 1831 John Temple Leader attained the age of 21 years. He had not been brought up to mercantile business, but had been educated at Oxford as a gentleman commoner at Christchurch; and, during the Long Vacation, made tours in France, Norway and Ireland for pleasure and improvement. On the 9th of May 1831 John Maberly, John Baker Richards and John Temple Leader signed the memorandum of the 9th of May 1831, set forth in the bill, by which the partnership between Maberly and Richards was dissolved; and, in consideration of £104,000, Maberly's share was to be given up to Mr. Leader. Maberly was no longer to use the name of the firm; but Messrs. Richards and Leader consented that the name of the firm should not be changed, nor the retirement of Mr. Maberly published in the *Gazette* till the 31st of December then next. This arrangement was made with the concurrence of William Leader's surviving executors. The debts due from Maberly to Leader's estate were considered to be satisfied. The bills of exchange for £25,000 were given up, and the sum of £28,500 was paid, by or on behalf of John Temple Leader, to Maberly, who signed a receipt for it dated the 9th of May 1831. The arrangement was made at a meeting of John Temple Leader, John Masterman, J. Maberly, Mr. Richards, Mr. Freshfield, jun., Mr. Lancelot Holland and Mr. Booth. The bill charges that, before the 3d of January 1832, Mr. Freshfield, the surviving trustee of the Scotch property, had no notice of the dissolution of the partnership between Maberly and Richards. That charge, however, [356] is expressly disproved by Freshfield in his answer to the 36th interrogatory, who states that the Exhibit L. was delivered to him, as surviving trustee and solicitor for Mr. Richards, on the 10th of May 1831. Freshfield, jun., in his answer to the 9th interrogatory, says he delivered it to his father on the 9th of May.

The effect of this arrangement was to leave the leasehold house in the Regent's Park unincumbered and at the disposal of Mr. Maberly. The arrangement was made

for full valuable consideration, deliberately and fairly. It had been proposed and discussed in the lifetime of William Leader, and was matured by his executors; and there is nothing to impeach it. The arrangement which, at first, rested in agreement, was afterwards perfected by formal conveyances; and Mr. Leader and the parties claiming under Mr. Richards, during the years 1835, 1836, 1837 and 1838, expended nearly £90,000 in various improvements upon the works in Scotland, as Edwards, who was examined in February 1839, proves in his answer to the 18th interrogatory.

In the month of June 1828 Mr. Maberly was indebted to his son, Colonel William Leader Maberly, in the sum of £12,300; for which he gave the colonel a common money bond, dated the 28th June 1828, payable in 12 months. In November 1830 Colonel Maberly married Miss Prittie. A settlement was made on the marriage, by indenture, dated the 12th of November 1830, by which the bond was assigned to George Robert Smith and George Ponsonby Prittie, upon certain trusts declared by that indenture. By an indenture, dated the 1st of July 1831, made between John Maberly of the one part, and Prittie and Smith of the other [357] part, and reciting a lease for a term of years of the house in the Regent's Park, an assignment of it to Maberly, the bond and the marriage settlement, and that Prittie and Smith had applied to Maberly for payment of the £12,300, but, it not being convenient to him to comply with their request, he had agreed, as a further security, to assign the house, with the fixtures, goods and furniture mentioned in the schedule, Maberly assigned the house for the residue of the term, with the furniture, fixtures and things in, about and belonging to the house, which were mentioned in the schedule, to Prittie and Smith, upon trust to sell and satisfy the bond, and pay the surplus of the proceeds, if any, to Maberly, and, until sale, to receive the rents and apply them in payment, first, of the interest and next of the principal due on the bond. This indenture was executed by Maberly on the 1st of July 1831.

After the 9th of May 1831 Maberly carried on his business of a banker, in London, till the 2d of January 1832, when he stopped payment there, and, in Scotland, till a few days after, when he stopped payment there also. On the 3d of January 1832 the first public announcement of the dissolution of his partnership with Richards was made by inserting, in the *London Gazette* of that day, an advertisement of the 9th of May 1831; and circulars, dated the 2d of January 1832, were sent to the Scotch correspondents, informing them of the dissolution, and that the business of linen manufacturers would be carried on by Richards and John Temple Leader, under the firm of Richards & Co. On the 26th of January 1832 a *fiat* in bankruptcy was issued against Maberly, upon the petition of Thomas Peters, on a debt contracted before the end of 1830. Under [358] that fiat Maberly was declared a bankrupt, and the Plaintiffs were appointed his assignees.

The Plaintiffs have filed their bill against Mr. Leader, and against other parties entitled under Mr. Richards (who is dead), claiming, in effect, to be entitled to that moiety of the partnership which was given up by Maberly to Mr. Leader, and to have accounts taken of the profits, and payment made to them; and they allege that they are entitled to relief on these grounds; namely, that the execution of the indenture of the 1st of July 1831 was an act of bankruptcy; and that, up to the 3d of January 1832, Maberly, by consent of Mr. Leader, was the reputed owner, and had the possession, order and disposition of the share taken by Mr. Leader under the agreement of the 9th of May 1831. These propositions are stated several times in the bill, and were contended for by the Plaintiffs' counsel in argument at the Bar. If either of them fails, the Plaintiffs have no title to relief.

It is said that the execution of the indenture of the 1st of July 1831 was an act of bankruptcy, because it was a fraudulent grant or conveyance of Maberly's lands, tenements, goods or chattels, within the meaning of the 3d section of the 6th Geo. 4, c. 16. The words of the Act being; "that if any such trader shall make, or cause to be made, either within this realm or elsewhere, any fraudulent grant or conveyance of any of his lands, tenements, goods or chattels, or make, or cause to be made, any fraudulent gift, delivery or transfer of any of his goods or chattels, every such trader making, or causing to be made, any of the acts, deeds or matters aforesaid, with intent to defeat or delay his [359] creditors, shall be deemed to have thereby committed an act of bankruptcy." Now it so happens that this section has received a

construction in a Court of law, which I see no ground for disputing. I refer to the case of *Belcher v. Prittie* (10 Bing. 408). There the present Plaintiffs brought trover for the title-deeds of the house in the Regent's Park against Mr. Prittie and Mr. Smith. Most of the facts in that case were the same as the facts in this case, but all of them were not precisely the same; and, therefore, the decision of that case is not a decision of this case. But the law laid down in that case is the law which must be applicable to the present case, namely, that, in order to make the assignment of the 1st of July 1831 an act of bankruptcy, it must be shewn that it was executed by Maberly in contemplation of bankruptcy, and was executed by him spontaneously, and not as yielding to the solicitation and request of the party who had a right to demand it of him. The Plaintiffs expressly charge that the assignment of the 1st of July 1831 was fraudulent and made for the purpose of giving Colonel Maberly's trustees an undue and unlawful preference over Maberly's other creditors; and that a letter of the 13th of June 1831, from Maberly to his solicitor, Mr. Walford (which was proved in the action, and has been proved in this cause), was written and directions for the assignment were given by Maberly, voluntarily and of his own accord, and without any previous demand being made. Now Maberly has been examined in this cause and says, in his answer to the fourth interrogatory: "I did not make such assignment spontaneously. William Leader Maberly called upon me at my house when I was ill. He stated that he had heard from Mr. Masterman that I had sold my [360] interest in the linen concern, and that various securities and a sum of money had been transferred and paid to me; and, therefore, he particularly requested that I would assign over the Regent's Park premises to his wife's trustees; and he wished the bond to be discharged; and he added, you have so many things to do you will forget it; and he said, let me beg of you to go immediately to Walford, for the purpose of giving him directions to prepare the assignment. I promised I would, as soon as I could go out; and I did, accordingly, give Mr. Walford instructions to prepare the assignment." And so he did, by sending to Walford the letter of the 13th of June 1831. This evidence of Mr. John Maberly is confirmed by the answer of Colonel Maberly to the 12th interrogatory. Colonel Maberly says: "The evening before I mentioned the subject to my father a conversation took place, between the said G. R. Smith (one of the trustees of the colonel's settlement) and myself, as to the propriety of my father's giving some further security for the sum of £12,300, secured by the bond, in consequence of his property having been released from William Leader's claims upon it; and it was agreed I should have an interview with my father the following morning, and propose to him to give us a security upon his house and furniture in the Regent's Park, as we considered they were somewhere about the sum secured by the bond. I accordingly saw my father the next day at his house, where he was confined to his bed with the gout; and then I made the said proposition to him. He at first hesitated to comply with it; but, upon my pressing it, and stating that I was anxious for it to be done, as the money secured by the bond constituted the settlement which I had made upon my wife, he acceded to the application, and, at my request, promised to give Messrs. Wal-[361]-ford directions to prepare the requisite instruments." This is also confirmed by Mr. G. R. Smith in his answer to the 12th interrogatory. That gentleman, after stating that he and Colonel Maberly agreed that the colonel should make the application to his father, and that the colonel reported that he had made it, says: "I repeated the application to John Maberly afterwards. We were then both Members of the House of Commons; and we were in the almost daily habit of meeting; and he confirmed the consent which he had expressed to his son." And Mr. Thomas Walford, in his answer to the 13th interrogatory, distinctly proves that, in consequence of the note of the 13th of June, he waited upon John Maberly, and afterwards prepared the assignment of the 1st of July 1831. From this evidence, which is not contradicted, it appears that the assignment was not voluntarily made. The son, with the concurrence of one of his trustees, applied to the father when he was ill, and pressed him to make the assignment; and the trustee repeated the application. This was moral pressure, having regard to the relation in which the parties stood to each other. The assignment was not made hastily, but deliberately. Mr. Walford says: "I have no doubt but that I must have seen the said John Maberly several times (on cross-examination, he says two or three

times) between the times of my first receiving his instructions to prepare the said assignment, and his execution of it; as the deed was not executed by him till the 1st of July 1831." Mr. John Maberly, in his answer to the fourth interrogatory, says: "I did not, at the time of executing the said indenture (meaning the assignment), contemplate bankruptcy; nor did I execute the same with an intention to defeat or delay any of my creditors in obtaining payment of the debts then owing by me to them." William Masterman and [362] Mr. Freshfield, jun., in answer to the 21st interrogatory, prove that Maberly was in very good pecuniary credit in the months of May, June and July 1831. The Plaintiffs allege and insist that, when Maberly executed the indenture of the 1st of July 1831, he was in embarrassed circumstances, and would have it inferred that Maberly, because he was embarrassed, contemplated bankruptcy. In order to make out the embarrassment, the Plaintiffs have proved the refusal to pay the two bills drawn by De Silva; the withdrawing from Masterman's and placing in Oxley's hands the monies mentioned in the Plaintiffs' Exhibits 13 and 14, the balance-sheets (Exhibit 17), the failure of the Terceira Loan, and, especially, the loss incurred by the speculation in the French funds. De Silva's bills were presented for payment on the 11th of July, when special reasons were given in answer; which appear on the Exhibits 11 and 12. From what Mr. Freshfield, jun., says, in answer to the 30th interrogatory, it appears there were special reasons for not paying the bills, and that, in order to prevent foreign attachment by the bill-holders, the expedient was adopted, on the 11th or 13th of July 1831, of transferring Maberly's money from Masterman's to Oxley's, and the dispute terminated in negotiation. All this might have been fairly done by an unembarrassed man, and certainly does not prove either contemplation of bankruptcy or embarrassment. The balance-sheets shew the deficiency to have been less on the 30th of June 1831 than it was on the 30th of April or on the 1st of January. As to the Terceira Loan, nothing is said about it in the amended bill. But, from a passage in Mr. Leader's answer, it seems that something was said about it in the original bill. Both Plaintiffs and Defendant, however, have entered into evidence respecting it, and, from Easthope's evidence, it appears that, on the 9th of June [363] 1831, it had in Maberly's judgment entirely failed. But though it failed as a source of profit, there is no proof that Maberly lost by it. As to the speculation in the French funds, it appears from the Marquis de la Valette's evidence that Maberly arrived in Paris in May 1831, and was, in June, introduced by the marquis to Franchessin. According to Weyer's evidence and the contracts A. and B., the purchases of French rentes by Franchessin for Maberly were made on the 3d and 4th of June. On the 6th or 7th of June Maberly returned to London. On the 10th of June there was a continuation which was before Franchessin could have received Maberly's letter of the 11th; which letter directed that no steps should be taken as to continuation till Maberly directed what he thought best. That continuation made by Franchessin seems to have been without Maberly's authority. Maberly, in his answer to the 8th interrogatory, states that he believes it was so. Maberly then wrote the letter of the 23d of June, in pursuance of which Franchessin sold the rentes on the 25th at a loss of nearly £18,000. Before the 29th of June Maberly paid, on account of the loss, one sum of £5000, and another of £4000; and on the 29th of June he gave a bond to Franchessin and the Count d'Isbal for £8838, to be paid in eighteen months by equal monthly instalments; and, on the 26th of July 1831, he paid the first instalment. Applications were afterwards made by La Valette to Maberly for payment of the instalments overdue, but without success. Maberly thought Franchessin had acted wrongly. What happened after the 1st of July is of little importance. Taking the evidence in the strongest way, the utmost that it can amount to is that Maberly felt a difficulty in paying £8838 on the 29th of June. But so little ground is there for inferring, from that circumstance, that Maberly then [364] contemplated bankruptcy, that La Valette says that, on his second journey to London on the 27th of June, he found Maberly very busily engaged on the subject of a Belgian loan, the treaty for which, according to Mr. Freshfield, junior's, answer to the 21st interrogatory, was going on in November 1831. When the time for advertizing the dissolution arrived, Maberly struggled to have it postponed. He was anxious to go on as he had done.

I think it is plain, upon all the evidence taken together, that Maberly did not, in the year 1831, contemplate bankruptcy, but meant to carry on his numerous affairs, and, in fact, did carry them on as he had formerly done, till the beginning of 1832, excepting only the linen business: and, more especially, that he did not contemplate bankruptcy on the 1st of July 1831.

As to order and disposition under the 72d section of the 6 Geo. 4, c. 16, it is clear, upon the evidence, that the clause in the memorandum of the 9th of May 1831, postponing the notice of the dissolution of Maberly's partnership with Richards, was introduced with reference to his connexion with the borough of Abingdon, for which place, as Mr. Graham proves, he had been chosen member in April 1831, and which he was desirous to represent again; and which, for that purpose, he visited in September 1831. Though, in fact, the linen business was carried on under the firm of Maberly & Co. till the 2d of January 1832 in pursuance of that clause, it is proved that, after the 9th of May 1831, Maberly did not interfere in the linen business, and did not give any order or direction as to the management of it. The business was carried on under the superintendence of Mr. Richards. George Edwards, a witness for the Plaintiffs, proves that, after the middle [365] of 1831, the practice of sending a weekly statement of the business to Maberly was discontinued. The reason assigned was that Maberly took no interest in it, and did not wish to see it. Edwards does not believe that Maberly ever came to the counting-house of the linen establishment after the 9th of May 1831. Upon the face of the transaction it was very unlikely that Maberly would interfere. If he had attempted to do so, he would at once have been stopped by Mr. Richards, who was upon the spot, though Mr. Leader was absent. With respect to the property vested in Mr. Freshfield, Maberly could make no disposition of it without Freshfield's co-operation: and Freshfield had notice of the transaction of the 9th of May. Therefore I do not see what order and disposition Maberly had of the share sold to Mr. Leader. The utmost that it could have amounted to was this: that, according to the present state of the law of this Court, he might have received some debts from debtors to the firm of Maberly & Co. who had no notice of the dissolution. But, if there were no act of bankruptcy on the 1st of July 1831, the consideration of this point is unnecessary.

It has been said, however, that, at all events, there ought to be an inquiry or an issue; especially because the facts relating to the dealings with Franchessin were not before the jury in the action of trover, but have been lately discovered. The action was commenced in Trinity term 1832, and judgment for the Defendants was signed on the 1st of February 1834. The charge in the bill is that, in or about May 1837, Franchessin, for the first time, applied to prove under the fiat, and that the Plaintiffs had not nor had either of them, previously to Franchessin's applying to prove, any knowledge or notice of the speculations in the French funds. Mr. Gordon, [366] in answer to the 77th interrogatory, says that Franchessin first applied to prove on or about the 17th of March 1837; and, in answer to the 78th interrogatory, says that, previously to the application by Franchessin to prove, the Plaintiffs had not obtained any accurate knowledge or notice of Maberly's speculations in the French funds. This falls very far short of the charge in the bill. And what was the real truth? Maberly, in answer to the 8th interrogatory, says: "I left England in the early part of the year 1832; and, I believe, before the month of April in that year the Plaintiff, Alexander Brymer Belcher, asked me if there was not a large debt due to some French persons for stock transactions. I said yes there was; and he replied he had so heard. I did not mention it to the other Plaintiffs or either of them, because I did not consider it a legal debt; and I did not mention it to Belcher till he asked me the question, for the same reason. The payment of the £9000 appears in my banker's book, and the same sum also appears in my account relating to stock transactions and marked with the letter C; which book and account were delivered up by me to, and are now, as I believe, in the possession of Belcher, as the official assignee." The Plaintiffs therefore (for the knowledge of one is the knowledge of all) in April 1832 had some knowledge of these French speculations which they might have matured into full information by examining Maberly, who was then in England. They chose, however, without further inquiry, to bring the action of trover. That failed, and then on the 6th of December 1837 they filed their present bill. On the trial of the action

Maberly and his confidential clerk, Edwin Young Bartley, a material witness, were examined. Since then they have both died. The *laches* of the Plaintiffs has made it impossible to have any further inquiry or [367] an issue tried in a fair manner; and, upon the whole of the case, my deliberate judgment is that the bill should be dismissed with costs.

[367] STILLWELL v. MELLERSH. Nov. 28, 1839.

[S. C. varied, 4 My. & Cr. 581; 41 E. R. 224.]

Practice. Vendor and Purchaser. Sale under Decree. Execution of Conveyance.

The conveyance of an estate sold under the decree had been settled by the Master, and one of the Defendants was made a party, but refused to execute it. The Court refused an application, by the purchaser, that the Plaintiffs should procure the Defendant to execute the conveyance.

An estate, in the proceeds of which the Plaintiffs were interested, had been sold under the decree in the cause; and W. Mellersh, one of the Defendants, was made a party to the conveyance to the purchaser, which had been settled by the Master. Mellersh having refused to execute the conveyance, the purchaser now moved that the Plaintiffs (some of whom were infants and others married women) might be ordered to procure him to execute it, within ten days from the date of the order to be made on the motion, and that the costs of the motion might be paid out of the fund in the cause.

Mr. Jacob, in support of the motion, relied on the following passage in 2d Smith's Pract. 213: "If a purchaser, after having obtained an order to pay in his purchase-money and to be let into possession experiences any difficulty in obtaining possession of the premises, it is not the practice for the purchaser to proceed against the person in possession, but he should apply to the vendor's solicitor to procure possession for him; and, if he refuses, he should serve a notice of motion that the vendor may procure possession to be delivered to him within a given time, and that the costs of the application may be paid by him, or out of the estate."

Mr. Knight Bruce and Mr. Shebbeare, for the Plaintiffs, said that Mr. Smith cited no authority for the position laid down by him, and that the application was [368] wholly unprecedented and contrary to the usual course of the Court.

Mr. Chandless, for J. S. Stillwell, one of the Defendants, said that Mellersh had parted with all his interest in the estate, and, therefore, his execution of the conveyance would be mere surplusage.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not think that it is unwise in the purchaser to ask that the conveyance may be executed by all the persons whom the Master has thought to be proper parties; for, otherwise, a future purchaser might object to the title.

In this case, however, the notice of motion asks, not that Mellersh, who is a party to the suit, may be ordered to execute the conveyance; but that the Plaintiffs, some of whom are married women and others infants, may be ordered to procure his execution of it within a given time. The case put by Mr. Smith is quite different from the present: and I have no recollection of any such order as is now asked, that is, that the Plaintiffs may procure another party to the suit to execute a conveyance, having been ever made by the Court: but it seems to me that the application is new in point of form, and unreasonable on the face of it; and, therefore, I shall refuse it with costs.⁽¹⁾

(1) The purchaser afterwards made a similar application to the Lord Chancellor, except that the notice of motion concluded thus: "or that such other order may be made as the Court may think proper for procuring the execution of the conveyance."

The Lord Chancellor said that the Vice-Chancellor was right in refusing the application which had been made to him; but, in consequence of the concluding words of the notice, his Lordship ordered Mellersh (who had been served with notice of the motion) to execute the conveyance.

[369] LEE v. SHAW. Nov. 28, 1839.

New Orders. Construction. Accounts and Inquiries.

The 5th Order of May 1839 merely enables the Court to direct such inquiries as must be made prior to the discussion of the question in the cause, but not to prejudice or decide that question. Therefore, where a bill is filed for an account, the Court will not, under the 5th Order, direct the account to be taken.

This was a suit for the administration of a testator's estate. The Plaintiff was the residuary legatee, and the Defendant was the administrator, *cum testamento annexo*, of the deceased's estate.

The Plaintiff now moved, under the 5th Order of May 1839, for a reference to the Master to take an account of the testator's personal estate and effects received by the Defendant, or which, without his wilful neglect or default, he might have received, and also of the testator's funeral and testamentary expenses, debts and legacies; and that the Master might be directed to advertise for creditors, and to ascertain the residue of the estate.

Mr. Shadwell appeared in support of the motion.

Mr. Anderdon, for the Defendant, said that the Plaintiff sought to obtain, by motion, an order to the same effect as the decree which ought to be made at the hearing of the cause: that the object contemplated by the Fifth Order was not to supersede the hearing of the cause, but to authorize the Court to direct such preliminary inquiries to be made as would enable the Court to make a more perfect decree, at the hearing, than it could otherwise have made.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I understand this order to mean, merely, that where there are preliminary matters which must be ascertained prior to the discussion of the question in the [370] cause, the Court may, on motion, direct the necessary inquiries to be made; but it cannot decide or prejudice any question in the cause. Therefore, when a bill is filed for an account, if the Court under this Fifth Order were to direct the account to be taken, it would decide the question in the cause, which cannot be done except by the decree at the hearing of the cause.(1)

[370] KERR v. REW. Dec. 3, 1839.

[S. C. affirmed, 5 My. & Cr. 154; 41 E. R. 329.]

Discovery. Pleading. Parties.

The decision in *Irving v. Thompson*, ante, vol. ix. p. 17, approved of by the Lord Chancellor.

A general demurrer was put in to the bill in this case, which involved precisely the same question as was decided in *Irving v. Thompson*, reported ante, vol. ix. p. 17.

Mr. Knight Bruce and Mr. Willcock appeared in support of the demurrer, and Mr. G. Richards and Mr. Calvert, in support of the bill.

The demurrer was allowed without argument, it being the intention of the Plaintiff to take the case, by way of appeal, before the Lord Chancellor.

The appeal was heard in February 1840; and on the 22d of that month the order allowing the demurrer was affirmed. His Lordship, at the conclusion of his judgment, said that the Vice-Chancellor's decision in *Irving v. Thompson* was conformable to principle and to all authority.

(1) See *Strother v. Dutton*, ante, 288.

[371] GILBERT v. BENNETT. Nov. 29, 1839.

Will. Construction.

Testator gave all his property to his wife and two other persons, in trust for the under-mentioned purpose, namely, to pay the income to his wife for the education and support of his children by her; and, after her death, the property to be divided among his children; and he gave his furniture, plate, &c., to his wife absolutely. Held, that the children were not entitled to the trust property on their father's death; but that their mother was entitled to the income for her life, she maintaining and educating the children out of it.

J. Bennett made his will, dated the 28th of March 1823, in the following words:—

"I, John Bennett, of Greenwich in the county of Kent, silversmith, do give and bequeath, unto my dear wife Elizabeth Sincock Bennett, Mr. Geo. Smith, wine merchant, of Park Row, Greenwich, and Mr. Geo. Sargent, of Battle in the county of Sussex, linen draper, in trust, all my freeholds, leaseholds, funded or other property, whether goods, chattels, stocks-in-trade or other of what kind soever it may be; my intention being to comprise in this bequest every kind of property that I may die possessed of, leaving to her, my said wife, and said trustees *in trust for the under-mentioned purpose*, viz., to pay over all the rents, profits, &c., arising from the leasehold and freehold property unto my said wife for the education and advancing in life of any children she may have born by me, and also to dispose of and receive all my personal property, of what kind soever it may consist, for the same purpose, and likewise for the income and maintenance; but none of my said freehold or leasehold property to be disposed of or sold, but the income arising out of it to be applied as above to their maintenance and support and the advancement in life and support of my child or children; and, *after her death*, the whole of the said property in trust, either freehold, leasehold, or any other property of mine or arising out of the management of this trust, to be divided equally, share and share alike, among my said children male or female, share and share alike, in [372] equal proportions; but it is my will that whatever furniture, plate for the use of my house, not being part of my stock-in-trade, books, furniture, china or other things being for the use or ornament of my dwelling-house, be my said wife's for her own use and benefit, subject to no control of the said trust who are above named as joined with her for the preservative of my other property for my children after her decease; and, further, that in order to discharge my said trust for the sums of money received annually or in any way for rents or interest, that the receipt of my said wife in her own handwriting, and that only, shall be a discharge for them from liability to my said child or children for the sum or sums of money so received; and my said wife's receipts so given shall be considered as their full and complete discharge from all future responsibility for the sum or sums so named in it; and, further, it shall and is lawful for my said trust, out of any and every part of my personal property, consisting of securities for money, stock-in-trade, the lease of my house I reside in, book debts or the goodwill of my business, to pay off any sum or sums of money owing by me; and, further, to borrow money on security of my freehold and leasehold property to pay any portion, or secure the payment of any portion of debts I may owe at my decease, should the disposal of the above stock-in-trade, book debts, &c., be insufficient; but not to borrow money on the said leasehold and freehold estates for no other purpose than to pay the said debts owing at my decease."

The testator died in February 1829, leaving his wife and four children by her surviving him.

The bill was filed by one of the testator's daughters and her husband against the widow and other chil-[373]-dren; and the question was whether, under the will, the children became absolutely entitled to their father's property on his decease, or whether the widow was entitled to the income of it for her life, subject to her maintaining and educating the children thereout.

Mr. Wigram and Mr. Haldane, for the Plaintiffs, said that the testator had

directed that the whole of the income of his property should be applied for the benefit of his children, and that he did not intend his wife to take anything except his furniture and the other articles specifically bequeathed to her; that the whole of the property was given to her and two other persons *in trust*; which excluded her from taking a life interest by implication (as it would be contended she did) under the words "and after her death." They cited *Broad v. Bevan* (1 Russ. 511, note), and *Woods v. Woods* (1 Myl. & Cra. 401).

Mr. Knight Bruce, Mr. Jacob, Mr. Koe, Mr. Heberden and Mr. Steere appeared for the Defendants: but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said that the judgment of the Lord Chancellor in *Woods v. Woods* was in favour of the wife taking in this case; and that, taking the whole of the will together, it would be extraordinary to hold that the children alone were to be supported out of the income of the testator's property and that the widow was to take no part of it; whereas the natural construction of the will was that the testator intended the whole of the income to be paid to his wife for her life, and to impose on her the burden of maintaining and educating the children out of it. (See *Hammond v. Neame*, 1 Swans. 35; *Bird v. Hunsdon*, 2 Swans. 342; and *Berkeley v. Swinburne*, ante, vol. vi. p. 613.)

[374] STRICKLAND v. STRICKLAND. Dec. 3, 4, 1839.

[S. C. 9 L. J. Ch. (N. S.) 60. See *Owen v. Gibbons* [1902], 1 Ch. 647.]

Stat. 3 & 4 Will. 4, c. 106. Heir. Marshalling of Assets.

Under the 3 & 4 Will. 4, c. 106, s. 3, an heir, to whom lands are devised by his ancestor, takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him.

The question raised on the argument of a demurrer in this case was whether the pecuniary legatees of the testator in the cause, who died after the 31st of December 1833, were entitled to have the assets marshalled as against the Defendant Sir George Strickland, who was the testator's heir at law, and also the devisee of his estates at Easton and Righton in Yorkshire.

Mr. Knight Bruce and Mr. Shadwell, in support of the demurrer, said that the 3 & 4 Will. 4, c. 106, s. 3, declared expressly that, when any land should be devised by any testator dying after the 31st of December 1833 to his heir, the devise should operate, and the heir should take as devisee and not as heir; (1) and therefore the declaration asked by the bill that Sir George Strickland took the estates at Easton and Righton by descent and not by devise was directly contrary to the Act; that there was an equal intention on the part of the testator in favour of the devisee and [375] the pecuniary legatees; and, consequently, the latter were not entitled to have the assets marshalled as against Sir George Strickland, who must be considered, to all intents and purposes, as the devisee of the estates at Easton and Righton. *Scott v. Scott* (Amb. 383, Blunt's edit.), *Herne v. Meyrick* (1 P. W. 201), *Clifton v. Burt* (*Ibid.* 678).

Mr. Jacob and Mr. Sidebottom, in support of the bill, said that the Act referred to was passed merely for the amendment of the law of inheritance; that it did not

(1) "And be it further enacted that, when any land shall have been devised by any testator, who shall die after the 31st day of December 1833, to the heir, or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and, when any land shall have been limited, by any assurance executed after the said 31st day of December 1833, to the person, or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate, or part thereof."

provide that the heir should take as devisee for all purposes; and that the rules respecting the marshalling of assets were not intended to be affected by it; that the 3 & 4 Will. 4, c. 104 (to render freehold and copyhold estates assets for the payment of simple contract debts), was passed on the same day; and the Legislature, if it had intended to make any alteration in those rules, would have done so by that Act. *Galton v. Hancock* (2 Atk. 424, 427, 430).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 3d section of 3 & 4 Will. 4, c. 106, enacts that land devised to the heir shall be considered to have been acquired by him as devisee, and not by descent; and it then proceeds to declare that, when any land shall have been limited, by any assurance, to the person or the heirs of the person who shall thereby have conveyed it, such person shall be considered to have acquired the land as a purchaser by virtue of the assurance, and shall not be considered as entitled thereto as his former estate or part thereof. Consequently, if a person seised of land by descent, *ex* [376] *parte maternâ*, were to execute a conveyance limiting property to the use of himself and his heirs, he would be considered thenceforth as taking the land by purchase, and the course of descent would be altered. I cannot, therefore, but think that Sir George Strickland must be considered as having taken the estates at Easton and Righton as devisee, to all intents and purposes.

That view of the question seems to me to be strengthened rather than otherwise by the circumstance that the 3 & 4 Will. 4, c. 104, was passed on the same day as the 3 & 4 Will. 4, c. 106; for the Legislature seems to have taken care that the laws respecting inheritance should not be altered, without, at the same time, making the lands of deceased debtors assets for payment of simple contract, as well as specialty debts.

Demurrer allowed.

[377] NEWLANDS v. PAYNTER. Dec. 2, 1839.

[S. C. 4 My. & Cr. 408; 41 E. R. 158.]

Feme Coverte. Separate Property.

Testator bequeathed all his property to his daughter (a single woman), in terms amounting to a gift to her for her separate use, and appointed her sole executrix. She married after her father's death; and a sum of stock, part of the property bequeathed to her, was assigned to trustees, in trust for her separate use for life, and if she survived her husband, in trust for her absolutely, and, if not, then in trust as she should appoint by will, and, subject thereto, in trust for her husband; but the settlement did not notice any other part of the property. Held, that the husband did not become entitled, in his marital right, to the property remaining unsettled, but was a trustee of it for his wife; and, therefore, it could not be taken in execution under a judgment recovered against him.

John Peter Reina, by his will, dated in 1833, bequeathed to his daughter, Mary Sarah Reina, all his property whatsoever, and appointed her sole executrix of his will; and directed that any property he might have given or should give to her should not be liable to the interference or control of any person or husband she might be married to, or liable to his then present or future debts, but that her receipt alone should be a discharge for all the money or effects he might give or leave to her.

Mary Sarah Reina proved her father's will; and, shortly afterwards, married William Newlands. On her marriage, a settlement was made of £5000 Bank stock, part of the property bequeathed to her by her father. The remainder of that property consisted of a leasehold house in Southwark, in which she and her husband had resided ever since their marriage, and of the furniture, plate and certain other articles therein.

The Defendant Holmes having recovered judgment and issued execution in an action brought by him against Mr. Newlands, the bill in this cause was filed by Mrs. Newlands against her husband, Holmes, and the Sheriff of Surrey, stating the facts above mentioned, and that the [378] Plaintiff had no property except what had been

bequeathed to her by her father's will, or had been purchased by her out of the income of that property; and submitting that her husband was a trustee of the house and the goods and chattels therein, for her separate use; and praying for an injunction to restrain the sheriff from seizing the house and the goods and chattels therein under the writ.

The injunction was afterwards granted, and

Mr. Jacob and Mr. Bethell, for the Defendant Holmes, now moved to dissolve it. They said that the property was bequeathed to the Plaintiff absolutely, and that she was appointed executrix of the will; that the marriage (which took place after the testator's death) vested the property in question absolutely in the husband; that a portion of the property bequeathed by the will was settled on the marriage, but no stipulation was made as to the remainder of it; and, therefore, the presumption was that the parties intended the marital right to prevail as to all the property except that portion of it which was comprised in the settlement.

Mr. Knight Bruce and Mr. James Russell appeared for the Plaintiff; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: "There cannot, I think, be any doubt that the Plaintiff's father did intend, by his will, to create a trust for the separate use of his daughter as to the property which he bequeathed to her, although he has not expressed that intention in a formal and technical manner; and I apprehend it is equally clear that, when he [379] died and his daughter proved his will, she became at law the absolute owner of all the property of a personal nature which passed by his will; and that, when she married, she did, at law, give to her husband the complete dominion over the whole of that property, except that portion of it which was settled on the marriage. But then the question is whether a husband, when he marries a woman who takes personal property under such a bequest as this, does not subject his marital rights and marital powers to that trust which was affixed on it by the will. I cannot but think that the legal rights and powers which the husband, in such a case acquires over the property, are subjected to the trust affixed on it by the will.

The settlement of the £6000 Bank stock, which was made on the marriage, is not a settlement of it to the separate use of the wife, to the same extent as she was entitled under her father's will; but, on the contrary, it is a reduction and limitation of the interest which she had, in that property, under the will: for it vests the stock in trustees in trust for the separate use of the wife for her life, and, if she survives her husband, it is to belong to her absolutely: but, if her husband survives her, then she is to have only a testamentary power of disposition over it; and so much as she may not so dispose of is to go to her husband. It is quite clear, therefore, that the husband is let in to participate, for his own benefit, in the Bank stock, to the prejudice and in derogation of the right and interest which the wife had in it under her father's will. Where a husband, by virtue of his marriage settlement, derives an interest in a portion of his wife's property, but gives her nothing whatever in return, and the settlement is totally silent as to any relinquishment by the wife of her rights [380] over the rest of her property, it would be strange indeed to hold that the husband, under such circumstances, became absolutely entitled to all his wife's property not comprised in the settlement.

My opinion is, taking the will and the settlement together, that the husband, as to any right or interest which he has acquired in that character over his wife's property, is a trustee for her; and that the leasehold house and the goods and chattels in it are not seizable in equity, although they may be at law, under the execution which has issued against the husband; and the motion to dissolve the injunction must be refused.

Mr. Paynter appeared for the sheriff.

[380] HARRISON v. BORWELL. Dec. 6, 1839.

Evidence. Legacy. Statute of Limitations. Pleading. Defendant.

Under 36 Geo. 3, c. 52, s. 27, a copy of an entry in the Stamp Office books, of payment of the duty on a legacy, is evidence of payment of the legacy: but the copy must be proved in the usual way.

A Defendant who has answered cannot have the benefit of the Statute of Limitations at the hearing, unless he has insisted on it in his answer.

In this case the Plaintiff, in order to prove that the testator in the cause left assets, tendered, in evidence, a copy of an entry in the Stamp Office books of payment of the duty on a legacy given by the testator. (1) [381] A witness deposed that the copy was made and signed by the Comptroller of Stamps, and was compared by him with the original in the presence of the witness, and that, to the best of the witness's belief, it was a true copy.

Mr. Jacob, for the Defendant, contended, first, that the document produced was not evidence under the Legacy Duty Act, in any case except that specified in the Act: secondly, that secondary evidence was not admissible, unless it was shewn that primary evidence could not be procured, which had not been done in this case: and thirdly, that in no case was a copy admissible, unless it was proved to be a true copy by a person who had compared it with the original.

Mr. Knight Bruce, for the Plaintiff, said that a copy of the entry in the Stamp Office books was made evidence by the Act: that those books were public documents belonging to the Crown, which the officers of the Crown could not be compelled to produce; and that the Comptroller of Stamps, like the Chirographer of Fines, was the proper officer to make copies from them. Phill. on Evidence, 3d edit. 338.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Act must, I think, be construed to mean that a copy of the entry in the books of the Commissioners of Stamps, of payment of the duty on a legacy, shall be evidence of that fact for all purposes. But, as there is nothing in the Act which provides that a copy of an entry in those books made by a particular person shall [382] be evidence of the original, the copy must be proved in the regular way, that is, by a person who has himself compared it with the original. This copy, therefore, is not evidence.

Another objection taken by Mr. Jacob in this case was that the Plaintiff's demand was barred by the Statute of Limitations.

Mr. Knight Bruce replied that a Defendant could not avail himself of the statute, unless he either demurred or pleaded to the bill, or claimed the benefit of the statute in his answer, which the Defendant had not done in the present case.

THE VICE-CHANCELLOR held the rule to be as stated by Mr. Knight Bruce, and said that the reason of it was that the Plaintiff might be put on his guard, and might have an opportunity of discovering something which would avoid the bar created by the statute.

Mr. Girdlestone, Mr. Purvis, Mr. James Russell, Mr. Jeremy, Mr. Faber and Mr. Renshaw were also counsel in the cause.

(1) By the 27th sect. of 36 Geo. 3, c. 52 (for repealing certain duties on legacies and shares of personal estates, and for granting other duties thereon in certain cases), it is enacted that no receipt for any legacy, in respect whereof any duty is imposed by the Act, shall be received in evidence, unless the same shall be stamped as required by the Act; and that no evidence whatsoever shall be given of any payment of such legacy, without producing such receipt duly stamped as aforesaid, unless the actual payment of the duty thereby imposed shall first be given in evidence: provided always, that a copy of the entry, in the books of the Commissioners of Stamps, of the payment of such duty, shall be admitted as evidence thereof.

[383] BURLES v. POPPLEWELL. Dec. 6, 1839.

Executor. Injunction.

To an action brought by a creditor of a testator the executors pleaded the decree in a suit for the administration of the testator's assets. The plea was held to be bad in law, and judgment was given for the Plaintiff at law. The Court restrained him from enforcing his judgment against the testator's assets, but not against the executors personally.

This was a creditors' suit, and the usual decree had been made in it.

The executors now moved for an injunction to restrain Hall, a creditor of the testator, from enforcing a judgment obtained by him in an action against them for the recovery of his debt. The executors, instead of applying for the injunction in an early stage of the action, pleaded the decree to it; but the plea was held to be bad, and, thereupon, judgment was given for the Plaintiff in the action.

A question having arisen as to whether the form of the judgment was such as to render the executors liable personally,

Mr. Jacob, who appeared in support of the motion, said that though the judgment did not affect the executors immediately, yet it might do so ultimately: (1) that [384] the executors had been relying on the decree, and had endeavoured to avail themselves of it by pleading it to the action, but the plea had been held to be bad; and, although it was bad in point of law only, yet the Court of law would assume that the executors had had assets, and had either elogned or wasted them: and a writ of [385] *scire fieri* would be issued to the sheriff to levy the debt *de bonis testatoris, et si non, de bonis propriis*; and the executors would be unable to protect their own property

(1) Mr. Williams, in his Treatise on the Law of Executors, vol. 2, p. 1223, thus points out the course of proceeding to enforce a judgment obtained against an executor, for a debt due from the testator: "After the Plaintiff has obtained a judgment against an executor, *de bonis testatoris*, there are two modes of enforcing it: first, by *fieri facias* or *scire fieri* inquiry: second, by an action of debt on the judgment, suggesting a *devastavit*. First, as to proceeding by *fieri facias* or *scire fieri* inquiry: if the sheriff returns, as he may do if he pleases, not only *nulla bona*, but also a *devastavit*, to a *fieri facias de bonis testatoris* sued out on a judgment obtained against an executor, the Plaintiff, according to the ancient practice, sued out execution immediately against the Defendant by *capias ad satisfaciendum* or *fieri facias de bonis propriis*: and so he may, it should appear at this day. And it seems that the sheriff runs no great risk by returning a *devastavit*, for the judgment and no assets to be found will be sufficient evidence of a *devastavit* in an action against him for a false return.

"But if the sheriff returns *nulla bona* generally, without also returning a *devastavit*, the ancient course was to issue a special writ for the sheriff to inquire by a jury whether the Defendant had wasted any of the goods of the deceased: and if a *devastavit* were found, and returned by the sheriff, a *scire facias* issued for the Defendant to shew cause why the Plaintiff should not have execution *de bonis propriis*; to which *scire facias* the Defendant might appear and plead. But now, for the sake of expedition, the inquiry and *scire facias* are made out in one writ, which is called a *scire fieri* inquiry; reciting the judgment, *fieri facias*, and return of *nulla bona*, and after suggesting a *devastavit*, commanding the sheriff to cause the debt or damages and costs to be made of the goods of the testator or intestate, if, &c., and if not, then, if it shall appear by inquisition that the Defendant hath wasted the goods of the deceased, to give notice to the Defendant to appear in Court at the return of the writ, to shew cause why the Plaintiff ought not to have execution *de bonis propriis*. But the most usual mode of proceeding is by action of debt on the judgment suggesting a *devastavit*. This action may be brought upon the judgment against the executor, upon a bare suggestion of a *devastavit*, without any writ of *fi. fa.* first taken out upon the judgment. The action is in form an action of debt in the *debit* and *detinet*, and the judgment is *de bonis propriis*."

from the force of the writ; though, so far from having any assets of the testator, his debts were much greater than the value of his estate at the time of his death: consequently, the case fell within the principle of *Brook v. Skinner* (2 Mer. 481, note), *Dyer v. Kearsley* (*Ibid.* 482, note), and *Fielden v. Fielden* (1 Sim. & Stu. 255).

Mr. Knight Bruce (with whom was Mr. Koe), appeared for Hall, the Plaintiff at law, and admitted that he intended to proceed against the executors personally.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In *Kent v. Pickering* (*ante*, vol. v. p. 569) I proceeded on what Lord Eldon is reported to have said in *Brook v. Skinner*, namely, that where a decree has been made in a suit for the administration of a deceased debtor's estate, if the Plaintiff at law recovers a judgment *de bonis testatoris*, this Court will not suffer execution to be taken out on such judgment; but if he recovers *de bonis testatoris, et si non, de bonis propriis*, this Court cannot interpose to protect the executors from any liability to which they may have subjected themselves. The rule of this Court, as I apprehend, is that, if the executor does at law so manage the matter as to make himself personally liable, this Court will leave him to be dealt with at law as the Court of law will permit: but this Court will not suffer any judgment that may be recovered at law to interfere with its own decree.

[386] In this case, I think that the executors, instead of pleading the decree at law, ought to have applied at once for an injunction: but as they thought fit to adopt a different course, the Plaintiff at law is entitled to have the benefit of his judgment as against them; but this Court will restrain him from using it against the assets of the testator; and, therefore, I shall grant an injunction to restrain him from proceeding against the assets, but not to restrain him from proceeding against the executors personally.

[386] WILLIAMS v. OWEN. Dec. 18, 1839.

[S. C. reversed, 5 My. & Cr. 303; 41 E. R. 386. The cases in the note (41 E. R. 386) refer to *Williams v. Owen*, 13 Sim. 597.]

Mortgage. Conditional Sale.

W. conveyed an estate to O. absolutely, as in pursuance of a sale: and, by a separate instrument, O. agreed to reconvey the property, on W. repaying the consideration money and the expenses of the conveyance (which O. had paid) within a year; and O. was, at his option, either to retain the intermediate rents, or to be paid interest. The agreement bore the same date and purported to be executed on the same day as the conveyance; but that fact was not admitted in the answer, and there was no evidence of it. A. was an attorney, and prepared the conveyance. O. paid the expenses of it, and was immediately let into possession, and the consideration money was very nearly the full value of the estate.

Held, nevertheless, that the transaction was, in fact, a mortgage, and that W.'s heir was, long after the year had expired, entitled to redeem the estate.

By indentures of lease and release of the 13th and 14th of June 1821, and by a fine, Richard Williams, a solicitor and his wife, in consideration of £550, paid to Williams by the Defendant, conveyed 12 cottages and a piece of land or garden ground situate near the town of Carnarvon, to the Defendant, who was a grocer, in fee. The conveyance was absolute, and purported to be made in pursuance of a contract for sale of the premises. The £550 was in part made up of a sum of £200 due on bond, from Williams to the Defendant. [387] Upon the execution of the conveyance, the Defendant entered into the possession or receipt of the rents and profits of the premises. By articles of agreement, dated the same 14th of June, made between the Defendant of the one part, and Williams and his wife of the other part, after reciting that Williams and his wife had that day executed to the Defendant an absolute conveyance of the fee-simple and inheritance of the premises, in consideration of £550 paid to Williams by the Defendant, and that, upon the treaty for the sale of the premises, it was mutually agreed between the parties that, in case Williams, his heirs or assigns,

should pay to the Defendant the like sum of £550, within 12 calendar months from that day, and also the sum of £13, being the sum laid out by the Defendant for preparing the conveyance of the premises, then the Defendant would reconvey the premises to Williams, his heirs or assigns: it was witnessed that, in case Williams, his heirs, executors, administrators or assigns, should pay or cause to be paid to the Defendant the sums of £550 and £13 within 12 calendar months from the date of the agreement, then the Defendant, for himself, his heirs, executors and administrators, agreed that he would reconvey the premises to Williams, his heirs, appointees or assigns, or consent that the conveyance, bearing even date with the agreement, might be cancelled and made void to all intents and purposes: and it was further agreed that the Defendant should retain the rents from the day of the date of the agreement to the day of payment of the £550, instead of interest, provided he preferred the same to lawful interest; that the rents should be apportioned from the 4th of August then next, and received, from that day, by the Defendant; and the Defendant engaged that, if the £550 was paid on or before the 4th of August 1822, the conveyance should be [388] cancelled, and the premises be reconveyed to Williams in the manner before mentioned.

The Defendant, in his answer, said he believed that he did not execute the agreement, on or about the same day as that on which Williams executed the release; but on what day in particular he could not set forth, except that he believed he executed it some days after the date of the release: and that he could not set forth the day on which the release was executed by Williams, or the day on which he himself executed the agreement.

In August 1824 Williams died intestate, leaving the Plaintiff, who was then an infant, his eldest son and heir.

The bill was filed within a few days after the Plaintiff attained 21, insisting that the transaction above mentioned was intended, by the parties, to be a mortgage and not a sale, and praying to redeem the premises. The answer insisted that the transaction was, and was always intended, by the parties, to be an absolute conveyance or purchase.

Two surveyors, who were examined for the Defendant, deposed that, in the year 1821, the fair yearly rent of the cottages was £50, subject to deductions for repairs and loss of rent by default of payment of rent by the tenants, who were poor labourers; and that, at the time when witnesses were examined, the fair yearly rent was about £47, subject to the same deductions; and that, at the same times, the values of the premises to be sold were £548 and £468 respectively. Another witness for the Defendant deposed that, in 1821, the [389] Plaintiff's father gave directions to John Evans, his agent or attorney, to sell or to contract for the sale of the premises, and that the Plaintiff's father prepared the conveyance of the premises to the Defendant, and that Evans perused and ingrossed the deeds on the part of the Defendant.

Mr. Wakefield and Mr. Koe, for the Plaintiff, cited *Manlove v. Ball* (2 Vern. 84), *Baker v. Wind* (1 Vez. 160), *Sevier v. Greeway* (19 Ves. 413).

Mr. Knight Bruce and Mr. G. Richards, for the Defendant. It appears, by the evidence, that £550, which was the consideration for the conveyance, very closely approached the full value of the property: it would have been imprudent, therefore, to lend so large a sum on a mortgage. The universal practice is not to advance more than two-thirds of the value of the mortgaged estate. Williams, the conveying party, was an attorney, and prepared the deeds: he must have known how the transaction was to be carried into effect, supposing that it was intended to be a mortgage and not a sale. The expenses of ingrossing the deeds and all the other expenses of the transaction, were paid by the Defendant, except that the grantor, being an attorney, prepared the drafts and made no charge for them. In a mortgage transaction, the mortgagee never pays any part of the expense; but the whole of it is borne by the mortgagor. The amount of the money paid, the form of the conveyance, and the mode of paying the expenses are all in favour of a sale, and not a mortgage, being intended. Besides, the party [390] to whom the conveyance was made was immediately let into possession, and has continued in possession ever since: in short, all the circumstances of the case (by which questions of the like nature have, in all former instances, been decided), except the articles of agreement, tend to shew that a sale was intended. The question

then is whether, in the face of all probability, those articles (which, it is important to observe, are not shewn to have been executed at the same time as the deeds) inevitably stamp, on the transaction, the character of a mortgage. One of the first rules in construing instruments is to intend that the parties meant what is legal: but the Plaintiff's view of this case makes the whole transaction illegal and void, and makes the parties amenable to a criminal prosecution: for, by the agreement, an option between rents and interest is given to the Defendant, which makes the transaction usurious, if it was intended to be a loan. Again, on the face of these articles, there is no mutuality or reciprocity between the parties: the Defendant has not the remedies for compelling payment of his money, which a mortgagee usually has. *Ensworth v. Griffiths* (5 Bro. P. C. 184, Tomlyn's edit.); *Davis v. Thomas* (1 Russ. & Myl. 506); *Goodman v. Grierson* (2 Ball. & Beatt. 274); Butler's Notes on Co. Litt. 205 a., note 96; *Mellor v. Lees* (2 Atk. 494); *Floyer v. Lavington* (1 P. W. 268); *Fulthorpe v. Foster* (1 Vern. 476); *Barrell v. Sabine* (*Ibid.* 268); *Howard v. Harris* (*Ibid.* 33, 190); Coote on Mortgages, 28, *et seq.*

We submit that the transaction in question was not a mortgage, but a sale; and that, under the articles of [391] agreement, the vendor was entitled to repurchase the estate within a given time. This is a case in which parol evidence is admissible; and at all events the Court cannot come to the conclusion that the transaction was a mortgage, without further inquiry: and we are ready to submit to any inquiry that the Court may think fit to direct.

Mr. Wakefield, in reply. In *Davis v. Thomas* the Defendant, having acquired the fee in Sept. 1820, granted a lease of the property to the Plaintiff in January 1821; and the lease contained a clause of repurchase. That case, therefore, does not apply; as it was a clear case of repurchase. Besides, the observations of Lord Brougham, C., in that case, seem to make against the Defendant. His Lordship says: "Upon the other question, can I reasonably hold that, where a man has mortgaged an estate, and two years afterwards has made a conveyance of that estate, and then again three months subsequently, upon obtaining a lease of the same estate from the purchaser, procures to be indorsed upon that lease by way of indulgence a power to repurchase the property on certain terms—can I reasonably hold that, because he obtains this power of repurchase, all the different instruments form parts of one conveyance?" His Lordship therefore puts his decision on the ground that all the deeds were not executed at the same time. Here the conveyance and the agreement were both executed at the same time, as is evident from the date and also from the language of the agreement; and the Defendant in his answer does not positively state the contrary. In *Ensworth v. Griffiths* the mortgagee agreed to sell and convey the premises to the mortgagor; therefore it was a clear case of repurchase. In this case the word used [392] in the agreement is *reconvey*. The case of *Goodman v. Grierson* is contrary to all the former cases in which a collateral agreement has been held to give to the transaction the character of a mortgage: for in none of those cases was there any mutuality or reciprocity; on the absence of which Lord Manners's judgment is founded. The cases referred to by Mr. Butler do not authorize the conclusion which he draws from them.

With respect to the valuations, they were made more than 20 years after the transaction took place; and they do not include the garden ground. The circumstance that the expenses of the conveyance were paid by the grantee has been treated as immaterial in all the cases in which the question now in discussion has arisen. As to the option given to the Defendant between rents and interest, the Court cannot presume that the Defendant will prefer that alternative which will make the whole transaction void.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The agreement to redeem need not be made at the same time as the conveyance; as appears from the judgment of Sir W. Grant, M.R. (in *Sevier v. Greenway*); and if that decision be right, I am bound by it, and I do not see how I can avoid deciding that the Plaintiff in this case is entitled to redeem the tenements comprised in the deeds of June 1821.

[393] DOVER v. GREGORY. Dec. 18, 1839.

[S. C. 9 L. J. Ch. (N. S.) 81.]

Will. Construction. Charge of Debts.

Testator expressed an intention to dispose of all his worldly effects, and directed all his just debts and funeral expenses to be fully discharged *by his executor thereafter named*: and, after giving several legacies, he devised all his copyhold lands to his son John A., and left all the rest and residue of his estate and effects unto and to the use of his son J. A., whom he thereby appointed sole executor and residuary legatee. Held, that taking the whole of the will together, the words were sufficient to pass the fee in the copyholds, and to charge them with the testator's debts.

John Ayer the elder, by his will, dated the 28th of October 1822, after declaring his intention to dispose of all his worldly effects, ordered and ordained that *all his just debts* and funeral expenses and the charges of proving his will should be fully discharged *by his executor thereafter named*; and, after giving several pecuniary legacies, he gave and devised to his son, John Ayer, all his copyhold lands and houses at Dunnington and Murton, all which said copyhold hereditaments and premises had been duly surrendered to the use of his will: and he gave and left all the rest and residue of his estate and effects whatsoever or wheresoever, or of what nature or kind soever, unto and to the use of his said son, John Ayer, whom he thereby appointed sole executor and residuary legatee.

The testator died in August 1824, leaving his son his customary heir. The testator was not seised of any real estates except the copyholds mentioned in his will, and his personal estate was insufficient to pay his debts. John Ayer, the son, died in 1836.

The bill was filed by a creditor of John Ayer the elder against the devisees and incumbrancers of John Ayer the younger; and the question was whether, by the will of John Ayer the elder, the copyholds were charged with the payment of his debts.

Mr. Jacob and Mr. R. Atkinson, for the Plaintiff. It is admitted that, where a testator has directed in general terms that his debts shall be paid, the debts are [394] charged upon his real estates: but it is said that that is not so, where, as in this case, the testator has directed his debts to be paid by his executor. In *Henvell v. Whitaker* (3 Russ. 343) the testator commenced his will by directing that all his just debts and funeral expenses should be fully paid and satisfied by his executor thereafter named: and then, after giving legacies and an annuity, he gave all his real and personal estate to his nephew, W. Whitaker, absolutely, and appointed him executor of his will. Now in that case there was this peculiarity, namely, that the testator expressed that the property given to his nephew should be subject to the legacies and annuity omitting the debts. The Master of the Rolls said that, where a testator directs that all his debts and funeral expenses shall be fully paid by his executor thereafter named, it must be intended that he had then fully determined who that executor should be; and that the will was to be construed as if he had said: "I direct that my just debts and funeral expenses be fully paid and satisfied by my nephew, W. Whitaker, whom I hereinafter name my executor;" and that in such a case the obligation to pay the testator's debts and funeral expenses would be a condition imposed on the nephew to be satisfied as far as all the property which he derived under the will would extend. In a note to that case there is an extract from the registrar's book of *Finch v. Hattersley* (*Ibid.* 345, note); in which the testator, after directing all his debts and funeral expenses to the value of twenty shillings in the pound to be paid by his executrix thereafter named, gave his real and personal estate to his wife for her life, and at the end thereof he willed that they should be divided by her among such of his children as should be then living; and he appointed her [395] executrix of his will: and it was held that the testator's real estates were charged with the payment of his debts and funeral expenses. It is observable that, in that case, only a life interest in the real estates was given to the wife, and the fee

was given to the children ; but in the present case the fee is given to the son, or if it is not given, it is suffered to descend to him ; and we must take it for granted that the testator knew that his son was his heir. However, it would be difficult to hold in this case that the will does not give the fee to the son : for the testator begins his will with declaring his intention to dispose of the whole of his property ; and then, after giving all the residue of his personal estate to his son, he appoints him the sole residuary legatee of his will. Those words would be surplusage if the testator did not intend his son to take something else under them. Besides, a direction to pay debts is always an indication of intention that the party should take a sufficient estate to pay the debts ; which he would not do if a life interest only were given to him : for he might die a few weeks after the testator. We submit, therefore, that John Ayer, the son, took the fee in the copyholds, subject to the payment of the testator's debts. *Graves v. Graves* (ante, vol. viii. p. 43), *Mirehouse v. Scaife* (2 Myl. & Cr. 695), *Bridgen v. Lander* (3 Russ. 345, note), *Awbrey v. Middleton* (2 Eq. Ab. 497), *Alcock v. Sparhawk* (2 Vern. 228), *Barker v. The Duke of Devonshire* (3 Mer. 310), *Wilce v. Wilce* (7 Bing. 664), *Doe v. Tofield* (11 East, 246), *Hardacre v. Nash* (5 T. R. 716), *Pitman v. Stevens* (15 East, 505), *Ronalds v. Feltham* (Turn. & Russ. 418), *Shallcross v. Finden* (3 Ves. 738), *Smith v. Coffin* (2 H. Black. 444).

[396] THE VICE-CHANCELLOR. In *Henvell v. Whitaker* Sir John Leach held that, in all cases where property is given by the will to the party who is directed to pay the debts, the property so given is charged with that which the party is directed to pay. I was one of the counsel in that cause ; and I do not recollect any case in which there was a greater spirit of litigation ; and I have no doubt that if the decision had been thought wrong it would have been appealed from.

Mr. Knight Bruce and Mr. Purvis, for some of the Defendants. We humbly submit that the decision in *Henvell v. Whitaker* is erroneous ; but it is not necessary for us to question that decision, as the present case may be decided against the Plaintiff without impeaching the authority of that case.

If a testator at the commencement of his will says, "I direct all my debts to be paid" without more, everything that he subsequently gives is subject to that preliminary charge : but that is not the case where he directs his debts to be paid in a particular way, or by a particular person, as by his executor. *Powell v. Robins* (7 Ves. 209) is the case which points out the distinction which we are contending for. In *Warren v. Davies* (2 Myl. & Keen, 49), it was decided that a direction that the testator's debts should be paid by his executors does not amount to a charge on a real estate devised to one of them. The case of *Wasse v. Heslington* (3 Myl. & Keen, 495) seems to bring the point to its true principle. There the decision was that, where a testator directs his debts and funeral expenses to be paid by [397] his executors, it is, *prima facie*, to be considered that he means the payment to be made by them out of the funds which come to their hands as executors ; whether he intends that all the property which he gives to his executors shall be subject to the payment of his debts and legacies must be gathered from the whole will. That case, therefore, was decided on a principle which is quite inconsistent with the ground on which *Henvell v. Whitaker* was decided. Why is a direction to do that which is the duty of the executor to do to amount to a charge on an estate which he takes as a beneficial devisee ? Sir J. Leach, at the conclusion of his judgment in *Wasse v. Heslington*, says : "In the case referred to, it appeared to me to be manifest from the whole will that the testator intended to subject all his property given by his will to the executors, to the payment of his debts and funeral expenses. It appears to me in this case to be equally manifest that he had not that intention." His Honor, therefore, corrects the generality of the language used by him in *Henvell v. Whitaker*, and states that the ground on which he decided that case was the intention of the testator, collected from the whole of his will.

If the testator in this case had directed his debts, &c., to be paid by his son, John Ayer, then it may be conceded that the debts would have been charged on the copyholds. But the testator does not mention his son's name : he mentions the character without the name : and then he makes a separate and distinct devise of all his copyhold lands to his son, John Ayer, without mentioning his character of executor. It was said that the clause by which the testator appointed his son his residuary legatee

would be surplusage, unless it was held to pass the fee in the copyholds. The expression "re-[398]-siduary legatee," has no meaning, except as applied to personal estate: it is very commonly found in wills; and the testator used it as descriptive of what he had done by giving his residuary estate to his son.

Mr. Loftus Wigram, for some of the Defendants, who were incumbancers on the estates of John Ayer the younger. The decision in *Henvell v. Whitaker* must be considered as corrected by Sir John Leach in *Wasse v. Heslington*. The utmost, however, that that case decides is that, where a testator directs his debts to be paid by his executor, and the executor takes property under the will, an obligation is imposed on him to pay the debts to the extent of that property. Here the son did not take more than a life interest in the copyholds under the will. He took the fee as heir to his father. If he had not been heir, he would not have taken more than an estate for his life; and it cannot be established upon his will that his father intended him to take any greater estate. *Henvell v. Whitaker*, therefore, has no direct application to this case. The word "effects" in the introductory clause cannot have the effect of passing lands. *Camfield v. Gilbert* (3 East, 516). It is begging the whole question to say that the son takes the fee in the copyholds because the testator has charged them with payment of his debts. It was said that the words "residuary legatee" must be taken out of their ordinary meaning and applied to real estate, or else they would be surplusage: but it may be asked why did the testator insert the words "by my executor," in the direction for payment of his debts, except for the purpose of confining the payment of his debts to his personal estate. Those words are surplusage unless they are held to have been used with that view.

[399] Mr. Simons appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I perfectly well recollect that the case of *Henvell v. Whitaker* was argued with great earnestness on both sides; and I must say that, in my opinion, the decision in that case is right.

I am willing that this will should be construed according to the intention of the testator. First of all there is a plain intention that the executor should pay the debts and the funeral expenses of course: and it does not amount to an evidence of intention that he is not to pay the debts because he is to pay the funeral expenses. And, as the testator says, "I order and ordain that all my just debts and funeral expenses, and the charges of proving this my will, shall be fully discharged by my executor hereinafter named," he denotes an intention that his executor should pay his debts, and should pay them by the means which the testator has supplied him with, either by a gift of property or by suffering it to descend.

If the heir had been a stranger, there would have been sufficient in the will to enable him to take the fee. There is an intention that he should pay the debts; and the fact that the testator gives the copyholds without words of inheritance shews that he meant that the debts should be paid out of the copyholds. The Court in construing a will is bound to give a meaning to every word if it can: and not to reject any words as being surplusage if it can be avoided. I admit that the expression "residuary legatee" ordinarily would apply to a person who is to take the undisposed-of personal estate. But, where the testator has given all the rest [400] and residue of his estate and effects whatsoever or wheresoever, or of what nature or kind soever, unto and to the use of his son, John Ayer, and then says, "whom I hereby appoint sole executor and residuary legatee of this my will," those words may be fairly construed to mean that he intended his son should take all his property of every description which he had not before given.

I think that I am bound by the case of *Henvell v. Whitaker* to hold that the debts in this case are charged on the copyholds.

[400] LENOX v. LENOX. Dec. 20, 1839.

[S. C. 9 L. J. Ch. (N. S.) 83 ; 4 Jur. 5.]

Will. Construction. Conditional Bequest.

Testator bequeathed £4000 in trust for his daughter (a single woman), for her life for her separate use, independently of any husband with whom she might intermarry, and, after her death, in trust for her children, and if there should be no children, then, *if she should survive any husband with whom she might intermarry*, in trust for her, her executors, &c. ; but if her husband should survive her, then in trust as she should by will appoint, and in default of appointment, in trust for her next of kin, as if she had died intestate, and without having married. The daughter died a spinster. Held, that the words, "if my daughter shall survive any husband with whom she may intermarry," were words of condition and not of mere limitation, and, consequently, the residuary legatees, and not the daughter's executor, became entitled to the £4000 on her death.

Samuel Lenox, by his will, dated the 4th of April 1835, gave the sum of £4000 to trustees, in trust to invest it in the usual securities, and to pay the dividends, interest, and yearly produce thereof into the proper hands of his daughter, Ann Lenox, during her life, or to any person or persons whom she should, from time to time, by note or writing under her hand, appoint to receive the same, to the intent that the said dividends, interest, and yearly produce might be enjoyed by his said [401] daughter, Ann Lenox, during her life, for her sole and separate use, independently of *any husband with whom she might intermarry* ; and he declared that his said daughter should have no power to anticipate, alien or assign the said dividends, interest, and yearly produce, or any part thereof, before the same should, from time to time, become due and payable ; and that, immediately after the decease of his said daughter, the trust fund should be in trust for all or any one or more of *her children, grandchildren, or other issue* (such grandchildren or other issue to be born in her lifetime) as she should at any time, or from time to time during her life, by any deed or deeds, to be executed by her in the presence of two or more witnesses and to be attested by the same witnesses, or by her last will and testament or any codicil or codicils thereto to be signed and published by her in the presence of and to be attested by two or more witnesses, appoint, and in default of such appointment, in trust for all her children, if there should be more than one, in equal shares, as tenants in common, their respective executors, administrators and assigns ; and in case any one or more of the said children, being a son or sons, should die under that age without having been married, (1) then as to as well the original share or shares of the said trust fund belonging to the child or children respectively who should so die as aforesaid, as also the share or shares thereof to which the said child or children respectively might become entitled under that trust, in trust for the other or others of the said children, and if more than one, to take as aforesaid, his, her or their executors, administrators and assigns, or in case there should be only one child of his said daughter, [402] then in trust for such only child, his or her executors, administrators and assigns : but in case there should be no child of his said daughter, or no such child who, being a son, should attain the age of 21 years or be married, then, as to the trust fund, if his said daughter *should survive any husband with whom she might intermarry*, in trust for his daughter, her executors, administrators or assigns, for her and their own absolute use and benefit ; but if the husband of his said daughter should survive her, then in trust for such person or persons, &c., as she, by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be respectively signed and published by her in the presence of and attested by two or more witnesses, should, notwithstanding her coverture, appoint, and in default of such appointment, in trust for the

(1) The above is a correct copy of the will as set forth in the brief.

person or persons who at her decease would have become entitled thereto under the Statute for the Distribution of the Effects of Intestates, if the said Ann Lenox had died possessed thereof, intestate *and without having married*; provided that, notwithstanding the trusts and provisions thereinbefore contained in favour of the children, grandchildren and issue of the said Ann Lenox, it should be lawful for her at any time, or from time to time, by any deed or deeds to be executed by her in the presence of and to be attested by two or more witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be respectively signed and published by her in the presence of and attested by the like number of witnesses, to appoint, to or in trust for *any husband with whom she might intermarry*, all or any part of the interest, dividends or yearly produce of the trust fund, to be payable to such husband during his life, or [403] any less period. The testator then gave the sum of £16,000 to the same trustees, upon trust to divide the same between his four daughters, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox, and Jesse Lenox, in equal shares, as and for their respective portions; and he declared that the share or portion of each of the same four daughters should be held by the trustees, upon the same or the like trusts, and with and under and subject to the same or the like powers, provisoes and declarations for the benefit of each daughter and her children, issue and appointees, as were thereinbefore declared concerning the sum of £4000 thereinbefore bequeathed in trust for the benefit of his daughter, Ann Lenox, and her children, issue and appointees, and including the like power of appointing in favour of a husband, and the like ultimate trusts for the benefit of the persons who, at the decease of the said Barbara Isabella Lenox, Margaret Lenox, Maria Lenox, and Jesse Lenox, respectively, would have been entitled thereunto under the Statutes for the Distribution of the Effects of Intestates if they respectively had died possessed thereof intestate and without having been married, or as near to such trusts, powers, provisoes and declarations as might be. The testator then directed the income of the portions of his four last-named daughters to be applied for their maintenance and education during their minorities: and he then gave the sum of £7243 to the trustees, upon trust to invest it in the usual securities, and to pay the income to his wife for her life, and after her decease, upon trust, as to the capital, for his sons, Samuel Lenox, Thomas James Lenox and John Lenox, and his five daughters, Ann Lenox, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, in equal shares, as tenants in common: and if his son, John Lenox, should die under the age of 21 years, or [404] any of them, the said Ann Lenox, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, should die under that age without having been married, then, as to the share or shares, as well original as accruing, of the said John Lenox and of his said daughters so dying under age as aforesaid, upon trust for the others of them his said three sons and five daughters in equal shares as tenants in common. And he declared that the share or shares, original and accruing, of his daughter, Ann Lenox, of the said trust monies, stocks, funds and securities, should, after the death of his wife, be held by the trustees upon the same trusts, and with, under and subject to the same powers, provisoes and declarations for the benefit of herself and her children, issue and appointees, as were thereinbefore declared concerning the legacy of £4000 thereinbefore bequeathed upon trust for the benefit of his daughter Ann Lenox, and her children, issue and appointees, and including the like power of appointing in favour of a husband; or as near to such powers, provisoes and declarations as might be; and that the share or shares, original and accruing, of each of his daughters, Barbara Isabella Lenox, Margaret Lenox, Maria Lenox and Jesse Lenox, of the said trust monies, stocks, funds and securities, should be held by the trustees upon the same trusts, and with, under and subject to the same powers, provisoes and declarations, for the benefit of his four last-named daughters respectively, and their respective children, issue and appointees, as were thereinbefore declared or referred to concerning their respective shares of the £16,000 hereinbefore bequeathed in trust for the benefit of his four last-named daughters and their respective children, issue and appointees, and including the power of appointing in favour of a husband, or as near to such powers, provisoes and declarations as might be. The [405] testator then gave his residuary estate to the same trustees, in trust

as to one moiety, for his son, Thomas James Lenox, his executors, &c., and as to the other moiety, for his son, John Lenox, and to be transferred or paid to him on his attaining 21.

The testator died in June 1836. In March 1839 Ann Lenox (having attained 21) died intestate and a spinster. Her mother, Margaret Lenox, took out administration of her effects. The bill was filed by Thomas James Lenox and John Lenox against Margaret Lenox and the trustees and executors of the will, praying that it might be declared that, by the death of Ann Lenox without having been married, the legacy of £4000 bequeathed in trust for her, and also her share and interest in the £7243, subject to the life interest of Margaret Lenox in that sum, had fallen into the testator's residuary estate.

Mr. Knight Bruce and Mr. K. Parker, for the Plaintiffs. The question is what is the effect of the words, "if my said daughter, Ann Lenox, shall survive any husband with whom she may intermarry." We contend that they are not words of limitation but of condition; and, therefore, as Ann Lenox never married, the ultimate limitation in trust for her, her executors, &c., did not take effect; but the £4000 and one-eighth of the £7243 fell, on her death, into the residue. In *Gulliver v. Wickett* (1 Wilson, 105), *Mackinnon v. Sewell* (*ante*, vol. v. p. 78; and 2 Myl. & Keen, 202), and *Murray v. Jones* (2 V. & B. 313), the words on which the question turned, [406] *prima facie*, imported condition; but were, in fact, nothing more than words of limitation: if, however, as in the present case, the words clearly import a contingency, the Court is bound to give effect to them. *Davis v. Norton* (2 P. W. 390), *Doe v. Shipphard* (1 Doug. 75), *Swayne v. Smith* (1 Sim. & Stu. 56). [THE VICE-CHANCELLOR. The testator seems to assume that his daughter would marry, and to treat it as doubtful whether she would survive her husband or not.] The intention which we impute to the testator is a reasonable one, namely, to give his daughter income only if she did not marry. He did not mean to sever the capital of the sums in question from the bulk of his property, except in the event of her marrying.

Mr. Wigram and Mr. Prendergast, for Margaret Lenox, the personal representative of Ann Lenox. The testator, in the limitations which he has made of the property in dispute, has provided for every event that could happen except one; and the question is whether the omission to provide for that event is not a mere oversight. The trust for the separate use of Ann Lenox, and all the other trusts declared of the property, shew that the testator's sole object was to protect his daughter from the marital right; it was immaterial to him whether she married or not. What difference could it make whether she had a husband who died in her lifetime, or whether she never had any husband at all? In short, the words "if my said daughter shall survive any husband with whom she may intermarry" mean nothing more than "if my said daughter shall die without leaving any husband her surviving." *Jones* [407] *v. Westcomb* (Prec. Ch. 316), *Mackinnon v. Sewell* (*ubi supra*), *Prestwidge v. Groombridge* (*ante*, vol. vi. p. 171), *Aiton v. Brooks* (*ante*, vol. vii. p. 204), *Murray v. Jones* (*ubi supra*), *Meadows v. Parry* (1 V. & B. 124). In every one of those cases the words, in their natural sense, were purely conditional.

THE VICE-CHANCELLOR. The question on this will is: can it be collected to be the testator's intention that the *corpus* of the legacy should pass away from his estate otherwise than by reason of the fact of marriage?

Mr. Knight Bruce, in reply. In the cases cited for the Defendant no motive could be found for the testator having made the property to go over in the event specified, and not in the event that happened; but if you can collect any probable reason why the testator should direct the property to go over in one event and not in the other, then the words are held to be words of condition, otherwise they are mere words of limitation. The majority of parents, when they provide for their daughters, do not mean them to take the capital unless they marry. I, therefore, shew a reasonable ground for holding the words in this case to be words of condition and not of limitation. *Davis v. Norton* was decided on the principle which I have stated. *Doe v. Shipphard* is a case of the same description. There Lord Mansfield, C.J., says: "There may be a reason why the testator might not intend the limitations over to take place, except in the event of the daughter's surviving her husband, viz., to secure the estate in tail to his grandson, Hewitt Shipphard, against

any prefer-[408]ence his daughter might shew to her issue by any subsequent husband. If she did not survive him there could be no danger of that sort, as the estate would descend to Hewitt Shippard. This bears no resemblance to the famous case of *Jones v. Westcomb*; for there the intention was clear that, failing the child, the estate should go over to the devisees in all events." The same doctrine is recognized in *Swayne v. Smith*. There Sir John Leach, V.-C., says: "It is not very easy to find a satisfactory reason why the testatrix should have intended that the three legatees of the three sums of £360 stock should take if the sister died without child or husband, having been married; which would be the effect of this will; and that the same legatees should not take if the sister died without child or husband, not having been married. But Courts of Justice are not at liberty to act, upon conjecture, against the clear expressions of a will. And this lady has told us in plain words what legacies are to take effect in the event of her dying unmarried; and I cannot intend that she meant more than she has expressed."

THE VICE-CHANCELLOR [Sir L. Shadwell]. The simplest of all the cases is *Jones v. Westcomb*; and all the others are, in fact, founded upon it. There, a man possessed of a long term of years devised it to his wife for life, and, after her death, to the child she was then *enceinte* with; and if the child died before it came to the age of 21, then he devised one-third part of the term to his wife, her executors and administrators, and the other two-thirds to two other persons. The fact was that the wife was not *enceinte*; and the question was whether she was entitled to the one-third of the term. There was nothing to prevent the wife from taking except the fact of a child being alive to take it [409] from her: and it was immaterial, in effect, whether the testator said that in case no child should live to attain 21, or if the child should die before attaining 21, the ultimate limitation should take effect.

In a case where the meaning of the testator clearly is that the ultimate limitation should take effect on the failure of a preceding gift, and that gift does fail, but the language in which the limitation over is expressed does not, in terms, apply to the event which has happened, there, in my opinion, the limitation over should take effect. But you cannot read this will without seeing that marriage was the event which the testator contemplated; and that the circumstance of the legacy passing away from the bulk of his property was to depend on the fact of his daughter thereafter marrying. It might have been different if she had been married. The trusts which the testator has declared of the legacies in question are, first, for the separate use of his daughter for her life, next, for the benefit of her children, and then he describes the failure of children on the supposition that there was a marriage. In my opinion, therefore, the testator did not mean that the legacies should go to the executors or administrators of his daughter in the event of there being a failure of children by her under any circumstances; but it seems to me that his general intention was that the *corpus* of the legacies should not go away from the bulk of his estate except in case of her marrying; and that, in order to mark that intention, he says: "If my said daughter, Ann Lenox, shall survive any husband with whom she may intermarry, then in trust for my said daughter." I must take it, therefore, that the testator in this case has himself described the very event on the happening of which he [410] intended the *corpus* of the legacies to go over; and, under the circumstances of the case, I must hold that they belong to the residuary legatees.

[410] TANNER v. SMITH. Jan. 15, 1840.

[S. C. reversed, 4 Jur. 310.]

Vendor and Purchaser. Conditions of Sale. Construction.

One of the conditions of sale provided that, if the purchaser should raise objections to the title which the vendor should not be able or willing to remove, the vendor should be at liberty to rescind the contract, and that all objections which should not be taken, in writing, within 10 days after the delivery of the abstract, should be considered as waived. Held, that the condition referred to the first delivery of

objections, and, if the vendor expressed his willingness to answer them, he could never afterwards rescind the contract.

The bill was filed, by the vendors of an estate against the purchaser, for a specific performance of the contract between the parties, and for an injunction to restrain an action brought by the Defendant against the Plaintiffs to recover the deposit.

By one of the conditions of sale the abstract was to be delivered to the purchaser, or his solicitor, within 20 days after the sale; and, by another condition (the 7th) it was provided that, if the purchaser should raise objections to the title, which the vendors should not be able or willing to remove, and the purchaser should insist upon such objections, the vendor should be at liberty, by writing under his hand, to rescind the contract, on repaying to the purchaser his or her deposit money, without interest or costs; and that all objections which should not be taken, in writing, within 10 days after the delivery of the abstract, should be considered as waived.

The abstract was delivered within the 20 days; and, on the 9th of March, which was the 10th day after, the [411] Defendant sent to the Plaintiffs several objections, in writing, to the title as shewn by the abstract. On the 12th of March the Plaintiffs informed the Defendant that they should have no difficulty in removing the objections; that a further abstract would be delivered within a few days, and that 10 days more would be then allowed for making objections to the title. On the 9th of May the further abstract was delivered; but, previously thereto, the time for completing the sale had expired, and the Defendant had commenced his action.

The motion for the injunction was now made; and one question was, what construction ought to be put upon the 7th condition of sale.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the 7th condition: I confess that it appears to me to be a new condition; but it must be looked at fairly and receive a reasonable construction; and that, in my opinion, is that, when objections to the title have been delivered within the 10 days, then the vendors shall have the power of determining which of two courses they will adopt, that is, whether they will endeavour to remove or answer the objections, or whether they will put an end to the contract altogether. If they are either unwilling or unable to remove the objections, then they must pay back the deposit money, without either interest or costs.

There seems to me to be nothing very unreasonable in the condition as so construed; but it would be very unreasonable to hold that, after the objections have been sent in, and the vendors have expressed a willingness to remove them, they shall be at liberty, at any time afterwards, to rescind the contract.

[412] My opinion, therefore, is that the construction which ought to be put upon this 7th condition is that, if the vendors once elect to answer the objections, they are for ever thereafter precluded from exercising the option given to them, by that condition, to rescind the contract.

Mr. Knight Bruce supported the motion; and Mr. Jacob, Mr. Wray and Mr. Humphry opposed it.(1)

[412] EVANS v. PILKINGTON. Dec. 23, 1839.

Will. Construction.

Testator directed his trustees to invest the proceeds of his real and personal estate, and to accumulate the interest *until the youngest child of his brother should attain 21*, and then to stand possessed of the trust fund and its accumulations, in trust for *all the children of his brother who should be then living*. The brother had seven children, and all of them were living at the date of the will, and at the testator's death. All the children, except the second, died, and none of them, except the eldest, the second and the fourth attained 21. The fifth was the last that died. Held, that

(1) The injunction was granted by the Vice-Chancellor; the Lord Chancellor, however, dissolved it, but, as the reporter has been informed, on a ground quite independent of the 2d condition; as to the effect of which, his Lordship did not express any opinion.

the trust for accumulation did not continue till the seventh child would have attained 21, if living, but that it ceased on the death of the fifth child, and that the second child then became entitled to the trust fund.

Samuel Jones, by his will, dated the 25th of May 1825, directed his trustees to invest as soon as conveniently might be after his decease, the monies to arise from the sale of his real and leasehold estates and the residue of his personal estate, in the usual securities, and, *in the meantime and until the youngest child [413] of his brother, Thomas Jones, should attain the age of 21 years*, to accumulate the interest and dividends thereof, in the way of compound interest; and, when and so soon as such youngest child of his said brother, Thomas Jones, should attain his said age of 21 years, to stand possessed of and interested in the said rest, residue and remainder of the said trust monies, and the stocks, funds and securities in or upon which the same and the accumulations thereof should be respectively invested, in trust for *all and every the children and child of his said brother, Thomas Jones, who should be then living*, or the issue of such of them as should be then dead, such issue respectively to take their parents' share, and to be divided amongst them, if more than one, in equal shares and proportions, and, if there should be but one such child, then in trust for such only child, or his or her issue, and if there should be no issue of his said brother, Thomas Jones, who should live to attain the said age of 21 years, or should die under that age leaving issue, then in trust for the person or persons (other than and except the testator's brother, Joseph Jones, or his issue) who, under and by virtue of the statutes made for the distribution of the personal estates of intestates, would then be entitled thereto.

The testator died on the 17th of December 1827. At the date of the will and at the testator's death seven children of the testator's brother, Thomas Jones, were living, that is to say, Stedman Richard Samuel Jones, his eldest child, Elizabeth Jane Stedman Jones, his second child, Samuel Huddart Owen Glendower Jones, his third child, Frederick Arthur Jones, his fourth child, Alfred Tudor Jones, his fifth child, Caroline Angelina Jones, his sixth child, and Rosa Matilda Jones, his seventh child; and their father, who died in Septem-[414]-ber 1834, had not afterwards any other child. Stedman Richard Samuel Jones attained 21 on the 20th of May 1829, and died on the 15th of October 1834. Elizabeth Jane Stedman Jones attained 21 on the 12th of May 1833. Samuel Huddart Owen Glendower Jones died on the 17th of June 1833, under 21. Frederick Arthur Jones attained 21 on the 12th of January 1837, and died on the 15th of February following. Alfred Tudor Jones died on the 17th of May 1837, under 21. Caroline Angelina Jones died on the 18th of June 1828, under 21; and Rosa Matilda Jones died on the 2d of July 1828, under 21. All the deceased children died intestate and without having been married; and Elizabeth Jane Stedman Jones took out administration to her four deceased brothers.

Elizabeth Jane Stedman Jones married Thomas Evans; and by the settlement on their marriage, dated the 17th of November 1834, she assigned all legacies and sums of money and shares of trust monies, stocks, funds and securities, and proceeds of real and personal estate, to which she was or might become entitled under or by virtue of the testator's will, and also all her share and interest of and in the personal estate of her brother Stedman Richard Samuel Jones (except her life interest in a legacy of £1500 given by the testator's will) to William Moore, Edward Hardwicke and David Evans, upon certain trusts for the benefit of herself and her husband and the children of their marriage.

The bill was filed by Thomas Evans and Elizabeth Jane Stedman, his wife, and their children and the trustees of their marriage settlement, alleging that, in consequence of the several events therein and hereinbefore stated, the Plaintiffs were advised that the whole [415] of the residue or surplus of the monies which had been produced by or from the real and personal estate and effects late of the testator Samuel Jones, and all the stocks, funds and securities wherein the same had been invested, had become and were then subject and liable to the trusts or provisions of the settlement, discharged from all trusts or directions for accumulation contained in the testator's will, and ought to be transferred, by the surviving trustee of the will, to the trustees of the settlement; and the bill prayed for a declaration to that effect, and that the trust funds might be transferred accordingly.

The Defendant Pilkington, who was the surviving trustee of the will, said in his answer that he had declined to transfer the trust funds to the trustees of the settlement, or to apply the interest, dividends and annual income thereof according to the trusts of that deed, inasmuch as he had been advised that it was doubtful whether, according to the true construction of the will, the trusts for accumulation therein contained were at an end, and whether they would not continue until the time when the youngest child of Thomas Jones would, if living, have attained 21; (1) and whether any person would attain a vested and absolute interest in the trust property or any part thereof until that period.

Mr. G. Richards and Mr. John Wilson, for the Plaintiffs, said that by the will cross-remainders were in effect created amongst the children of Thomas Jones, the testator's brother; and they cited *Ford v. Rawlins* (1 Sim. & Stu. 328).

[416] Mr. Knight Bruce and T. H. Hall, for the Defendant Pilkington, the surviving trustee of the will, submitted that the trust for accumulation would not cease until the seventh child of Thomas Jones would have attained 21.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In my opinion the trust for accumulation ceased, and the trust fund became absolutely vested on the death of Alfred Tudor Jones; for when he died there was no other child of Thomas Jones who could either attain 21, or die under that age leaving issue.

Declare that, on the death of Alfred Tudor Jones, the Plaintiff, Elizabeth Jane Stedman Evans, and her trustees became entitled to the fund in question in this cause; and it is ordered that the Defendant do transfer the same to the Plaintiffs, W. Moore, Edward Hardwicke and David Evans.

Reg. Lib. A. 1839, fo. 1542.

[417] BENNETT v. BAXTER. Jan. 17, 1840.

[S. C. 9 L. J. Ch. (N. S.) 137; 4 Jur. 50. See *Simmonds v. Great Eastern Railway Company*, 1868, L. R. 3 Ch. 799; *In re Hawkes* [1898], 2 Ch. 9.]

New Orders. Solicitor.

The prosecution of a decree in a creditors' suit having been taken from the Plaintiff and committed to another creditor under the 56th Order of 1828, the Plaintiff's solicitor was ordered to allow that other creditor's solicitor to inspect and take copies of all the papers in the cause, in his possession.

This was a creditor's suit; and the usual decree had been pronounced in it.

The Plaintiff and his solicitor having failed to prosecute the decree with due diligence, the Master, under the 56th Order of 1828, had committed the prosecution of the suit to another creditor. A motion was now made, on behalf of that creditor, that the solicitor of the Plaintiff might be ordered to allow the solicitor of the substituted creditor, at all seasonable times and upon giving reasonable notice, to inspect and take copies of and extracts from the several drafts, briefs, decree, orders, letters, copies of letters, documents and papers relating to, or made in the cause, in his possession.

The motion was supported by an affidavit stating that applications had been made, by or on behalf of the party making the motion, to the Plaintiff's solicitor, for information as to the state of the proceedings, and for liberty to inspect the documents, which had been refused.

Mr. Girdlestone, in support of the motion. There is no case which precisely governs the question. It must be decided on principle. Two principles are established by the cases; one is that, if a solicitor is discharged by his client, he is not compellable to afford facilities towards the prosecution of the suit by the production of the documents on which he has a lien; the other is that, if the solicitor discharges himself, he

(1) The time at which the youngest child would have attained 21 did not appear.

cannot, on the ground of his lien, withhold the documents. *Heslop v. Metcalfe* (*ante*, vol. viii. p. 622).

[418] The present case falls within the principle of *Heslop v. Metcalfe*. It is through the default of the Plaintiff and his solicitor that he is discharged. It is in vain to arm the Master with power to take the prosecution of a decree from a dilatory party, and commit it to another party interested in the suit, if the solicitor of the party making default can, by refusing access to the papers in the cause, set the Court at defiance. The General Order would, by that means, be rendered nugatory.

Mr. G. Richards, *contrà*. *Heslop v. Metcalfe* was a case between the solicitor and his own client. Here the applicant is a mere stranger. There is no privity between the solicitor and the present applicant, who is under no responsibility for costs to the solicitor. The papers are the papers of the client, or of the solicitor, by virtue of his lien. What jurisdiction has the Court to order the Plaintiff or his solicitor to part with the possession of their own documents; and if not to part with them, why should an inspection of them be directed? It is a new application; and the circumstance that no precedent can be found after the General Orders have been in operation ever since 1828 shews that it has been felt in practice that such an application could not be sustained.

Mr. Girdlestone, in reply. The absence of a precedent proves nothing. It is not correct to say that there is no privity in this case. The solicitor is the officer of the Court, and as such he is amenable to the jurisdiction of the Court. When he obtains a decree for creditors, he virtually undertakes to prosecute it duly to a termination. He voluntarily assumes the character of solicitor for all the creditors who may come in and prove under the decree. No [419] prejudice can ensue to the solicitor from granting the application. He has his lien on the fund for his costs. Will he relinquish that lien? If not, he is protected. But the solicitor of the substituted party can do nothing without the office copies of the bill, answers, decree, states of facts, and other documents. Is he to be driven to take new office copies? If so, the estate, and consequently the Plaintiff himself, will pay twice over for them, and the office copies of the proceedings, when obtained, may not afford all the information necessary to the due prosecution of the suit.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not remember the point ever to have occurred before; and therefore the question must be decided on principle.

Now I have already decided in *Heslop v. Metcalfe* (and my decision has been affirmed by the Lord Chancellor), that where the solicitor of a Plaintiff refuses, improperly, to proceed with the suit on behalf of his client, he can not withhold the papers in the cause from his client's new solicitor; but ought to deliver them up, so as to enable the new solicitor to proceed with the suit; without prejudice, however, to his own lien for costs. The question then is whether there is any substantial difference between the case of a solicitor who has discharged himself, and that of the solicitor of a Plaintiff who, by his own course of conduct, induces the Court to take from him the prosecution of the suit, and to commit it to another party, who employs another solicitor. The Master must be deemed to have exercised a sound discretion in making the order to which effect is now sought to be given, his decision having been acquiesced in.

[420] The principle of *Heslop v. Metcalfe*, which is substantially the same case as the present, is that the solicitor who has possession of the documents in the cause, holds them for the benefit of the Plaintiff; and where, by reason of the Plaintiff's default in prosecuting the decree in the cause, the prosecution of it has been committed to another party, the solicitor ought not to be permitted to increase the expenses of the suit by compelling that party to take, *de novo*, office copies of the proceedings which have taken place in it.

I shall, therefore, make an order in the terms of the notice of motion. The costs of the party applying must be costs in the cause; but I shall give no costs to the solicitor against whom the application is made.

[420] BROWNE v. LOCKHART. Jan. 21, 1840.

[S. C. 9 L. J. Ch. (N. S.) 167; 4 Jur. 167. As to inspection of mortgage deeds, see *Fitzgerald's Trustee v. Mellersh* [1892], 1 Ch. 387. See also Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 16.]

Advancing Cause. Costs. Mortgagor and Mortgagee. Foreclosure.
Inspection of Mortgage Deed. Trustee.

The costs of a motion to advance a cause, under the 4th Order of May 1839, ordered to be paid by the Plaintiff.

A mortgagee is not bound to produce his mortgage deed to the devisee of the mortgaged estate, until payment of principal and interest, notwithstanding the devisee may be ignorant of the amount of the interest, the time of payment, and all the other particulars of the security.

Where a trustee for a mortgagee is made a Defendant to a foreclosure suit, the Plaintiff must pay his costs, and add them to his own.

This was a foreclosure suit against the devisee of the equity of redemption of the mortgaged estate.

Under the 4th Order of May 1839, the cause had been advanced on an application made by the Plaintiff and opposed by the Defendant.

A question having arisen as to whether the costs of the application, like the other costs of the suit, ought to be borne by the Defendant, or paid by the Plaintiff,

THE VICE-CHANCELLOR said that the advancing of a cause was in the nature of an indulgence to the Plain-[421]-tiff, and therefore the costs of the application ought to be paid by him.(1)

The cause now came on to be heard.

It appeared, by the answer, that in November 1836 half a year's interest on the mortgage having become due, the Defendant's solicitors gave notice to the Plaintiff's solicitors that the amount of it was in their hands, and that they were ready to pay the same on a proper receipt being given; but, in reply to that notice, the Plaintiff's solicitors claimed a larger sum to be due for interest than was afterwards claimed by them: that some time was consumed in the correspondence between the solicitors of the two parties with respect to the amount of interest due and other matters connected with the mortgaged estate; and, on the 17th of February 1837, a year's interest having become due, the Defendant deposited the amount in the hands of his solicitors; who, thereupon, wrote a letter to Plaintiff's solicitors, dated the 11th March 1837, offering to pay over the money to the Plaintiff, on being allowed to inspect the mortgage deed, which, they said, neither themselves nor the Defendant had seen. The letter concluded thus: "We shall therefore be obliged by your making, at our expense, a copy for us, and allowing us to compare it with the original."

The reason alleged, in the answer, for making this request was that the Defendant's solicitors were desirous, before they paid over the money deposited with them, of [422] being satisfied that the sum deposited was the amount due, and also of ascertaining the proper times of payment of the interest, and such other particulars connected with the security and the hereditaments comprised in it, as it concerned the Defendant's interest, as devisee of the equity of redemption, to know; and that the Defendant and his solicitors were more especially desirous of obtaining authentic information as to what hereditaments were comprised in the mortgage; as the Defendant had reason to believe that some property, in addition to that which he was entitled to as devisee, was included in it. The answer further stated that the Defendant had been always ready and willing, and had repeatedly offered by his solicitors, to pay the interest, on the terms mentioned in the letter; but the Plaintiff's solicitors had refused to comply with those terms, and that, after a lengthened correspondence in which the Defendant's

(1) But see *Carthew v. Barclay*, ante, p. 273.

solicitors offered to pay the interest immediately on the production of the mortgage deed, and which offer was not accepted, the Plaintiff filed the bill in this cause, of which his solicitors gave notice to the Defendant's solicitors, by a letter of the 8th of January 1838. The answer concluded by submitting that, under the above circumstances, the Plaintiff ought to pay the Defendant's costs of the suit, or, at anyrate, the Defendant ought not to be compelled to pay the Plaintiff's costs.

The only question in the cause was that raised by the answer, as to the costs of the suit.

Mr. G. Richards and Mr. Lowndes, for the Plaintiff, said that a mortgagee was not bound to produce his mortgage deed to the mortgagor or any person claiming under him, except on payment of the principal and interest due on the mortgage.

[423] Mr. Knight Bruce and Mr. Lloyd, for the Defendant, said that, as the Defendant was not the original mortgagor, but the devisee of the mortgaged estate, he was, of necessity, ignorant of the contents of the mortgage deed, and that he had a right to inspect that deed for the purposes mentioned in the answer, and, in particular, in order to ascertain whether there was not another estate than that devised to him, comprised in the security, which would be liable to contribute to the payment of the principal and interest: that no application for payment of the principal had been made to the Defendant: and the Defendant could not have paid it without giving the Plaintiff six months' notice of his intention so to do. *Latimer v. Neale* (4 Clark & Fin. 570); *Anon.* (Mosley, 246). Cases and Opin., vol. 2, p. 52. Powell on Mortgages, Coventry's edit., p. 335, note.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As I understand the answer, the Defendant's solicitors in November 1836 gave notice to the Plaintiff's solicitors that some interest was in their hands. Then there was a dispute about the amount due for interest: and then, on the 11th of March 1837, that letter was written to the Plaintiff's solicitors, which is set forth in the answer, and by which the Defendant's solicitors asked to have a copy of the mortgage deed made at their own expense. Nothing further seems to have been done; and one important fact seems to have been omitted, namely, payment of interest. Then, on the 9th of January 1838, a letter was written to the Defendant's solicitors, which announced the filing of the bill. Now the question is whether that was not perfectly right.

[424] The interest had actually become in arrear. I do not apprehend that the Plaintiff, the mortgagee, was bound, in the year 1837, to permit the mortgagor to take a copy of the mortgage deed. I never understood that to be the rule. I admit that it is the usual practice for a mortgagor, when he intends paying off the mortgage, to give a proper notice of his intention so to do; but I apprehend that there is no law of this or any other Court which requires that to be done: it rests entirely upon custom: and the custom is founded on this, namely, that it is but fair that the party who has lent his money upon the security should have a reasonable opportunity, before the transaction is put an end to, of finding some other security on which he may lay out his money when it has been repaid to him.

I do not think that the case of *Latimer v. Neale* has any bearing upon the present case. That case, as I collect it from the Lord Chancellor's judgment, was this: a bill had been filed, and the Defendant had not refused to give the discovery, but did, by his first answer, give some discovery: and, that not being thought sufficient, exceptions were taken to the answer, and then a further answer was put in: and that further answer also purported to give a discovery, but it happened that the discovery, which professed to be full, differed from the discovery given by the first answer; and then, on application to the Court of Exchequer to produce certain documents, it was said: "By the very information you give, you make us suspect its accuracy; for the information is not consistent with itself; therefore in order that we may have that full discovery which you, by submitting to answer the interrogatories, shew you think you were bound to give, the documents must be produced." [425] That I see is stated by the Lord Chancellor, at some length; and it appears to me to be a very good reason why the House of Lords should affirm the order made in the Court of Exchequer.

With respect to the case cited from Mosley: in the first place, Mosley is not a reporter of very great authority; and I confess that it seems to me to be most extra-

ordinary that, after a decree *nisi* for a foreclosure had been made, an application should be made, by the mortgagor, that the mortgagee should produce his deed, in order that it might be laid before a conveyancer, to enable him to draw an assignment of the mortgage to some person who might be disposed to lend the money to pay off the first mortgage; and, what is still more unaccountable, the Court granted the motion. I apprehend that such an application would not be listened to at the present time. It does not quite tally with our notions of the right of the mortgagee to keep his deeds to himself until the moment arrives when the mortgagor appears with the principal and interest in his hand; and then the mortgagee is not bound to part with the deeds before he has received his money; at least, it must be a simultaneous transaction.

If there was such a great desire on the part of the mortgagor in this case to pay the interest, why did he not, as soon as the bill was filed, apply to the Court for an order, under the statute (7 Geo. 2, c. 20), to have an account taken of the principal and interest due on the mortgage. Instead of taking that step he allowed the suit to go on to a hearing in the usual way. My opinion is that the decree should be made in the common form.

[426] J. Walsh, a trustee of a term in the mortgaged estate, for better securing to the Plaintiff the principal and interest, and, subject thereto, to attend the inheritance, having been made a Defendant, it was insisted, for the Defendant Lockhart, that the trustee ought to have been made a Co-plaintiff in the suit, and therefore his costs ought not to be thrown on Lockhart.

THE VICE-CHANCELLOR said that Walsh might have objected to being made a Co-plaintiff; and, therefore, the Plaintiff ought to pay his costs, and then add them to his own, which must be paid by Lockhart.

[426] CLAPTON v. BULMER. Jan. 24, 1840.

[S. C. 9 L. J. Ch. (N. S.) 261; 4 Jur. 288; affirmed, 5 My. & Cr. 108; 41 E. R. 312 (with note).]

Will. Construction. Nearest of Kin of my own Family.

Testator bequeathed his residue to trustees, in trust to pay an annuity to his wife, and, subject thereto, in trust for his daughter for life, and, after her death, in trust for her children. Provided that, if his daughter should die without leaving any issue, then the trustees should pay £3000 as she should appoint; and, if his wife should survive his daughter and his daughter should die without issue, then that the trustees should pay £2000 to his wife, and assign the residue of the trust monies unto *the nearest of kin of his own family for ever*. The daughter survived the wife, and died without leaving issue. Held, that the next of kin of the daughter were entitled to the fund.

William Johnson, by his will, dated the 26th of August 1811, after giving legacies to John Alexander Mackenzie, the Plaintiff Richard Clapton, Richard Cranmer, the Defendant John Martin Bulmer, and various other persons, and appointing his wife, Bexey Amelia Morris Johnson, and his daughter, Amelia Rebecca Johnson, executrices of his will, disposed of [427] the residue of his personal estate in the words following: "And all the rest, residue and remainder of my monies in the public funds, and of all other my personal estate, whatsoever and wheresoever, not hereinbefore disposed of, I order and direct my executrices to lay out the same, in the names of the before-named John Alexander Mackenzie, Richard Clapton, the said Rev. Richard Cranmer, and the said John Martin Bulmer, or the survivors or survivor of them, at interest, upon Government securities, who, thereupon, shall stand possessed thereof, upon trust and to and for the several intents and purposes hereinafter expressed and declared of and concerning the same, that is to say, upon trust that they, my said trustees, John Alexander Mackenzie, Richard Clapton, Richard Cranmer, and John Martin Bulmer, and the survivors and survivor of them, and the

executors and administrators of such survivor, shall and do fully authorize and empower my said dear wife, during her natural life, in case she shall so long continue my widow but not otherwise, to receive so much of the interest and dividends and annual produce of the said stocks, funds and securities, and of all other the residue of my personal estate, as the same shall, from time to time, become due and payable, as, together with the dividends of the several sums of £500 four per cent. Bank annuities, and £350 three per cent. Bank annuities, particularly mentioned in the settlement made on my marriage with my said wife, bearing date on or about the 26th day of April 1781, will make up one clear annuity or yearly sum of £150, and to apply the same for her own proper use and benefit; and upon this further trust to pay the surplus of the said interest, dividends and annual produce of the trust monies aforesaid (after payment of the said annuity or annual sum before mentioned), unto my said daughter, Amelia Rebecca Johnson, for and during the term of [428] her natural life, or otherwise permit and suffer her to receive the same; but, in case of the death or intermarriage of my said wife, then I direct that the whole of such interest, dividends and annual produce as aforesaid be paid to my said daughter, for her life, in like manner: provided always, and I do hereby further declare my will and mind to be that the interest, dividends and annual produce of the said stocks, securities, trust monies and premises, which I have by this my will given to and ordered and directed to be paid to my said daughter, during her natural life, shall be for her sole and separate use and benefit, and that the same or any part thereof shall not be subject or liable to the debts, control, intermeddling or engagements of any husband she may marry, and that the receipt of my said daughter, whether married or unmarried, without her husband, or any other person or persons whom she may appoint to receive the same, shall be a good and sufficient discharge to my said trustees for the said interest, dividends and produce, or so much and such parts thereof as shall be therein acknowledged and expressed to have been received; and, from and after the decease of my said daughter, then upon this further trust, that they, my said trustees, and the survivors and survivor of them, and the executors and administrators of such survivor, shall and do assign and transfer the said funds hereinbefore mentioned (subject, nevertheless, and chargeable with the payment of the said annuity hereinbefore by me given to my said wife, in case the same shall, by virtue of this my will, be then due and payable) unto all and every the child and children of my said daughter, lawfully begotten, to be equally divided between them if more than one, share and share alike, and, if there be but one such child, then the whole to go to such one child." The will then contained direc-[429]-tions and provisions as to the payment and vesting of the shares of his daughter's children, and for their maintenance during their minorities; and then proceeded as follows: "Provided always, and I do declare my will and mind to be that, in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, upon the decease without issue as aforesaid, (1) raise and pay the sum of £3000 to such person or persons as she, my said daughter, shall, in and by her last will and testament or any writing purporting to be her last will and testament or any codicil thereto, nominate, give, direct or appoint; and in case my said wife shall happen to survive my said daughter, and my said daughter shall die without issue as aforesaid, then I will and direct that my said trustees, or the survivors or survivor of them, and the executors or administrators of such survivor, do and shall also, upon the decease of my said daughter and such failure of issue as aforesaid, raise and pay out of the said trust monies the further sum of £2000 unto my said dear wife, to and for her own use and benefit; and I will and direct that my said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall assign and transfer the residue of such trust monies and of my personal estate unto *the nearest of kin of my own family for ever.*"

The testator died on the 1st of April 1812, leaving Bexey Amelia Morris Johnson, his widow, and Amelia Rebecca Johnson, his only child him surviving. Bexey

(1) So in brief.

Amelia Morris Johnson died in 1827, without having [430] married a second husband, leaving her daughter, Amelia Rebecca Johnson (who afterwards married the Defendant, Percival White) her surviving.

Amelia Rebecca White made her will, dated the 9th of September 1834, and thereby, in exercise of the power given to her by the testator's will, directed the trustees thereof, immediately after her decease without issue, to pay or transfer to her husband, Percival White, his executors, &c., the sum of £3000 directed to be levied and raised by the testator's will, together with the interest, dividends and annual produce thereof, to and for his and their own absolute use and benefit; and she appointed P. White and H. H. White executors thereof. The testatrix died in October 1837.

The bill, which was filed by Richard Clapton, the surviving trustee of the testator's will, against J. M. Bulmer and P. White, alleged that Bulmer was the nephew of the testator's mother, and that, at the death of Amelia Rebecca White without issue, he was the cousin and sole next of kin of the testator, and that, as such, he claimed the whole of the funds in which the testator's residuary estate had been invested; that P. White alleged that, according to the true construction of the will, the intention of the testator was that his residuary estate should go to his nearest of kin who should be living at the time of his death, and that, consequently, his daughter, Amelia Rebecca White, took a vested interest in the residuary estate, and that he, P. White, as her legal personal representative, was then entitled thereto. The bill prayed that it might be declared which of the two Defendants, or what other persons or person were or was entitled to the testator's residuary estate.

[431] In pursuance of the decree made at the hearing of the cause, the Master found that Amelia Rebecca White was the next of kin of the testator at the time of his death, and that the Defendant John Martin Bulmer was his next of kin at the time of the death of A. R. White, and also was the next of kin of A. R. White and the testator at the time of the death of A. R. White, and that A. R. White died without leaving any issue, and that the Defendant Percival White was the personal representative of Bexey Amelia Morris Johnson, and also of Amelia Rebecca White.

The cause now came on to be heard for further directions.

Mr. Stinton appeared for the Plaintiff.

Mr. Jacob, Mr. G. Richards and Mr. Keene, for the Defendant Bulmer. The question is, what is the effect of the ultimate limitation in the testator's will to the nearest of kin of his own family for ever? At the date of the will the testator had a wife and only one child, a daughter; and the daughter was his sole next of kin at his death. The Defendant Bulmer was the next of kin of the testator at the death of the daughter, and he was also the next of kin of the daughter at her death. We contend that, under the ultimate limitation in the will, he is entitled to the testator's residuary estate. That limitation was to take effect on the death of the daughter, who was the testator's sole next of kin, without issue: the testator, therefore, was contemplating the death of his daughter and failure of her issue. The limitation is not, "to my nearest of kin," but, "to the nearest of kin of my family," that is, "to the nearest of kin of the persons, [432] whoever they may be, who are members of my family." *Marsh v. Marsh* (1 Bro. C. C. 293); *Jones v. Colbeck* (8 Ves. 38), is a good deal like the present case. There the testator, after declaring trusts of his residuary estate in favour of his daughter and her children, directed that, after the decease of his daughter and her children, in case they should all die under 21, the residue should go and be distributed amongst his relations, in a due course of administration. The daughter was the sole next of kin of the testator at his death. She died without leaving any issue; and the Court held that the next of kin of the testator living at the death of the daughter, and not the personal representative of the daughter, were entitled to the residue. Here the testator has directed his residue to be distributed at the death of his daughter; and in addition to that, he has given her a disposing power over a portion of the residue. That circumstance is wanting in *Jones v. Colbeck*; and therefore this case is stronger than that, in favour of holding that the next of kin of the testator at the death of the daughter is entitled to the residue. In *Briden v. Hewlett* (2 Myl. & Keen, 90) the testator gave all his goods, chattels, &c., to trustees, in trust for his mother for life, and, after her death, to

such persons as she should by her will appoint, and, in default of appointment, to such person or persons as would be entitled to the same by virtue of the Statute of Distributions. The testator's mother was his sole next of kin at his death. She died intestate; and the question was whether her personal representative, or the testator's cousins, who were his next of kin at her death, were entitled to the property. The Court decided in favour of the testator's next of kin at the death of his mother. [433] That case also wants the strong circumstance of there being a portion of the fund carved out for the benefit of the tenant for life. In *Elmsley v. Young* (2 Myl. & Keen, 82 and 780) the limitation was to such person or persons as should, *at the time of the decease of the said P. Elmsley*, the settlor, be his next of kin: and the Lords Commissioners, on appeal from the decision of Sir John Leach, held that the tenant for life, who was the next of kin of the settlor at his death, was entitled. In *Butler v. Bushnell* (3 Myl. & Keen, 232) the testator declared trusts, of certain portions of his residue, for his daughters for their lives, and, after their deaths, for their children; and in case there should be no child who, being a son, should attain 21, or being a daughter, should attain that age or marry, then for such person or persons who should happen to be his next of kin according to the Statute of Distributions. One of the daughters died without issue, and Sir John Leach, Master of the Rolls, held that the testator's next of kin at the death of the daughter, and not his next of kin at his own death, were entitled. There His Honor says: "In the case of *Elmsley v. Young*, which was recently before the Court, I took occasion to examine very fully all the authorities on this point; and I then referred to a case of *Briden v. Hewlett*, which, in the language used by the testator, resembles the present case. One of the propositions then laid down by me was that, where a testator gives property over to his next of kin, after the death of a tenant for life without issue, the Court must look at the whole will to ascertain who are the next of kin intended, by the testator, to take. In *Elmsley v. Young* the ultimate limitation was made expressly to those persons who should be the settlor's next of kin at his death; so that there could be no [434] question that the tenant for life, who answered that description, was entitled. In *Briden v. Hewlett* there was no express designation of the next of kin at the death of the testator; but the gift was to the testator's widow, for her life, with remainder as she should appoint, and, in default of appointment, to such person or persons as would be entitled by virtue of the Statute of Distributions: and I was of opinion, looking to the intention of the testator to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life." Sir John Leach then lays down the following rule:—"Where a testator gives property to a person for life, with remainder to his children, and, if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over." Still less probable is it where, as in the present case, the tenant for life was the testator's sole next of kin at his death, and a portion was carved out of the residue and given to her to appoint.

Mr. Knight Bruce, for the Defendant White. The party for whom I appear is the representative of the testator's widow as well as the representative of the daughter: and one question that arises in this case is whether there is not an intestacy, or, in other words, whether the event in which there is a gift to the next of kin has happened.

It is obvious that the testator contemplated the marriage of his daughter as a probable event. He, first, provides for her and her children, and then, in the event of her dying without issue, he gives her power to dispose [435] of £3000, whether she survives her mother or not. Then the testator takes up the event of his wife surviving his daughter, and says: "In case my said wife shall happen to survive my said daughter and my said daughter shall die without issue, then I will and direct that my said trustees do and shall, also upon the decease of my said daughter and such failure of issue as aforesaid, raise and pay, out of the said trust monies, the further sum of £2000 unto my said dear wife, to and for her own use and benefit, and I will and direct that my said trustees do and shall assign and transfer the residue of such trust monies and of my personal estate unto the nearest of kin of my own family." There is, therefore, no disposition of the capital of the trust fund, except

in the event of the wife surviving the daughter. That part of the passage which I have read from the will, which follows the words "and I will and direct," is controlled by the double contingency of the wife surviving the daughter and the daughter dying without issue. The testator intended to exclude his wife from sharing in the capital; and, with that view, he provides that, if she survives his daughter, the capital shall go to the nearest of kin of his own family, meaning his next of kin who share in his blood. That view of the will makes the whole of it consistent and rational: and, if the two events do cover the whole passage, it is quite clear that, under existing circumstances, there is an intestacy. *Davis v. Norton* (2 P. W. 389), *Doe v. Shipphard* (1 Doug. 75).

Supposing, however, that there is no intestacy, and that the gift of the capital is an absolute gift, what authority is there for construing the words "nearest of kin" in any other than their natural sense, that is, [436] that they mean the next of kin of the testator at any time except his death? In every one of the cases cited there were circumstances not found here which called on the Court to say that the testator did not mean his next of kin at his own death to take. If the case of *Marsh v. Marsh* were now to arise, the gift in that case, to the testator's nearest relations, would be held to be void for remoteness; as it is a gift over after a general failure of issue. But, supposing that not to be so, Lord Loughborough's only reason for holding that the next of kin at the death of the son, and not the next of kin at the testator's own death, were entitled was that the next of kin at the latter period was the tenant for life of the residue: but, in subsequent cases, that circumstance has been always held not to have any effect. In *Jones v. Colbeck* the testator contemplated a plurality of relatives; and that was the reason why Sir W. Grant held that the testator's daughter, who was his sole next of kin at his death, was not entitled. That learned Judge says:—"As to the claim of the daughter, it is hardly possible the testator could mean to describe an only daughter by the terms 'my relations;' directing also the residue to be distributed among those relations." (8 Ves. 43.) It is evident, therefore, that the circumstance that the testator indicated a plurality of relatives and directed a distribution to be made was the ground of the decision. The next case is *Briden v. Hewlett*. There the testator, in case his mother, who was *his sole next of kin*, should die without a will, gave all his goods and chattels to such person or persons (using a word of plurality) as would be, not will be, entitled to the same by virtue of the Statute of Distributions: and Sir John Leach says: "It is impossible to contend that this testator meant to [437] give the property in question absolutely and entirely to his mother; because he gives it to her for life, with a power of appointment. In case of her death without a will, the testator gives his property to such person or persons as would be entitled to it by virtue of the Statute of Distributions. Entitled at what time? The word *would* imports that the testator intended his next of kin at the death of his mother. It is clear that he intended to exclude his mother from the class who were to take in the event of her intestacy." As the ultimate limitation was to take effect in the event of the mother's intestacy, that case is clearly distinguishable from the present. Then comes the case of *Butler v. Bushnell*. The language of the will in that case was: "And in case there should be no child or children of his daughters respectively, or if such child or children being a daughter or daughters should die under the age of 21 years without being married, or, being a son or sons, should die under the age of 21 years, then in trust for such person or persons as *should happen to be* his (the testator's) next of kin according to the Statute of Distributions." Sir John Leach, in his judgment in that case, speaking of his decision in *Briden v. Hewlett*, says: "One of the propositions then laid down by me was that, where a testator gives property over to his next of kin after the death of a tenant for life without issue, the Court must look at the whole will to ascertain who are the next of kin intended, by the testator, to take. In *Elmsley v. Young* the ultimate limitation was made, expressly, to those persons who should be the settlor's next of kin at his death; so that there could be no question that the tenant for life who answered that description was entitled. In *Briden v. Hewlett* there was no express designation of the next of kin at the death of the testator, but the gift was to the testator's [438] widow for her life, with remainder as she should appoint, and, in default of appointment, to such person or persons as

would be entitled by virtue of the Statute of Distributions; and I was of opinion, looking to the intention of the testator to be collected from the whole will, that the testator meant his next of kin living at the death of the tenant for life. Where a testator gives property to a person for life, with remainder to his children, and, if he should die without children, then over to his next of kin, it is not a probable intention that he should mean to include, as one of his next of kin, the person upon whose death without issue he has expressly directed that the property should go over. In looking to the cases, it appears to me that the Court always considers whether the words of limitation are words of present intention, so that they are intended to take effect as soon as the testator's next of kin, living at his death, are ascertained; or whether they import a future period, and are referable to the event upon which the gift over is to take effect. The words 'such persons as shall happen to be my next of kin,' or 'such persons as shall or should be my next of kin,' indicate an intention to confine the gift to such persons as shall answer the description of the testator's next of kin at the death of the tenant for life. I am of opinion, therefore, in this case, that it was the intention of the testator that the share of Maria Butler should, upon her death without issue, vest in such persons as should then be his next of kin."

Now, with the exception of *Marsh v. Marsh*, I assert that no case is to be found in which the mere fact of the tenant for life (on whose death without issue the fund is given over) being the next of kin has been held to exclude the tenant for life. One of the cases which [439] shew that the rule cannot be as was supposed in *Marsh v. Marsh* is *Harrington v. Harle* (1 Cox, 131). There the testatrix bequeathed her residuary estate to trustees, in trust for her daughter Jane Champernowne, for her separate use for life, and, after her death, in trust for such persons as Jane Champernowne should by deed or will appoint, and, in default of appointment, in trust for such person or persons *as would then*, by virtue of the Statute of Distributions, be entitled to the testatrix's estate in case she had died intestate. There never was an expression more calculated to try the rule than that was; and yet the counsel for the Defendant admitted that, Jane Champernowne having died without making any appointment, the fund must go to such persons as were next of kin to the testatrix at the time of her death. *Doe v. Lawson* (3 East, 278) and *Masters v. Hooper* (4 Bro. C. C. 207) also shew that a mere tenancy for life given to one of the next of kin operates nothing to exclude him from taking under the ultimate trust. *Pope v. Whitcombe* (3 Mer. 689) and *Pearce v. Vincent* (2 Keen, 230; and 2 Myl. & Keen, 800) establish the same point. [THE VICE-CHANCELLOR. The words in which the ultimate limitation is expressed in this case are words which have reference to an event which is to happen at a time subsequent to the testator's death.] The words "assign and transfer" mean nothing more than "in trust for." Lastly, with respect to the meaning of the word "family." There is no case in which that word has been held to apply to a single person. The testator, in using that word, did not mean to designate the next of kin of any given person, but the next of kin *de* [440] *familiâ mea*, or *de sanguine meo*; so as to exclude his wife. *Blackwell v. Bull* (1 Keen, 176).

THE VICE-CHANCELLOR [Sir L. Shadwell] stopping the reply. I do not think that there is any chance of my deriving any benefit from a further discussion in this matter; because, according to the view I take of it, I quite agree with that set of cases which Mr. Knight Bruce has quoted in support of the proposition, that, if you find a gift, ultimately, of the residue of the personal estate of the testator to his relations or to his next of kin or in words which are tantamount, and the tenant for life of the residue happens to answer that description, it is nothing more than a paraphrastical description of the person before mentioned. If A. B. were the next of kin, it is of very little importance whether the testator says that, in the event of his dying without issue, the fund shall go to A. B., and, in the event of A. B. dying without issue, the fund shall go to a person whom he designates by a multitude of words which point to A. B. That is the effect of all the cases which Mr. Knight Bruce has adverted to.

Now I am to consider, first, whether there is an intestacy. I think it is plain that there is not an intestacy; because, after the testator has made that disposition of the residue of his property which consists in giving the daughter an interest and making a provision for her children, he proceeds in this manner: "Provided always and I do

declare my will and mind to be that, in case my said daughter shall happen to die without leaving any issue, then I will and direct that my said trustees, [441] or the survivors or survivor of them, or the executors or administrators of such survivor, do and shall, upon her decease without issue as aforesaid, raise and pay the sum of £3000 to such person or persons as she, my said daughter, shall, in and by her last will and testament in writing, or any writing purporting to be her last will and testament, or any codicil thereto, nominate, give, direct or appoint." That is one part of what he directs under the general head of the provision. And then he says: "And in case my said wife shall happen to survive my daughter and my daughter shall die without issue as aforesaid, then I will and direct that my trustees shall, upon the decease of my said daughter and such failure of issue as aforesaid, raise and pay out of the said trust monies the further sum of £2000 unto my wife." And then he says, "and I will and direct."

Now Mr. Knight Bruce has wished me to construe that part of the will as if the expression, "and I will and direct," was, of necessity, to be referred to that second part of his will and direction which is comprehended under the general proviso: whereas, it appears to me that the natural construction of the words is that, having made what I will call the plain and obvious disposition of his property, namely, to his daughter and her issue, it occurs to his mind that the daughter may die without issue; and what is then to be done? He begins the proviso, and he divides what shall be done into three parts, first, by directing that, if his daughter dies without issue, £3000 shall be paid as she shall appoint; and if the wife survives the daughter, she dying without issue, then £2000 shall be paid to the wife; and then he proceeds to complete the proviso by declaring that he does direct that the trustees shall [442] assign and transfer the residue of the trust monies and the residue of his personal estate unto the nearest of kin of his own family for ever. I consider, therefore, that there is no intestacy. There is a gift; and there can be no intestacy unless it is made out that those last words have no meaning: if they have the meaning which either the one or the other of the counsel contended for, then there is no intestacy.

The expression used by the testator is "unto the nearest of kin of my own family for ever." Now, if he had meant to say his own nearest of kin, how easy would it have been to have said "my nearest of kin." But it is plain he did not mean that: because, if that which is said to be a man's intention is obviously easy to execute, and the party does not execute it in the obvious and easy manner, I think it is a fair inference that he meant something else than that which is so obvious and easy. He says, "the nearest of kin," not of myself, but "the nearest of kin of my own family for ever." Now I cannot but think that, if he had used the words, "in the event of the death of my daughter and failure of issue of my daughter the trustees shall transfer the residue of the trust money to my family," that would have been a gift to the daughter. And, when he says: "the nearest of kin of my own family," I cannot but think that the most natural construction of the words is that the persons whose nearest of kin are spoken of are those persons who, according to ordinary language, would be his family, that is his daughter. And I am the more inclined to think that that is the meaning of the phrase, because, though the construction has been put by Courts of law upon the words *relations*, &c., which has been established by a series of cases, beginning with the case of *Harrington v. Harte*; yet I believe that, out of the [443] Courts of law, nobody would think that that is the construction; and the multitude of cases shews the willingness to dispute the point where it is disputable.

Now the words which this testator has used are words which do not, of necessity, imply his own next of kin; and those words never having as yet received a legal construction, I will, for the purpose of construing them, look at what he has done by the former part of his will; and I find that he has given the residue of his property to his daughter for life, with remainder to her children; and then, for the obvious purpose, as I conceive, of making a disposition of his property in the event of his daughter and her issue being no longer able to enjoy it, he uses these singular terms.

Upon the whole, therefore, it appears to me not to be unreasonable to hold that,

under the term "the nearest of kin of my own family" the nearest of kin of the daughter is the party to take.(1)

[444] CHAMBERLAIN v. LEE. Jan. 23, 1840.

Vendor and Purchaser. Title.

If A. agrees to sell an estate, and it is afterwards discovered that a small portion of it is the property of another person; the Court will not discharge the purchaser from his contract without giving A. an opportunity of acquiring a title to that portion.

In June 1837 the estates of John Lee, the testator in the cause, who died in 1836, were sold in lots under the decree of the Court; and Joseph Gosnay became the purchaser of Lots 62, 63 and 64. In the particulars of sale those lots were described as follows: Lot 62 as a moiety of a plot of freehold building-land situate on the north side of the Wakefield Ings road, and adjoining to the fair ground, containing 2495 square yards; Lot 63, as a moiety of a plot of freehold building land bounded on the east by Lot 62, on the west by Denby Dale road, and containing 1400 square yards; Lot 64, as a moiety of a plot of freehold building-land bounded on the east by Lot 65, on the west by the Denby Dale road, on the north by the fair ground, and on the south by the Ings road, and containing 2600 square yards. By the second condition of sale it was stipulated that the purchasers should, within six weeks from the delivery of the abstract of title, deliver, in writing, at the office of Mr. T. Taylor, the vendors' solicitor, all objections, if any, to the title; and that all objections not delivered by that time should be considered as waived. The 12th condition provided that, if any mistake, error or misstatement should be made in the description of the property, or any other error should appear in the particulars of sale, such mistake, error or misstatement should not annul the sale, but a compensation or equivalent should be given or taken as the case might require, such compensation or equivalent to be settled by the Master.

On the 19th of July 1837 the Master's report as to Gosnay's purchase was confirmed. On the 22d of March 1838 the abstract of the vendors' title to the [445] lots was delivered to Gosnay. In June 1838 he presented a petition praying to be discharged from his purchase, on the ground that the auctioneer had put up the lots to be bid for at so much per square yard; and that he was thereby induced to believe that he was bidding for the entirety, and not a moiety only of a square yard. In December 1838 the petition was heard by the Vice-Chancellor, who granted the prayer of it; but, in May 1839, the Lord Chancellor, on appeal, dismissed it with costs.

On the 6th of June 1839 the Plaintiff gave a notice of motion that Gosnay might be ordered to pay his purchase-money into Court. On the 9th of November following Gosnay gave a cross-notice of motion that he might be discharged from his purchase, and that the contract entered into by him for the purchase of the three lots might be rescinded, the vendors not having a title thereto at the time of the sale; and that the Plaintiffs might pay to him his costs and expenses of confirming the report and investigating the title to the lots and of the motion.

It was stated, in the affidavits for the purchaser, that the lots in question adjoined the Wakefield Ings turnpike road on the south side; and that the whole of that side

(1) Pereival White appealed to the Lord Chancellor from the above decision. His Lordship said that the Vice-Chancellor was right in deciding that J. M. Bulmer was the party entitled to take under the ultimate limitation in the will; that the person intended to be described by the words of that limitation was, clearly, an individual who was to be ascertained at a future period; that those words admitted of two constructions, namely, either the next of kin of the daughter at her death, or the next of kin of the testator at the same period; and that, as the same individual filled both those characters, it was unnecessary to decide which of the two constructions ought to be adopted.

of the lots, which was 200 yards in length, consisted of a piece of ground, (1) to which the testator had no right or title whatsoever, but which, as to so much of it as was comprised in Lot 62, belonged to J. H. Smith, Esq., and as to the remainder to the trustees of the late Joseph Hargrave, Esq. It appeared, from [446] the affidavits for the vendors, that for the last nine years, if not longer, the testator and those claiming under him had been in quiet possession of the whole of the lots: and the vendors' solicitor deposed that he did not know or believe that any part of Lots 63 and 64 belonged to Hargrave's trustees.

In October 1839, which was some months after the vendors had been informed by the purchaser of the alleged defect in their title, their solicitor sent to the purchaser's solicitor an abstract of Mr. Smyth's title to that part of the piece of ground which belonged to him and which formed part of Lot 62, and at the same time informed the purchaser's solicitor that, for the purpose of preventing any further litigation and expense, the vendors had entered into a contract with Mr. Smyth for the purchase of a moiety of that portion of the piece of ground which belonged to him, and which formed part of Lot 62; but no new title was shewn to that part of the piece of ground which was alleged to belong to Mr. Hargrave, and which was comprised in the two other lots.

The original and cross-motions now came on to be heard.

Mr. Knight Bruce and Mr. Metcalfe appeared in support of the former; and Mr. Wakefield and Mr. Bethell, in support of the latter, said: When a person agrees to sell property which is not his, the contract cannot be enforced either at law or in equity. Sir E. Sugden, in his Treatise on the Law of Vendors and Purchasers, says: "Where a person takes upon himself to contract for the sale of an estate, and is not absolute owner of it, nor has it in his power, by the ordinary course of law or equity, to make himself so; [447] though the owner offer to make the seller a title, yet equity will not force the buyer to take it; for every seller ought to be a *bonâ fide* contractor: and it would lead to infinite mischief if one man were permitted to speculate upon the sale of another's estate. Besides, the remedy is not mutual; which, perhaps, is of itself a sufficient objection in a case of this nature." (Vol. i. p. 207, 9th edit.) The learned author then cites *Tendring v. London* (2 Eq. Ab. 680, pl. 9) as an authority for the position laid down by him, and adds the following query: "Whether there is *any* case in which a man knowing himself not to have any title has been allowed to enforce the contract by procuring a title before the report." These lots were sold at so much per square yard: they were described in the particulars of sale as building-ground and as abutting on the turnpike road. It turned out, however, that the vendors had no title whatever to the ground, so far as it abuts on the turnpike road. They allege that they have contracted for the purchase of part of the slip of land to which they had no title; but they do not pretend that they have entered into any negotiation for the purchase of the remainder: and great additional delay and expense will be incurred by the purchaser in investigating the title to that part which they say they have contracted for. Besides, the slip of land in question is the frontage of the lots. It is the most important part of the whole; and it was the inducement to the purchase. If a person who has purchased building-ground cannot have the frontage conveyed to him, he loses the whole benefit of his purchase; the remainder of the ground is valueless to him. If this slip of land is taken away, the character under which the land was sold will be taken away. [THE VICE-CHANCELLOR. Were the vendors in possession of the slip of land at the time of the [448] sale?] We believe that they were. [THE VICE-CHANCELLOR. I do not see why the 12th condition of sale should not apply to this case.] That condition has been always held to apply to unintentional errors, and not to a case like the present. Besides, if the purchaser cannot have the frontage, the rest of the ground is of no value; and, therefore, this is not a case which admits of compensation. The Court cannot now give the vendors an opportunity of acquiring a title to that in which they had no interest whatever at the time of the sale, without

(1) It did not appear, from the briefs on the motions, what was the breadth of this piece of ground; but in one of the papers belonging to the purchaser's solicitor it was stated to be six feet.

infringing the very wholesome rule laid down by Lord Eldon in *Lechmere v. Brasier* (2 Jac. & Walk. 289). There his Lordship says: "I must say that I will not extend the rule which the Court has adopted of compelling a purchaser to take the estate, where a title is not made till after the contract, to any case to which it has not already been applied. The rule has, in many instances, been productive of great hardship." In *Dalby v. Pullen* (1 Russ. & Myl. 296; and *ante*, vol. iii. p. 29), the Court discharged the purchaser, although the defect in the title was actually cured at the time: and, consequently, it refused to give the vendor the benefit of the acquisition of title which had been made subsequent to the contract. A Court of Equity will never sanction that species of dealing by which a man sells the estate of another, speculating on his being able to acquire a title to it before the cause is heard for further directions.

THE VICE-CHANCELLOR. What Lord Eldon is reported to have said in *Lechmere v. Brasier* applies to a case where A. has sold the estate of B.; but it does not apply to a case where that which the vendor has not is a very small portion of the property sold.

[449] Mr. Knight Bruce and Mr. Metcalfe cited *Williams v. Carter* (1 Sug. Vend. 208), and said that it was not pretended that the alleged defect in the title to a portion of Lot 62 was known to the vendors until they were informed of it by the purchaser's solicitor: that it was a fallacy to say that the vendors had no title to the slip of land; for they and the testator had long had possession of it, which was a species of title: that the 12th condition was not intended to apply to fraudulent errors, but was intended to apply to unintentional ones: that Gosnay, a quarter of a year after the abstract had been delivered to him, presented a petition praying to be discharged from his purchase on other grounds; and that it was his duty to have stated that he did not know of the present objection at that time; but he had not done so: that the abstract, which was delivered in March 1838, shewed that he must have been aware of the objection when he presented his petition to be discharged: that the notice of motion for payment of the purchase-money into Court was given on the 6th of June 1839; and that it was not until the 9th of November in that year that the notice of motion to discharge him from his purchase was given: that it was not pretended that the possession of any one of the lots was necessary to the enjoyment of the others; and, therefore, Gosnay was, at all events, bound to complete his purchase as to Lots 63 and 64.

Mr. Bethell, in reply. It is admitted that the vendors had no title to a part of the property which they contracted to sell. The 12th condition applies only to cases which admit of compensation; but not to cases in which the vendor [450] has not the power of giving that which was the inducement to the purchase; for that does not admit of compensation. The slip of land was the inducement to the purchase in this case: it gave the land its quality, and constituted the whole value of the purchase.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is said that this Court will not sanction a contract made by a person to sell to another that which at the time he knows he has not. I admit, if the case is that A., with reference to an estate which he knows to belong to B., contracts to sell it to C.; that it is a very wholesome rule that this Court ought not to aid such a contract. But general rules do certainly admit of variation; and, in my opinion, it would be vastly too harsh an interference with the common mode of the management of the business of mankind if such a rule were taken to be applicable to a case where a party, apparently in the ownership and *prima facie* appearing to have a title, sells land; and it afterwards turns out that a very small portion of it is not his (although he was in possession), but is the property of another person. It would be a harsh application of the first principles of this Court were I to say that in such a case the contract was so radically bad that, even if the vendor could honestly procure his title to be made good by purchasing the property for himself from the rightful owner, in order that he might hand it over to the purchaser, he should not be at liberty to do so.

I cannot but think that it has happened repeatedly that contracts have been made for the sales of estates in which small pieces have not been found to belong to the vendors, and they have been at liberty to deal with persons, over whom they have no control, for the purpose of making good their title to the purchaser

with whom they have *bonâ fide* contracted. I am satisfied that it has repeatedly happened, although I cannot mention any particular case. And I never heard that it was a received rule with gentlemen practising conveyancing that, merely because, as to a certain portion of the estate, the vendor had not a title at the time of the sale, he might not be at liberty to make good his title, and hand over the whole of the property contracted to be sold to the purchaser.

With respect to this particular case, it seems to me that it would be too much to say that there has been such a fraudulent dealing, such a jobbing in land, as that this Court is bound to say that the contract ought to be rescinded.

I am very willing to admit that, notwithstanding the proceedings which were adopted by this purchaser in the year 1838, a case might be stated in which he might fairly make the objection which he now makes: but let us consider how it is on his own shewing. I do not understand him to allege that there was actually any fraud: but what he represents on his own affidavit is, in substance, that, with respect to this little slip of land, the breadth of which I do not find anywhere stated (the length is, but the breadth is not), that with respect to this little slip of land, it turned out, by admeasurement, that the quantity which the vendors undertook to sell could not be made good except by including this slip of land. And then it is alleged that, with respect to that part which bounds Lot 62, it belongs to a gentleman of the name of Smyth; and, as to that part which bounds Lots 63 and 64, it belongs to Mr. Hargrave. I will take it to be so. Well then, the vendors having [452] this objection notified to them, proceeded immediately to make a contract with the gentleman of the name of Smyth, for the purpose of acquiring the fee-simple in that part of the slip of land which was Smyth's, and it does not appear that they may not be able to make an effectual contract with Mr. Hargrave with respect to the other portion. Now I must look at the whole together, and I am inclined to think that it will be lawful for the vendors to make good this contract with Messrs. Smyth and Hargrave; and, by means of those contracts with them, enable themselves to complete the contract with Mr. Gosnay.

But supposing it should fail, I have not got circumstances enough before me now to determine, at once, that these slips of land do not fall within the 12th condition; because it struck me that a good deal of the objection arising from the materiality of this slip of land would depend on the very width of the slip; and, if it be of considerable extent, so as to afford a very easy means of annoyance to be practised on Mr. Gosnay, by means of building and so on, it might lead to objections; but, before I am told how wide it is (and I am certain from the statement that is made that it must be narrow) I cannot at once conclude, without any further statement, that it may not be comprehended within the 12th condition of sale.

Then there is also the circumstance which regards the second condition of sale. I am not at liberty, at present, to say how far the vendors may not be at liberty to avail themselves of that condition: and then, having nothing presented to me except that general objection which is made with reference to a case which I do not think is similar at all to the present case, I am asked to [453] say, at once, that this is a case in which I ought to make a peremptory order, and discharge the purchaser. It appears to me that that is asking too much: and I do not think that this application of the purchaser's ought to be favoured: and, that being so, I shall refuse the application with costs.

The order directed a reference to the Master to inquire and state to the Court whether a good title could be made to the premises comprised in the three lots, and at what time it was first shewn that a good title could be made, with liberty to state special circumstances: and Gosnay's application to be discharged from his purchase was refused, with costs.

[453] TWEEDALE v. TWEEDALE. Jan. 24, 30, 1840.

[Overruled, *Blewitt v. Roberts*, 1841, 10 Sim. 491; 59 E. R. 706; Cr. & Ph. 279; 41 E. R. 497.]

Will. Construction. Cumulative Legacies. Annuity.

Testator, by his will, bequeathed sums to his four sons absolutely, and other sums to his four daughters for their lives, with remainder to their children. One of his sons afterwards died; and the testator thereupon made a codicil as follows: "In consequence of the death of my son, J. T., I have opened my will, and now wish to bequeath to my wife, £600 a year; to my three sons, £2000 each; to my four daughters, £300 a year each: and, at the death of my wife, the £600 a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." Held, that the gifts by the codicil were in addition to those by the will; and that the annual sums given by the codicil were perpetual, and not mere life annuities.

James Tweedale, by his will, dated the 16th of November 1820, after directing all his just debts, funeral expenses, and the charges of proving his will to be fully paid by his executors thereafter named, gave and bequeathed unto his wife, the Defendant Caroline Tweedale, the sum of £150 for her immediate occasions, and all the stock of provisions, wines and liquors that [454] should be in and about his house at Brighton at the time of his decease; and he also gave and bequeathed to her and her assigns for life the use and occupation of his house with the appurtenances, and also of the household furniture, plate, linen, china and fixtures therein; and from and after her decease, he gave and bequeathed the house, furniture and effects to trustees, their executors, administrators and assigns, upon trust to be sold in such manner as they should think proper, and the produce to be by them retained and applied upon the trusts thereafter declared concerning his residuary estate; and he gave and bequeathed to his wife and the trustees all the residue of his goods, chattels and personal estate, upon trust to sell and convert into ready money all such parts thereof as should not consist of money or securities for money, and to call in and collect such parts thereof as should consist of monies or securities for money, and to invest the same monies in the usual securities; and to stand possessed thereof upon the trusts following, that is to say, as to the sum of £8000 part thereof, upon trust to pay the interest thereof to his wife, for her life, and, after her decease, upon trust to stand possessed of the £8000 and the interest arising therefrom, in the manner thereafter declared concerning the same: and, as to the sum of £2000, other part of the principal trust estate, upon trust to pay the interest thereof to his son James Charles Tweedale, or his assigns, until he should attain the age of 25 years, and then upon trust to pay the same to him or them, to and for his or their absolute use and benefit: and as to the sums of £3000 and £4000, and £4000, other parts of the principal trust estate, upon the same trusts for the benefit of his (the testator's) sons Farquharson Tweedale, the Plaintiff, William Hutton Tweedale, and Alexander Tweedale respectively, as [455] were thereinbefore declared respecting the legacy of £2000 for his son James Charles Tweedale. Provided that in case any or either of his sons should die under the age of 25 years leaving issue, then that the legacy of any or either of them so dying and leaving such issue should go to such his or their issue equally to be divided between them, if more than one, share and share alike, and if but one, to such only child, as and when they should severally attain the age of 21 years, such issue taking only the share to which their, his or her own deceased parent or parents was or were or otherwise would have been entitled to; and the interest, dividends and annual produce thereof to be, in the meantime, applied for their, his or her education and maintenance respectively; but in case any or either of the testator's sons should die under the age of 25 years without leaving issue, then the legacy of him or them so dying without any such issue (or such part thereof as should then remain unapplied to the purposes thereafter mentioned) should go to the survivors or survivor of

them, and the issue of any one or more of them who should be dead leaving issue, at such ages, days or times, and in such manner as his or their original legacy was thereinbefore directed to be paid to him or them. The testator then provided for the advancement of his sons out of their legacies: and then declared that his trustees should stand possessed of £16,000, other part of the trust estate, upon trust to pay to his wife a sufficient part of the interest thereof, for the purpose of maintaining and educating his four daughters, Caroline Ann Tweedale, Emily Sophia Tweedale, Louisa Tweedale and Susan Rose Tweedale, until they should attain 21, and, when they should severally attain that age, upon trust to appropriate £4000 for the benefit of each of them, and to stand possessed thereof, in trust for their [456] separate use for life, without power of anticipation; and when they should die leaving issue, to transfer their fortunes to their respective issue equally, if more than one, and if but one, to such only child as and when they, he or she should attain 21, and the interest thereof to be, in the meantime, applied for their, his or her education and maintenance, or in any other manner for their advancement in life, respectively, at the discretion of the trustees, together with all or such part of the principal as the trustees should think proper: and as to the residue of the trust estate, upon trust to pay the interest thereof to his wife, Caroline Tweedale, for her life, and, after her decease, to stand possessed of such residue, and also of the £8000 thereinbefore appropriated for the benefit of his wife during her life, for the equal benefit of his four daughters and their respective issue, and to be payable at the same times and in the same manner as thereinbefore directed concerning their original fortunes. The testator then provided for the survivorship of his daughters' fortunes on their dying under 21 without leaving issue who should attain that age; and in case any of his daughters should marry with the approbation of the trustees, then he empowered the trustees to give to the husband of any daughter so marrying, for his life, the interest of the fortune of such daughter or such part thereof as the trustees in their discretion should think proper, in the event of his surviving his wife: and the testator lastly declared that, in case of his having any child or children after making his will, or born in due time after his death, such child or children and their issue should be entitled to an equal share or shares of the fortunes thereinbefore appropriated for the benefit of his daughters and their issue, and to be payable to them in the same manner, and with the same provisions, in all respects: and he appointed his [457] wife and James John Farquharson, William Donaldson and John Frazer executrix and executors of his will.

In the early part of the year 1826 the testator's eldest son, James Charles Tweedale, died unmarried, leaving property to the amount of about £5000; the interest of which, by his will, he bequeathed to his mother, for her life, and, after her death, the principal to his brothers and sisters equally.

On the 21st of November 1826 the testator made a codicil to his will in the following words:—"In consequence of the death of my son, James Tweedale, I have opened my will, and now wish to bequeath to my wife, Caroline Tweedale, £600 a year; to my three sons, £2000 each; and to my four daughters, £300 a year each; and, at the death of my wife, the £600 a year to be equally divided amongst my four daughters. This memorandum will, I hope, be attended to in case of death before I make the legal alteration in my will." In the year 1831 Louisa Tweedale, one of the testator's daughters, died: and on the 6th of July 1839 the testator died abroad. He left the Defendants, Caroline Tweedale, his widow, and Farquharson Tweedale, the Plaintiff William Hutton Tweedale, the Defendant Alexander Tweedale, Caroline Ann Tweedale, Emily Sophia Tweedale and Susan Rose, who had married Charles Lushington, his only children and next of kin. The Defendants, F. Tweedale and Alexander Tweedale, and the Plaintiff had attained the age of 25 years. The bill alleged that doubts had arisen as to the proper construction of the will and codicil; and that the Plaintiff was advised that the benefits by the codicil given to himself and his mother and his brothers and sisters were additional to the benefits given to them by the will; or that, [458] if they were substitutional for the benefits given by the will, then they were substitutional for all those benefits, and the residue of the testator's estate was wholly undisposed of: but that the widow and daughters of the testator alleged that some other construction ought to be put upon the will and codicil.

The bill prayed that the testator's estate might be administered under the direction of the Court, and that the rights and interests of the Plaintiff and the Defendants might be ascertained and declared. The Defendants submitted the construction of the will and codicil, and their rights and interests under them, to the judgment of the Court.

The questions at the hearing of the cause were, first, whether the bequests made by the codicil were cumulative or substitutional: second, whether the annuities given by the codicil to the widow and daughters were perpetual or only life annuities.

Mr. Knight Bruce and Mr. G. L. Russell, for the Plaintiff. The testator begins his codicil by reciting the death of his son, James Charles Tweedale. That recital affords a key to his intention: for, by the death of his son, a portion of his property was set at liberty, and he was enabled and intended to increase the legacies which, by his will, he had given to his surviving sons: we submit, therefore, that there can be no doubt that the legacies given by the codicil to the surviving sons are cumulative; and the only question upon this point is whether the incomes given by the same instrument to the widow and daughters are open to the same consideration.⁽¹⁾ Now, by the will, the testator gives the interest [459] of £8000 (which at five per cent. is £400 a year) to his wife; and the interest of four sums of £4000 each, which at the same rate is £200 a year, to his daughters. By the codicil he gives £600 a year to his wife, and £300 a year to each of his daughters: it is manifest, therefore, that the provisions made for those ladies by the codicil are substitutional for the provisions made for them by the will.

With respect to the other question, namely, whether the annuities given by the codicil were perpetual or merely life annuities, we contend that where income is given, simply and without reference to any capital by which it is to be produced, the donee takes it for life only. Besides, in this case, the testator, when he gave the £600 a year to his wife, did not add the words "for her life;" although, as he gave that sum over on her death, he clearly intended her to take it for her life only. His impression was that a gift of a certain sum per annum was sufficient of itself to denote a life interest. As he had given capital to his sons by his will, so he gave them capital by his codicil; and, as he had given income to his wife and daughters by his will, so he meant to give them income by his codicil.

Mr. Jacob and Mr. Nicholl, for the widow and sons except the Plaintiff, contended that all the gifts by the codicil were cumulative.

Mr. Wood, for the testator's daughters, contended that the gifts by the codicil were, all of them, cumulative; and that the sums of £300 a year each were given absolutely, and therefore each of the daughters was entitled to a capital sum producing that yearly sum. *Rawlings v. Jennings* (13 Ves. 39).

[460] Mr. Stuart appeared for the trustees and executors.

THE VICE-CHANCELLOR. I take it to be quite clear that all the legacies given by the codicil are cumulative: they are totally distinct legacies.

There is nothing to assimilate this case to the case of *The Duke of St. Albans v. Beauchamp* (2 Atk. 636), where, owing to the identity of the things given, the legacies were held to be substitutional.

With respect to the annuities, I have always thought that, if there is a gift to A. of £100 a year simply, it is a gift to him absolutely of the fund that would produce the £100 a year.

Mr. Knight Bruce, in reply. If a testator gives £300 a year in the three per cents., or the interest of a sum secured on mortgage, it is a gift of the capital; but it is not so where, as in the present case, a mere annual sum is given without reference to the capital. In *Rawlings v. Jennings* there was an express reference to the funds which produced the annual sums given.

THE VICE-CHANCELLOR. My opinion is that the words of this codicil are so unambiguous that the legacies bequeathed by it must be held to be cumulative: but I will give you leave to look into the authorities on the question relating to the annuities.

(1) The bill alleged that *all* the gifts in the codicil were cumulative. See the preceding page.

Let the cause be placed in the paper again on Thursday next.

[461] Jan. 30. Mr. Knight Bruce and Mr. G. L. Russell referred to *Savery v. Dyer* (Amb. 139), in which Lord Hardwicke says: "There is a difference between an annuity existing at the time of the will, and one created by it *de novo*. If one gives by will, an annuity not existing before, to A., A. shall have it only for life." They cited also *Neal v. Hanbury* (Prec. Ch. 173): and said that the testator, when he intended to give capital, knew how to express himself accurately; for he gave to his sons £2000 each.

Mr. Jacob and Mr. Nicholl contended that the daughters were entitled to nothing more than annual sums of £300 and £600 a year for their lives, subject, as to the £600 a year, to the life interest of their mother: and they cited *Dawson v. Hearn* (1 Russ. & Myl. 606).

Mr. Wood submitted that the annuities were given in perpetuity: and cited *Elton v. Sheppard* (1 Bro. C. C. 532), *Haig v. Swiney* (1 Sim. & Stu. 487), *Page v. Leapingwell* (18 Ves. 463), and *Sheepshanks v. Williams*.(1) He added that the passage cited from [462] Ambler was nothing more than a *dictum* by Lord Hardwicke; and that the testator evidently thought that the [463] annuity of £600 a year was perpetual and would have gone to his wife's executors, unless he had given it over, on her death.

THE VICE-CHANCELLOR, in the course of the argument, made the following observations on *Savery v. Dyer* and *Sheepshanks v. Williams*.

(1) Decided by the Vice-Chancellor in 1831 but not reported. The reporter was furnished with the following note of the case:—

"The said testator, James Burgis, by his will, bearing date the 8th day of September 1820, bequeathed to his, the said testator's, sister, Mary Brooke, an annuity of £300 for her life, and, at her death, one-sixth part of the said annuity to the Corporation for the Relief of Poor Clergymen, &c., in Essex, and one-sixth part to the similar institution in Middlesex, and one-sixth part to the Rector of Hanworth, Middlesex, in trust to promote the education of youth in that parish; one-sixth part to the Vicar of Braintree, in Essex, in trust for the same purpose in that parish; one-sixth part to the Clergy Orphan School at St. John's Wood, Middlesex; and the remaining one-sixth part the said testator empowered his said sister to dispose of by will: to Henrietta Goode Seale (eldest daughter of the Rev. Barnard Seale), an annuity of £300; to each of the four daughters of John Blunt, Esq., of Woodford, Essex, an annuity of £50; and the said testator declared that the above annuities, arising from foreign securities, might, with the consent of the respective parties interested therein, be converted into Government securities, making up the respective deficiencies, if any existed, by the said transfer out of the residue of his property, taking care, first, to complete the charitable bequests; and, if there should be any surplus, he desired it might be divided amongst the several annuitants, proportionably to their respective bequests.

"Declare that the annuities by the will of the said testator given to the Corporation for the Relief of Poor Clergymen, &c., in Essex, the similar institution in Middlesex, &c., the Rector of Hanworth, Middlesex, the Vicar of Braintree, Essex, and the Clergy Orphan School at St. John's Wood, Middlesex, and to the said Plaintiff, Henrietta Goode Sheepshanks, the Plaintiff, Mary Goff Terrington, the Plaintiff, Lydia Maria Hanson, the Plaintiff, Elizabeth Blunt and the Plaintiff, Caroline Blunt, respectively, are perpetual annuities; and declare that the one-sixth part of the annuity of £300 a year, which, by the will of the said testator, his sister, Mary Brooke, was empowered to dispose of by will, has lapsed and fallen into the residue of the said testator's estate; and declare that the residue of the said testator's estate is divisible between the Plaintiff, Henrietta Goode Sheepshanks, the Plaintiff, Mary Goff Terrington, the Plaintiff, Lydia Maria Hanson, the Plaintiff, Elizabeth Blunt, and the Plaintiff, Caroline Blunt, proportionally to their respective bequests, so that six tenth parts of the said residue will belong to the said Plaintiff, Henrietta Goode Sheepshanks; one tenth part thereof to the said Plaintiff, Mary Goff Terrington; one tenth part thereof to the Plaintiff, Lydia Maria Hanson; one tenth part thereof to the said Plaintiff, Elizabeth Blunt; and the remaining one tenth part thereof to the said Plaintiff, Caroline Blunt."

It is strange that any question at all should have been made in *Savery v. Dyer*. The thing given was expressly defined by the will, namely, an annuity of £50 a year during the life of the executor. For the decision of the question before Lord Hardwicke it was not necessary to say what is attributed to him in the report.

In *Sheepshanks v. Williams* the testator, after giving several annuities, desired that, if there should be any surplus of his personal estate, it should be divided amongst the several annuitants proportionably to their respective bequests: And the Court declared that the residue was divisible accordingly, and that the daughters of John Blunt (to each of whom an annuity of £50 was given) were entitled to share the residue equally, as between themselves: therefore the Court must have held that the annuities were perpetual; or else it would have directed them to be valued.

At the conclusion of the argument,

THE VICE-CHANCELLOR [Sir L. Shadwell] delivered judgment as follows:—I do not see any substantial difference between a gift of an annuity out of personal estate, generally, and a [464] gift of an annuity to be satisfied out of a particular fund: because an annuity, when it is given generally, is to be provided for out of all the personal estate: and if a gift of £300 a year out of the testator's funded property would give to the annuitant the absolute interest in so much of the funded property as would produce £300 a year; what is the substantial difference between that gift and a gift of £300 a year simply, to be satisfied out of so much of the personal estate as would produce the sum? I confess that I do not see any difference myself. I am very much inclined to think that the true construction is that if it is given simply, it is given absolutely.

The decision in *Sheepshanks v. Williams* seems to be a decision on the point; and, as the decree does not appear to have been made by consent, or to have been appealed from, I take it to be correct.

Declare that, according to the true construction of the will and codicil, the annuities and the legacies given by the codicil are additional to those given by the will, and that Caroline Ann Tweedale, Emily Sophia Tweedale and Susan Rose Lushington are each entitled, under the codicil, to an annuity of £300 in perpetuity; and that, under the codicil, they will also become entitled in perpetuity, on the death of their mother, to one equal fourth part of the annuity of £600, the remaining one-fourth part thereof having lapsed by the death of Louisa Tweedale in the lifetime of the testator.(1)

[465] MURRAY v. TANCRED. Jan. 24, 1840.

Will. Construction. Legacy.

Testator bequeathed his residuary estate in trust for his nephew for life; and, after his death, in trust to transfer the whole to his children by any lawful marriage, on the day of their attaining the age of 21. Held, that the time of payment was annexed to the gift, and, therefore, none of the nephew's children would be entitled to take unless they attained 21.

Robert Scott, Esq., by his will, dated the 18th of September 1804, after disposing of a part of his real estate, and giving certain legacies and annuities, gave all the rest and remainder of his property, real and personal, in trust, in the first place, to pay the interest, dividends, rents and produce thereof to the use of his nephew, Charles Scott Murray, for his life, and, after his decease, *to transfer the whole of such residuary estate to his children by any lawful marriage, on the day of their attaining the age of 21 years*, in such shares and proportions as he, Charles Scott Murray, should have appointed by any deed or last will and testament; and, in default of such appointment, to the eldest son, if there should be one, otherwise to all the daughters, equally:

(1) William Hutton Tweedale and Farquharson Tweedale intended to appeal from the above decision, so far as it declared the annuities to be annuities in perpetuity: but the appeal was compromised. See *Blewitt v. Roberts*, post, 491.

and, in case Charles Scott Murray should die without issue, or if none of the issue should live to attain the age of 21 years, then the testator gave his residuary estate, real and personal, to Henry William Tancred and Henry Parnell, in equal shares, or to the survivor of them who should be living at the time such contingency took place, and their heirs, executors, administrators and assigns: and, in case neither of them should be living at that time, then the testator gave the whole of his residuary estate to William Brodie, his heirs, executors, administrators and assigns.

The testator died on the 6th of February 1808.

By the articles made in contemplation of the marriage of Charles Scott Murray with Eliza Buller, C. S. Mur-[466]-ray covenanted with the trustees therein named, that, in case there should be any child or children of the marriage, he would make, do and execute such acts and deeds as should be reasonably required for making a valid appointment or appointments in favour of such child or children, in exercise of the power of appointment given to him by the testator's will over the residuary estate thereby devised and bequeathed, subject to his own life interest therein, of the portion or portions following, namely, if there should be only one such child, then the sum of £20,000 for the portion of such child, or if there should be two such children, then the sum of £25,000 for the portions of such children, and, if there should be three or more such children, then the sum of £30,000 for the portions of such three or more children; and, in the event of there being two or more such children, then the sum of £25,000 or £30,000, as the case might be, should, by such appointment or appointments as aforesaid, be directed to be divided between such children, in such shares and proportions as Charles Scott Murray should, by deed or will, appoint, and, in default of such appointment, then that the sum of £25,000 or £30,000, as the case might be, should be directed to be divided between the said children in equal shares, their respective executors, administrators and assigns.

There was issue of the marriage two children, Charles Robert Scott Murray and Augusta Murray.

Charles Scott Murray made his will, dated the 15th of February 1826, part whereof was in the following words: "This is the last will and testament of me, Charles Scott Murray, relative to the personal property of the late Robert Scott, now the estate of the trustees [467] of the late Robert Scott: I give and bequeath to my daughter, Augusta, an annuity of £300, payable half-yearly out of the estate of Robert Scott, for the term of her natural life; I likewise give and bequeath to my said daughter, out of the said estate, an annuity of £300, payable half-yearly, while she remains unmarried; these annuities being in addition to the share she is entitled to by my marriage settlement, which, if not thereby sufficiently secured to her, I hereby give and bequeath to her."

Charles Scott Murray died on the 24th of April 1837.

Charles Robert Scott Murray attained 21 pending the suit; but Augusta Murray was still an infant.

Charles Robert Scott Murray, after he had attained 21, presented a petition in the cause, stating that the Petitioner proposed to leave three sums of stock, belonging to the residuary estate of Robert Scott, standing in the name of the Accountant-General, for the purpose of paying the annuity of £300 a year to the infant until she married, and the other annuity of £300 a year during her life, and the sum of £12,500 to which she was entitled under the marriage articles and will of her late father; and the Petitioner submitted that, until Augusta Murray should attain 21, the dividends of those three sums of stock would be payable to the Petitioner, he being entitled to the remainder of Robert Scott's estate. The petition prayed that it might be declared whether Augusta Murray was entitled to an absolute interest in the annuity of £300 for her life, and the other annuity of £300 until she married, and in the £12,500, or whether she was only entitled thereto, respectively, in the event of her attaining 21.

[468] Mr. Jacob, for the Petitioner, said that, under the will of Robert Scott, Charles Scott Murray could not make any appointment in favour of his children, which would give them a vested interest before they attained 21; and, consequently, the intermediate dividends of the sums of stock mentioned in the petition belonged to the Petitioner.

Mr. G. Richards and Mr. Matcham, for the infant Defendant Augusta Murray, contended that the infant Defendant took a present interest in the two annuities of £300, and the sum of £12,500. They said that Robert Scott, in that part of his will on which the question arose, used the word *transfer*, which implied a present interest; that, according to the construction contended for on the Petitioner's behalf, the infant's father could not have made a settlement on her, if she had married under 21; that Robert Scott, in disposing of his property in default of appointment to the eldest son, if there should be one, otherwise to all the daughters of Charles Scott Murray, did not mention the age of 21.

They cited *Wadley v. North* (3 Ves. 364).

Mr. Knight Bruce and Mr. G. L. Russell appeared for the trustees.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The original testator gives his residuary estate to trustees, in trust to pay the income to his nephew, Charles Scott Murray, for his life, and, after his decease, to transfer the whole to the children of his nephew on [469] the day of their attaining the age of 21 years; there is, therefore, no time of payment disannexed from the gift; but the time of payment is so annexed to the gift that it is necessary for the children to attain 21 in order to entitle them to take any share of the property under an appointment by their father. The testator then proceeds to dispose of his property in default of appointment; but the words, "and in default of such appointment," &c., which he uses for that purpose, do not begin a new sentence, but are governed by the preceding word "transfer;" and then he gives the property over, on a failure of issue generally or in the event of none of the issue attaining 21. Charles Scott Murray might, under his uncle's will, appoint the shares in which his children were to take the trust property; but he could not vary the time at which they were to take those shares; and, as I am of opinion that no child could take a share unless it was a child who should attain 21, all that can be done at present with respect to Miss Murray's interest is to secure in Court sufficient sums of stock to produce the two annuities of £300 and the £12,500, in case she shall eventually become entitled to them by attaining 21.

[470] MANNERS v. ROWLEY. Jan. 29, 1840.

Pleading. Demurrer. Multifariousness. Joint Stock Company.
Construction of 7 Geo. 4, c. 46.

If a Plaintiff has one remedy against A., and that remedy and another against B. for the same cause of suit, neither A. nor B. can demur for multifariousness, on the ground that the bill seeks to enforce both the remedies against B. and only one of them against A.

A joint stock banking company, under 7 Geo. 4, c. 46, may sue, by their public officer, members of the company jointly with strangers.

The bill was filed, under 7 Geo. 4, c. 46, sect. 9,(1) by a joint stock banking company, in the name of one of their public officers, against persons, some of whom were members of the banking company and others were not, to recover monies which the Defendants had improperly drawn out of the bank, and applied for the purposes of an undertaking in which they were jointly engaged. The bill prayed, as against all the Defendants, for an account and payment of the sums so drawn out of the bank; and, as against those Defendants who were partners in the bank, it further prayed that the banking company might be declared to have a lien on the shares of those Defendants in the bank, for what should be found due on taking the account.

On the argument of a demurrer,

Mr. Knight Bruce and Mr. Stinton, in support of it, said that the bill was multifarious, as it prayed totally different relief against some of the Defendants from what it did against others of them.

(1) This sect., and the sect. of 1 & 2 Vict. c. 96, after referred to, are set forth in the judgment.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case made by the bill is the same as against all the Defendants. It may easily happen that the Plaintiff may have one remedy with regard to one Defendant, and that, with regard to another Defendant, he may have that remedy and another in addition to it; and, in my [471] opinion, one Defendant has no right to complain because the Plaintiff seeks to enforce, against another Defendant, all the remedies which he is entitled to against that other Defendant.

Another ground on which the Defendant's counsel attempted to support the demurrer was that the bill was filed before the passing of the 1st & 2d Vict. c. 96, and that the 7 Geo. 4, c. 46, did not authorize suits to be instituted by a joint stock banking company, in the name of one of their public officers, against individuals, some of whom were members of that company and others were not; as was evident from the Legislature having thought it necessary to pass the 1st & 2d Vict. c. 96, for the purpose of conferring that authority on such companies. *Macmahon v. Upton* (*ante*, vol. ii. p. 473).

Mr. Jacob and Mr. Hubback, in support of the bill, said that the Act of the 7th Geo. 4, c. 46, was, of itself, amply sufficient to support the present suit: that there was a difficulty at law in the same person being both Plaintiff and Defendant in the action; and that the Act of 1st & 2d Vict. c. 96, was passed in order to obviate that difficulty: that that Act had made the case stronger than it was before, in equity, but was not necessary for the purpose of enabling the public officer to sustain the suit.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I must say that, before the passing of the Act of 1st & 2d Vict. c. 96, I should have thought that, under [472] the Act of 7 Geo. 4, c. 46, the public officer of a joint stock banking company might have sued a person who was a member of that company jointly with a person who was not a member of it. The 9th sect. enacts: "That all actions and suits, and also all petitions to found any commission of bankruptcy against any person or persons, who may be at any time indebted to any such co-partnership carrying on business under the provisions of this Act, and all proceedings at law or in equity under any commission of bankruptcy, and all other proceedings at law or in equity to be commenced or instituted for or on behalf of any such co-partnership against any person or persons, bodies politic or corporate, or others, whether members of such co-partnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such co-partnership, or for any other matter relating to the concerns of such co-partnership, shall and lawfully may, from and after the passing of this Act, be commenced or instituted and prosecuted in the name of any one of the public officers nominated as aforesaid for the time being of such co-partnership, as the nominal Plaintiff or Petitioner for and on behalf of such co-partnership." Those words seem to me to comprehend all persons whom it may be necessary to make Defendants to a suit in equity, whether they are members of the company or not. There may possibly have been some difficulty in applying the statute at law; but I think that a suit in equity between parties standing in the relation to each other, which the parties to this suit do, is expressly within the words of the Act.

The only question is whether I am forbidden to put that construction on the 7th Geo. 4, because the 1st [473] & 2d Vict. contains the words, "Be it enacted." I think I am not.

The Act of 1st & 2d Vict., after reciting the Act of 7 Geo. 4, and another Act of 6 Geo. 4, proceeds thus: "And whereas it is expedient that the said Acts should, for a limited time, be amended so far as relates to the powers enabling any such co-partnership, not being a body corporate, to sue any of its own members, and the powers enabling any member of any such co-partnership, not being a body corporate, to sue the said co-partnership: Be it therefore enacted that any person now being or having been or who may hereafter be or have been a member of any co-partnership now carrying on, or which may hereafter carry on, the business of banking under the provisions of the said recited Acts, may, at any time during the continuance of this Act, in respect of any demand which such person may have, either solely or jointly with any other person, against the said co-partnership or the funds or property thereof, commence and prosecute, either solely or jointly with any other person (as the case may require), any action, suit, or other proceeding at law or in equity,

against any public officer appointed or to be appointed, under the provisions of the said Acts, to sue and be sued on the behalf of the said co-partnership : and that any such public officer may, in his own name, commence and prosecute any action, suit, or other proceeding at law or in equity, against any person being or having been a member of the said co-partnership, either alone or jointly with any other person against whom any such co-partnership has or may have any demand whatsoever : and that every person being or having been a member of any such co-partnership shall, either solely or jointly with any other person (as the case may re-[474]-quire), be capable of proceeding against any such co-partnership by their public officer, and be liable to be proceeded against, by or for the benefit of the said co-partnership, by such public officer as aforesaid, by such proceedings and with the same legal consequences as if such person had not been a member of the said co-partnership ; and that no action or suit shall in anywise be affected or defeated by reason of the Plaintiffs or Defendants, or any of them respectively, or any other person in whom any interest may be averred, or who may be in anywise interested or concerned in such action, being or having been a member of the said co-partnership ; and that all such actions, suits and proceedings shall be conducted and have effect as if the same had been between strangers." Now, with respect to this Act, it is very remarkable that it does not take notice, in the recitals, of the very case for which it afterwards professes to provide, namely, the case of a company suing, in the name of their public officer, persons who are members of the company jointly with persons who are not members ; consequently the reciting part of the Act does not point to the very case on which the amendment is constructed.

My opinion is that I am not precluded, because the Act of the 1st & 2d Vict. uses the words, "Be it enacted," from holding that, under the Act of the 7 Geo. 4, the public officer of a joint stock banking company may sue a person who is a member of the company, jointly with a person who is not a member.

Demurrer overruled.

[475] FRY v. RICHARDSON. Jan. 30, 1840.

Plea and Pleading. New Orders. Costs. Plea.

Plaintiff sued as administrator. Defendant pleaded that Plaintiff was not administrator, but did not deny by answer the usual charge as to documents. Held, that the plea was not bad on that account.

Under the 31st Order of 1828, if a plea to the whole bill is argued and allowed, the Plaintiff, although he undertakes to reply to the plea, must pay the costs of it ; but the other costs of the suit will be reserved.

The Plaintiff sued as administrator to an intestate ; and the bill contained the usual charge as to the Defendant having documents in his possession. The Defendant pleaded that the Plaintiff was not administrator ; but did not deny, by answer or otherwise, the charge relating to the documents.

THE VICE-CHANCELLOR held that as the Defendant had pleaded that the Plaintiff was not administrator, it was not necessary for him to deny the charge as to documents.

Mr. Knight Bruce and Mr. Koe appeared in support of the plea, and Mr. Rolt, in support of the bill.

The plea, which was to the whole bill, having been allowed on argument, and the Defendant having undertaken to reply to it, the question was whether, under the Thirty-first Order of 1828, the costs of the plea, as well as the further costs of the suit, ought to be reserved.

The Thirty-first Order directs that, upon the allowance of any plea or demurrer, the Plaintiff shall pay to the Defendant the taxed costs thereof ; and when the plea or demurrer is to the whole bill, then the further taxed costs of the suit also ; unless in the case of a plea, the [476] Plaintiff shall undertake to reply thereto ; and then

the costs shall be reserved, unless the Court shall think fit to make other order to the contrary.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Plaintiff might have saved the costs of arguing the plea by submitting to it and filing a replication; and that the true construction of the order was that the costs of the plea should be paid by the Plaintiff; but that the other costs of the suit should be reserved.

[476] THE MAYOR AND CORPORATION OF DARTMOUTH v. HOLDSWORTH.
Jan. 31, 1840.

[Cf. *Lyell v. Kennedy* (No. 2), 1883, 9 App. Cas. 81.]

Production of Documents. Confidential Communications.

The schedule to a Defendant's answer of the documents in his power contained as follows:—

"Letters from Messrs. K. & C., the Defendant's solicitors, to Mr. F., one of the witnesses examined for the Defendant at the trial of the action, bearing date," &c.: and the Defendant in the body of his answer stated that all the documents in the schedule related to and were connected with the matters in question in the suit, and were prepared and written, after the institution of it, for the purpose of the Defendant's defence to the suit and for the purpose of the action between the parties to which the suit related. Held, that the letters were not sufficiently characterized as being of a confidential nature to protect them from being produced.

The Defendant, being required by the supplemental bill in this suit to set forth a list of documents in his power relating to the matters in question in the original and supplemental causes, annexed a schedule of such documents to his further answer to the supplemental bill: and in the body of the answer he said that all the papers enumerated in the schedule related to and were connected with the matters in question in the supplemental suit and in the original suit which was still subsisting between the parties, and were prepared and written after [477] the institution of the original suit for the purpose of the Defendant's defence in that and the supplemental suit, and for the purpose of an action between the parties to which such suits related, and which was mentioned or referred to in his former answer to the supplemental bill.(1)

Amongst the documents comprised in the schedule were certain letters which the Defendant's solicitor had written to a person who was examined as a witness at the trial of the action.

On the hearing of a motion on behalf of the Plaintiffs, for the production of the documents mentioned in the schedule, one question was whether the Defendant ought to be compelled to produce those letters.

Mr. Jacob and Mr. Teed, in support of the motion, cited *Storey v. Lord George Lennox* (1 Myl. & Cr. 525; see 537).

Mr. Knight Bruce and Mr. Wigram, for the Defendant. The point did not arise in *Storey v. Lord George Lennox*; and, therefore, the Lord Chancellor said that [478] if he were to give any opinion upon it, it would be extra-judicial. It is sworn in the answer that all the letters in question were written by the Defendant's solicitor after the institution of the suit, and for the purpose of the Defendant's defence to the suit, and for the purpose of the action: we submit, therefore, that the Court cannot order them to be produced.

(1) The supplemental bill prayed that the Defendant might make a full disclosure and discovery of all the matters therein mentioned; that that bill might be considered as supplemental to the original bill, and that the Plaintiffs might have the benefit thereof accordingly, and that the Plaintiffs might have the relief prayed by the original bill: and it prayed also for an injunction to restrain the Defendant from entering up judgment on the verdict which he had obtained in the action, and from issuing execution thereon against the Plaintiffs' estate.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Court will not order letters written by a client to his solicitor, or by the country solicitor to his town agent, relating to the subject of a suit (see *Hughes v. Biddulph*, 4 Russ. 190; and *Vent v. Pacey*, *Ibid.* 193), to be produced. But the letters in this case did not pass between the client and his solicitor or between the solicitor and his agent; but were written by the Defendant's solicitor to a witness who was examined for the Defendant at the trial of the action. I cannot infer that they contained confidential communications merely because they were written by the solicitor to A. B. The case would have been different if either the answer or the schedule had stated that the letters contained confidential communications: but I do not think that what is stated respecting them in the body of the answer or in the schedule sufficiently gives them the character of being of a confidential nature: the Plaintiff, therefore, is entitled to have them produced.

[479] CRAWFORD v. FISHER. Jan. 31, Feb. 1, 1840.

Interpleader. Injunction. Practice.

Where one of the Defendants to a bill of interpleader is suing the Plaintiff in equity, and another is suing him at law, the Court will grant an injunction to restrain the suit in equity as well as the action at law.

This was an interpleading suit respecting a balance, amounting to £496, in the hands of the Plaintiffs. One of the Defendants had brought an action against the Plaintiffs to recover that sum: and the other Defendant had filed a bill in Chancery against them, praying that the necessary accounts might be taken to ascertain the balance, and that the amount to be found due might be paid to him.

The Plaintiffs paid the £496 into Court, and obtained an injunction restraining the prosecution of the suit, as well as the prosecution of the action.

The Defendant who had filed the bill against the Plaintiff now moved to discharge the order for the injunction.

Mr. Knight Bruce, in support of the motion. Although Lord Eldon decided, in *Morgan v. Marsack* (2 Mer. 107), that legal and equitable claims might be joined in an interpleading suit; yet it is not the rule that a suit in equity is to be stopped by the filing of a bill of interpleader.(1)

[480] Mr. Wigram and Mr. L. Wigram, for the Plaintiffs, said that, in *Warington v. Wheatstone* (Jac. 202), the injunction granted by Lord Eldon restrained the proceedings in the suit in equity, as well as those in the action at law.

Some doubt having been expressed as to this point, THE VICE-CHANCELLOR said that he would direct Reg. Lib. to be searched for the order in *Warington v. Wheatstone*.

Feb. 1. On this day, THE VICE-CHANCELLOR [Sir L. Shadwell] said that he had looked at the order in *Warington v. Wheatstone* in Reg. Lib.; and that the order that was made was to grant an injunction to restrain the action at law, and another injunction to restrain the suit in equity.(2)

(1) Lord Redesdale, in his Treat. on Plead. p. 39, 3d edit., says that, if any suits at law are brought against the Plaintiff in an interpleading suit, he may pray that the claimants may be restrained from proceeding till the right is determined; and, in p. 116, his Lordship says that a bill of interpleader generally prays an injunction to restrain the proceedings of the claimants in some other Court.

(2) The following is an extract from the order in *Warington v. Wheatstone*, in Reg. Lib. (B.) 1820, fo. 1619: "That the Plaintiffs be at liberty to pay the sum of £3000, insured on the life of Samuel Henderson, in the Plaintiffs' bill mentioned, into the bank, with the privity of the Accountant-General, &c., in trust, in this cause; and it is ordered that an injunction be awarded against the Defendants Sir F. G. Fawke, and Dame Mary Ann, his wife, to restrain them from proceeding in the action at law commenced by them against the Plaintiffs, as in the Plaintiffs' bill mentioned; and it

Motion to dissolve the injunction refused.

Mr. Jacob and Mr. Long appeared for the Defendant who had brought the action against the Plaintiffs.

[481] BARNES v. TWEDDLE. Feb. 1, 1840.

Dismissal. Practice. New Orders. Supplemental Answer. Exception.

Where a Defendant, after his answer is to be deemed sufficient, files a supplemental answer, the Plaintiff is not allowed two months to except to it; but, as it cannot be excepted to without leave, it is to be deemed sufficient from the time when it is filed; and therefore the Defendant may move to dismiss at the end of two months from the filing of the supplemental answer.

A supplemental answer cannot be excepted to without leave; and therefore it is to be deemed sufficient, *primâ facie*, from the time when it is filed.

Motion, of which notice was given on the 8th of January, to dismiss the bill for want of prosecution.

The answer was filed in February 1839. On the 5th of August following the Defendant, who had obtained the leave of the Court for that purpose, filed a supplemental answer, in order to state a fact that had occurred since he put in his former answer.

The question was whether the time at which the Defendant was entitled to move to dismiss had arrived.

By the 4th Order of 1828, the Plaintiff is allowed two months from the filing of the answer to except to it; and, if he does not except within that time, the answer is thenceforth to be deemed sufficient. By the 16th Amended Order, if the Plaintiff does not proceed in the cause within two months after the time when the answer is to be deemed sufficient, the Defendant may, at the expiration of those two months, move to dismiss; and, by the 19th Amended Order, the time between the last seal after Trinity term and the first seal before Michaelmas term is not to be reckoned in computing the time allowed for excepting to the answer.

In this case, therefore, the time for moving to dismiss had arrived, unless the Plaintiff, after he had filed his supplemental answer, was entitled to be allowed two [482] periods of two months each for proceeding with the cause, in addition to the interval between the last seal after Trinity term and the first seal before Michaelmas term.

Mr. Knight Bruce, in support of the motion, said that a supplemental answer could not be excepted to; and therefore it must be deemed to be sufficient from the time when it was filed; and, consequently, the time for moving to dismiss had arrived. *Marriott v. Tarpley* (*ante*, vol. viii. p. 18), *Attorney-General v. Jones* (*ante*, vol. v. p. 246).

Mr. Jacob, for the Plaintiff. The two answers form but one document; and the whole defence is not complete until both of them are filed. The effect of the supplemental answer may be to render the original answer insufficient, although it was sufficient before. The facts stated in the supplemental answer may render it material for the Defendant to answer some questions which it was not material for him to answer before. Suppose that the Defendant, in the schedule to his original answer, had set forth a list of all the documents in his possession, and then, in his supplemental answer, were to state that none of those documents were in his possession; in that case the original answer would become insufficient. It is not correct to say that a supplemental answer cannot be excepted to.

THE VICE-CHANCELLOR [Sir L. Shadwell]. What I decided in *Marriott v. Tarpley*

is ordered that all the Defendants be restrained by the injunction of this Court from commencing or prosecuting any other action or actions, suit or suits, or other proceedings against the Plaintiffs, or either of them, to recover the monies insured by the policy in the bill mentioned; and it is ordered that the said sum, when so paid into the bank, be laid out," &c.

and *The Attorney-General v. Jones* was that, in computing the time at the expiration of which an answer is to be deemed sufficient, the intervals mentioned in the 19th [483] Order are not to be reckoned; but that, in computing the two months after the answer is to be deemed sufficient, those intervals are to be taken into account.

The Defendant in this case filed his answer; and, after the time for excepting to it had passed, he filed a supplemental answer, having first obtained the leave of the Court so to do; and the question is whether the Plaintiff can except to that supplemental answer.

My opinion is that he cannot except to it without obtaining special leave for that purpose.

If, according to the case put by Mr. Jacob, the Defendant had put in his answer and stated that he had in his custody the documents mentioned in the schedule relating to the matters in the bill, and then had put in a supplemental answer stating that the documents mentioned in the schedule did not relate to the matters in the bill, there would be no statement of what documents he had in his custody or power relating to the matters in the bill; and I apprehend that, in such a case, if the time for excepting to the first answer had expired, the Plaintiff ought to apply to the Court for special leave to except; for it would be incongruous for him to except to the first answer, without leave, after the first answer is to be deemed sufficient.

Where the first answer is, by lapse of time, to be deemed sufficient, and then the Defendant puts in a supplemental answer, having first obtained leave so to do; it must, *prima facie*, be taken to be an answer to which the Defendant cannot except; and therefore the two months from which the Defendant must move to [484] dismiss must be two months from the time when the supplemental answer was filed.

The 19th Order speaks of the time between the last seal after Trinity term and the first seal before Michaelmas term; but, as there now is no seal before Michaelmas term, it must be taken to mean the first day of Michaelmas term.

Mr. Cooper, *amicus curiæ*, said that the Lord Chancellor had so decided.

[484] GRANE v. MITCHELL. Feb. 1, 1840.

Mortgagor and Mortgagee. Foreclosure.

Order made, on motion in a foreclosure suit, to the same effect as a decree, although the order could not be made under the 7th Geo. 2, c. 20, owing to some of the parties interested in the equity of redemption being infants, and consequently incapable of admitting the Plaintiff's title.

Charles Mitchell and his children, some of whom were infants, being entitled to a leasehold dwelling-house under the will of Charles Mitchell's father, assigned it, by way of mortgage, to the Plaintiff. The Plaintiff, who had been for some years in receipt of the rents of the house, filed a bill of foreclosure against Mitchell and his children, alleging that £161 remained due to him on the security of the premises.

A motion was now made, on behalf of the Defendants, for an order to the same effect as the decree which would have been made at the hearing of the cause, C. Mitchell offering to pay to the Plaintiff the £161, together with subsequent interest and costs of the suit, and, in the meantime, that all proceedings in the suit might be stayed.

[485] THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot make an order under the Act 7 Geo. 2, c. 20, as the infant Defendants cannot admit the Plaintiff's title; (1) but I think that the Court has jurisdiction to make the order independently of the statute.

As Charles Mitchell offers, by his counsel, to pay to the Plaintiff the balance of £161, which the Plaintiff states in his bill to remain due to him for principal and interest, together with the interest subsequently become due and the costs of the

(1) See *Lushington v. Price*, *ante*, vol. ix. 'p. 651, where the words of the Act are set forth; and *Praed v. Hull*, 1 Sim. & Stu. 331.

suit to be taxed by the Master, I shall direct that, upon those payments being made, the Plaintiff do reassign the leasehold premises to Charles Mitchell, *as administrator to his father*, who, in that character, will take them as part of the assets of his father and subject to the bequest in favour of himself and his children.

The interests of the children will not be prejudiced by this arrangement: for, as they claim the premises under the bequest in the will, they must take them subject to the right of the administrator to deal with them as part of the assets of the testator. If Charles Mitchell pays more than is due to the mortgagee for principal and interest, he, being the administrator, and, as such, bound to settle the account with the mortgagee, will be responsible to the infants for the excess; and, if he pays less, the infants will be benefited by it.

Mr. Knight Bruce, in support of the motion.

Mr. Jacob, for the Plaintiff.

[486] FOLLAND v. LAMOTTE. Feb. 6, 1840.

Practice. Dismissal.

On the death of a sole Defendant, the Plaintiff filed a bill of revivor and supplement against his heir, executor and devisee, but did not obtain an order to revive. The devisee joined with the heir and executor in moving that the Plaintiff might revive within a week, or that the suit might be dismissed. The motion was refused, because the devisee, who was unaffected by the revivor of the suit, had joined in it.

The original bill was filed by a sole Plaintiff against a sole Defendant. The Defendant afterwards died; whereupon the Plaintiff filed a bill of revivor and supplement against the Defendant's heir, executor and devisee, who were three distinct persons. Such of the Defendants as were required to answer the bill had done so, and their answers had been replied to, but the Plaintiff had not obtained an order to revive the suit.

Mr. Wood now moved, *on behalf of the three Defendants*, that the Plaintiff might obtain an order to revive within a week, or that the suit might be dismissed. He cited Mitf. Treat. p. 69, 4th edition.

Mr. Elderton, for the Plaintiff, said that the devisee had improperly joined in the motion, as he was quite unaffected by the bill, so far as it sought to revive the suit; and that the motion ought to be refused on account of the misjoinder.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The devisee may move to dismiss; but he has nothing to do with the reviving of the suit, the bill being supplemental merely so far as it relates to him. He has, therefore, improperly joined in the motion with the heir and executor, as against whom alone the suit can be revived.

Motion refused, with costs.

[487] TWOPENY v. PEYTON. Feb. 14, 1840.

[S. C. 9 L. J. Ch. (N. S.) 172; 4 Jur. 456. See *In re Coleman*, 1888, 39 Ch. D. 449. Cf. *In re Johnston* [1894], 3 Ch. 204.]

Will. Construction. Bankrupt.

Testatrix bequeathed a share of her residue in trust for her nephew for life. By a codicil, after reciting that her nephew had become a bankrupt and insane, she directed the trustees to apply, during his life, the whole or such part of the interest of the fund, at such times, in such proportions, and in such manner, for the maintenance and support of her nephew, and for no other purpose whatsoever, as they in their discretion should think most expedient. Held, that the nephew's assignees were not entitled to any portion of the provision made for him.

Catherine Peyton made her will, dated the 23d of October 1822; and, after giving several specific and pecuniary legacies, she disposed of the residue of her personal estate in the following words:—"Item, after all my just debts, funeral expenses and legacies are paid, I give to my brother, the Rev. Edward Peyton, for his natural life, the interest of all the property that shall then remain belonging to me in the public funds or Government securities; and, at his death, my will is that all the aforesaid property shall be equally divided between my niece, Mrs. Catherine Hicks, daughter of my late brother, Rear-Admiral Joseph Peyton, and my nephews William Grenfell Peyton and John Strutt Peyton, as also between my nieces Catherine Smith Peyton and Phillis Harriott Peyton: but the share of my property in the public funds that will devolve to my nephew William Grenfell Peyton, on the death of the Rev. Edward Peyton, I give only the interest to my said nephew for his life, and at his death the principal I will to be equally divided between his surviving children." And she appointed several persons, of whom the Plaintiffs Edward Twopeny and William Twopeny were the survivors, executors of her will.

The testatrix made a codicil, dated the 26th of October 1822, which was partly as follows:—"Whereas my nephew William Grenfell Peyton has become a bankrupt. and is also, from the present state of his health, incapable of the management of his own affairs: And [488] whereas it is my wish and intention that the provision made for my said nephew by my said will shall be applied *solely for or towards his maintenance and support* during his life: Now therefore I do hereby revoke the bequest for life to my said nephew in my said will made; and I do hereby bequeath to the executors in my said will named, as trustees thereof, the interest or annual produce of that portion of my personal estate bequeathed by my said will to my said nephew William Grenfell Peyton, upon trust, during the life of my said nephew, to apply *the whole or such part of such interest or annual produce, at such time or times, in such proportion and in such manner for the maintenance and support of my said nephew (and for no other purpose whatsoever)* as they, my said executors, or the survivor of them, or the executors or administrators of such survivor, shall, *in their or his discretion*, think most expedient: and, subject to such trust, I do hereby confirm the bequest, in my said will contained, of the capital of the said trust fund to and in favour of the children of my nephew William Grenfell Peyton."

William Grenfell Peyton became bankrupt in July 1822, and was still uncertificated. Between July and October of the same year he became lunatic.

In 1823 the testatrix died. In March 1837 Edward Peyton, the tenant for life of the residue, died.

The bill was filed by Edward Twopeny and William Twopeny against William Grenfell Peyton and James Arbouin, the surviving assignee under his bankruptcy.

The question was whether the assignee had any right to the provision made for William Grenfell Peyton by the codicil.

[489] Mr. Pole, for the Plaintiffs.

Mr. Jacob and Mr. Lefroy, for William Grenfell Peyton. At the date of the codicil, William Grenfell Peyton was both a bankrupt and a lunatic. The testatrix notices both those circumstances in her codicil, and directs the trustees to apply the income of the trust fund for the maintenance and support of her nephew, and for no other purpose whatsoever; the trustees, therefore, cannot apply the income for any purpose which does not come under the words "maintenance and support." Besides, the trustees are not bound to apply the whole or even any definite portion of the income for those purposes; the amount to be so applied is left to their discretion.

The cases of *Green v. Spicer* (1 Russ. & Myl. 395), *Snowdon v. Dales* (*ante*, vol. vi. p. 524), *Piercy v. Roberts* (1 Myl. & Keen, 4), will be cited for the assignee. But those cases are clearly distinguishable from the present; for, in each of them, the gift took effect before the donee became bankrupt; and the income of the fund was either to be paid to the donee, or to be applied for his benefit generally. The purposes of the gift were not restricted, as they are in this case, to maintenance and support.

Mr. Dickenson, for the assignee, relied on *Snowdon v. Dales*, *Piercy v. Roberts* and *Green v. Spicer*, and said that the last case was almost the same as the present.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is distinguishable from those that have been [490] cited; for, in the first place, there is a gift in the will to the

nephew for his life ; and then the testatrix, in her codicil, after taking notice that her nephew had become a bankrupt and a lunatic, revokes the bequest for life to her nephew, and directs her executors, during his life, to apply for his maintenance and support, and for no other purpose, the whole or such part of the interest of that portion of the residue which, by her will, she had bequeathed in trust for him, at such time or times, in such proportions and in such manner as they should, in their discretion, think most expedient. In my opinion, therefore, it would be impossible for the executors to apply the income of the trust fund for the benefit of the nephew generally, or for any purpose beneficial to him, which is not comprehended under the terms "maintenance and support." Besides, the executors are not directed to apply the whole of the income for the maintenance and support of the nephew, but only such a proportion of it as they, in their discretion, should think expedient.

I am, therefore, of opinion that in this case a trust is created for the mere special purpose of supporting and maintaining the nephew ; and, under such a trust, the assignee cannot take any interest.

[491] REGINALD JAMES BLEWITT v. ROBERTS AND OTHERS. Feb. 17, 1840.

[Reversed, Cr. & Ph. 274 ; 41 E. R. 495 (with note).]

Will. Construction Annuity. Legacy.

Testator bequeathed to his wife £600 per annum for her life, and, after her death, the said annuity to be equally divided between A., B., C., D., E. and F., or the survivors or survivor ; and he bequeathed to the same six persons £100 per annum each, during their lives, with power to leave their annuities at their deaths to any persons they might marry, or any children they might leave ; but in case of either of them dying without exercising such power, then to the survivors or survivor. Held, by the Vice-Chancellor, that the above bequests in favour of A., B., C., D., E. and F., passed the capital of the funds producing the annuities ; but the Lord Chancellor reversed His Honor's decision.

Edward Blewitt made his will, dated the 12th of October 1830, which was partly as follows :—"I give to my wife, Rachael Blewitt, all my plate, linen and furniture ; and I appoint my said wife and my son, Edmund Blewitt, and Wightwick Roberts executors and trustees of this my will ; and I give to my said wife £600 per annum for her life, but not to be liable to the control of any future husband, but to be paid quarterly, from time to time, to her, on her receipt only, and not to be subject to any debts or assignment ; and, after her death, *the said annuity to be equally divided between Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt and Oscar Blewitt, or the survivors or survivor.* I also give to each of them, the said Ann Rogers Blewitt, Thomas Rogers Blewitt, Henry Blewitt, Georgiana Blewitt, Byron Blewitt and Oscar Blewitt, £100 per annum during their lives, *to be paid quarterly, with power to leave their said respective annuities, at their deaths, to any persons they may marry, or any child or children they may leave, but in case of either of them dying without exercising such power, then to the survivors or survivor.* All the residue of my property I give to my son, Edmund Blewitt, if he should survive me ; but, in case of his death, to my son, Reginald James Blewitt, and, in case of his death also before me, to my daughter, Frances Mary Ann Blewitt."

[492] The testator died on the 8th of March 1832. Edmund Blewitt died in the lifetime of the testator. Henry Blewitt died in September 1837. Rachael Blewitt died in June 1838, and Oscar Blewitt died in November 1838. Both Henry and Oscar Blewitt died under age, intestate and unmarried.

The question, on the hearing of the cause for further directions, was whether the bequests of the yearly sums of £600 and £1000 passed life annuities, or the capital of sums in the three per cents. sufficient to produce those yearly sums.

Mr. Wigram and Mr. Macdonnell appeared for the Plaintiff, the residuary legatee.

Mr. Jacob, Mr. Girdlestone, Mr. Sharpe and Mr. Loftus Wigram, for the surviving legatees, cited *Tweedale v. Tweedale* (1) and other cases.

Mr. Torriano, for the executors, and

Mr. Wray, for the Attorney-General, who claimed Oscar Blewitt's interest on behalf of the Crown, on the ground that he was illegitimate.

THE VICE-CHANCELLOR declared that the capital of a sum of three per cents. sufficient to answer the annual sum of £600 during the life of Rachael Blewitt, became, upon her death, absolutely vested in and divisible, in equal shares, between and amongst the Defendants Ann Rogers Blewitt (who, pending the suit, married the [493] Defendant Robert Stauffer), Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt and Oscar Blewitt, as being the survivors of themselves and the late Henry Blewitt living at the death of Rachael Blewitt; and that, upon the death of Henry Blewitt, the capital to answer his annuity of £100 became absolutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, Byron Blewitt and Oscar Blewitt, as joint-tenants; and that, on the death of Oscar Blewitt, his share of the last-mentioned capital became absolutely vested in Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt and Byron Blewitt, as joint-tenants; and that, upon the death of Oscar Blewitt, the capital to answer his annuity of £100 became absolutely vested in the same parties as joint-tenants.

The Plaintiff appealed from this decree to the Lord Chancellor.

The appeal was heard on the 4th of August 1841; when his Lordship reversed the Vice-Chancellor's decree, and declared in effect that, on the death of Rachael Blewitt, the annuity of £600 became vested in equal shares in the Defendants, Ann Rogers Stauffer, Thomas Rogers Blewitt, Georgiana Blewitt, and Byron Blewitt, and in Oscar Blewitt, as tenants in common *for their respective lives*; and that, upon the death of Henry Blewitt, his annuity of £100 became vested in equal shares, in the four last-named Defendants and Oscar Blewitt, as tenants in common, *for their respective lives*: and that, upon the death of Oscar Blewitt, his annuity of £100 became vested in equal shares in the same Defendants, as tenants in common, *for their respective lives*: and that, upon the death of each of the four last-[494]-named Defendants, his or her annuity of £100 would, subject to his or her power to appoint the same to any person he or she might marry, *for the life of such person*, or to any child or children he or she might leave *for his, her, or their life or lives* (the annuity so left to vest in and be divisible among the children equally, as tenants in common), would vest in the survivors of the four last-named parties *for their respective lives*.

[495] IBBETSON v. IBBETSON. Feb. 5, 7, April 16, 1840.

[Affirmed, 5 My. & Cr. 26; 41 E. R. 281 (with note). For subsequent proceedings, see 12 Sim. 206; 13 Sim. 544.]

Will. Perpetuity. Remoteness. Heirlooms.

Testator devised his reversion in fee, expectant on his decease without issue male, in his mansion-house and estates at D. to his brother for life, with remainder to his first and other sons in tail male, with divers remainders over: and he bequeathed his plate, pictures, &c., in and about his mansion-house at D. to trustees, in trust to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his mansion-house under the settlement on his marriage, or the limitations contained in his will, until a tenant in tail of the age of 21 years should be in possession of his mansion-house, and then the plate, pictures, &c., were to go and belong to such tenant in tail; and he gave the residue of his personal estate to the person who, at his decease, would be beneficially entitled in possession to his mansion-house. The testator's brother had a son born

(1) *Ante*, p. 453. The reporter has given a note of the above case, in order that the profession may judge whether it impugns the authority of *Tweedale v. Tweedale*.

at the date of the will, and both he and his son survived the testator. Held, that the trust declared of the plate, pictures, &c., was void for remoteness, so far as it was intended to take effect after the death of the brother.

Sir Henry Carr Ibbeston, being seised of the reversion in fee-simple expectant on his decease without issue male, of and in estates situate at Denton, Askwith, Otley and Weston in Yorkshire, and being seised in fee-simple in possession of other real estates, made his will, dated the 11th of October 1814, and thereby charged all his estates real as well as personal, with the payment of his funeral and testamentary expenses, debts and legacies, and gave to his wife, Alicia Mary, for her life a yearly rent-charge of £400 [496] in addition to the jointure of £800 a year provided for her on her marriage with the testator, to be issuing out of the testator's reversion in fee-simple expectant on the failure of issue male of his body, of, and in his estates at Denton, Askwith, Otley and Weston, and subject thereto, he gave his reversion of and in the same estates, and all other his real estates, to Wm. Charlton and Matthew Wilson and their heirs, to the use of Viscount Lascelles and Sir Wm. Fowle Middleton, their executors, &c., for the term of 1000 years, to be computed from the day of his death, in trust for securing the yearly rent-charge of £400, and upon further trust (in case there should be no son or sons of his body living at his decease or born afterwards, or being such son or sons, all of them should die under 21 without leaving issue male), to raise portions and provide maintenance for any daughter or daughters of the testator; and after the determination of the term, and in the meantime, subject thereto and to the trusts thereof, to the use of the testator's brother Charles Ibbetson (who afterwards became Sir C. Ibbetson, Bart.) for his life, with remainder to trustees and their heirs during the life of Sir C. Ibbetson, in trust to preserve the contingent remainders thereafter limited, with remainder to the use of the first son of Sir C. Ibbetson in tail male, with divers remainders over; and the testator bequeathed to Wm. Charlton and Matthew Wilson, their executors, &c., all his plate, pictures, books and household furniture in and about his mansion-house at Denton Park, upon trust *to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled to the possession of his mansion-house under or by virtue of the settlement made upon his marriage, or of the limitations contained in his will, until a tenant in tail of the age of 21 years should be in pos-* [497] *session of his mansion-house, and then the plate, pictures, books and household furniture were to go and belong to such tenant in tail:* and the testator gave all the residue of his personal estate, after payment of his funeral and testamentary expenses, debts and legacies, to the person who at his decease would be beneficially entitled in possession to the mansion-house.

The testator died in June 1825 without leaving any issue, but leaving Alicia Mary, his widow, and Sir Charles Ibbetson, his brother, him surviving.

Upon the testator's death Sir C. Ibbetson entered into the possession of his real estates, and possessed himself of the plate, pictures, books and household furniture in and about the mansion-house at Denton Park.

In the year 1837 Sir Charles Ibbetson and Charles Henry Ibbetson, his eldest son (who attained 21 in July 1835), suffered a recovery of the testator's estates, and settled them by deeds, dated in March of that year, on Sir Charles for life, with remainders to Charles Henry Ibbetson and his first and other sons, in strict settlement, with remainder to the Plaintiff, who was Sir Charles's second son, and his issue male in like manner.

Sir Charles Ibbetson died on the 9th of April 1839, leaving his two sons and a daughter him surviving.

The bill was filed by the second son against Sir Charles Henry Ibbetson, the eldest son, and against the testator's personal representatives and other persons, charging *that the trusts declared by the will, of the plate, [498] pictures, books and household furniture in and about the mansion-house at Denton Park, was void for remoteness,* and therefore those articles constituted part of the testator's general residuary personal estate, and ought to be applied in payment of his debts remaining unpaid.

Mr. Knight Bruce and Mr. R. Atkinson, for the Plaintiff. Sir Henry Carr Ibbetson devised his real estates to his brother Sir Charles and his issue male, in strict settlement; and he bequeathed his plate, pictures, books and household furniture as

heirlooms, in language which forms the subject of the present discussion. Sir Charles was the residuary legatee of the testator's personal estate, as well as the tenant for life of his real estates; and therefore, in every view of the case, he was entitled to take possession of the articles which were bequeathed or attempted to be bequeathed as heirlooms. If the bequest of the heirlooms was, as we mean to contend, void for remoteness; then they would be part of the testator's general personal estate, and, as such, applicable to the payment of his debts, some of which are secured by mortgage of part of his real estates. On the other hand, if those articles are to be considered as specifically bequeathed, they will be liable to contribute to the payment of the debts, rateably with the real estates specifically devised.

When specific chattels are bequeathed as heirlooms, it is usual to add the words: "So long as the rules of law and equity will admit," after the direction to the trustees to permit the chattels to be held and enjoyed by the person for the time being in possession of the mansion-house. But the clause on which the present question arises wants those words: and the tenant in [499] tail there spoken of is not, of necessity, to be a child either of the testator or of the tenant for life under the will; but may be any tenant in tail, however remote from the testator, or from the tenant for life under the will. Therefore the trusts declared by that clause transgresses the bounds prescribed by law. [THE VICE-CHANCELLOR. What were the limitations in the settlement to which the will alludes?] They were limitations to the testator for life, with remainders to his first and other sons in tail male, with remainder to himself in fee; consequently, as the testator never had any issue, the settlement became abortive, and he was, in effect, seised in fee in possession.

The cases of *Ware v. Polhill* (11 Ves. 257), and *Lord Southampton v. The Marquis of Hertford* (2 V. & B. 54), seem to be decisive of the present question. In the latter case the trust declared of the term, subject to which the estates were limited in strict settlement, was to lay out the rents in stock, and to accumulate the dividends during the minorities of the persons who, for the time being, should be tenants for life and in tail under the limitations thereinbefore contained. That trust, therefore, was liable to precisely the same objection as the trust in the present case is: it was not confined within the limits prescribed by the law against perpetuity; and, being void in its creation, the Court could not give effect to it to the extent allowed by law; but held it to be void *in toto*. In that case Sir W. Grant, Master of the Rolls, thus speaks of *Ware v. Polhill*: "In the case of *Ware v. Polhill*, where the rents and profits of leasehold estate were to go to the persons entitled to the rents of the freehold and copyhold estates; but with a [500] power to the trustees, at any time, with consent of the persons so entitled, or, if minors, at their own discretion, to sell and invest the produce in real estate to the same uses, the Lord Chancellor held that, notwithstanding the power, the leasehold estate vested absolutely in the first tenant in tail from the time of his birth. The Lord Chancellor held the power of sale to be void, on the ground that it might travel through minorities for two centuries, and adds: "If it is bad to the extent in which it is given, you cannot model it to make it good." (2 V. & B. 64.)

The principle upon which Sir W. Grant decided the case of *Leake v. Robinson* also applies to the present case. There a trust was created which would have included unborn children of the testator's grandson who should attain 25: and Sir W. Grant held that the Court could not modify the trust so as to confine it to the objects who were within the limits prescribed by law, for that would be making and not construing a will; and consequently the trust was void, not only so far as it exceeded those limits, but altogether. The recent case of *Mackworth v. Hinman* (2 Keen, 658) may be, perhaps, properly mentioned here. There Admiral Affleck bequeathed personalty in trust to pay the interest to his nephew, Sir Gilbert, for life; and, after Sir Gilbert's death, to his eldest son for the time being, for life; and, in case Sir Gilbert should leave no son, then to the person on whom the baronetcy should devolve: it being the testator's will that the interest should never be alienated from the title, but that each succeeding baronet should enjoy it for his life. Sir Gilbert had two younger brothers, James and Robert, both of whom, [501] as well as Sir Gilbert himself, were living at the testator's death. Sir Gilbert afterwards died without issue; upon which James succeeded to the baronetcy. James also died without issue, whereupon the baronetcy

devolved on Robert. The Master of the Rolls said that the testator's general intention was that the property should go on, to all time, with the baronetcy: that that intention must have been defeated by giving a life-estate to each baronet successively: and that, for the purpose of accomplishing that intention, it must be held that Sir James took a *quasi* estate tail in the property; and that, being personalty, it was absolutely at his disposal. The case of *Tollemache v. Coventry* (1) is very much the same as *Mackworth v. Hinman*. There the House of Lords ultimately decided that the first member of the class to whom the property was given took the absolute interest. Now the Court will observe that the words used in this case are not "to permit the same to be used and enjoyed by the person or persons who, for the time being, shall be entitled to the possession of my mansion-house under or by virtue of my will;" but "under or by virtue of the settlement made upon my marriage, or of the limitations contained in this my will:" and, as the testator's wife was alive when the will was made, it was uncertain whether the first taker would be the issue male of the testator and his wife, or his brother, Sir Charles. This case, therefore, is not precisely similar to either of the two last-mentioned authorities; for no particular individual is expressly pointed out as the first taker. Sir Charles became the first taker by the happening of a contingency. Sup-[502]-posing, however, that the trust in this case is not altogether void for remoteness, the principle upon which those two cases were decided would give the plate and other articles to Sir Charles, as being the first individual of a class. But if the trust is altogether void for remoteness, then Sir Charles would take those articles as residuary legatee. In either case, therefore, he would be entitled to them absolutely; and the only difference would be that, in the one case, he would take them as specific legatee, and, in the other, as general legatee. It is necessary, however, to decide in which of those two characters he took them, in order to ascertain the order in which they are to be applied towards payment of the testator's debts.

The argument on the other side we understand to be this, namely, that the clause now under consideration ought to be read as if it concluded with the words "or of the limitations contained in this my will," because, either the words that follow, "until a tenant in tail of the age of 21 years shall be in possession of my said mansion-house, and then the said plate, &c., shall go and belong to such tenant in tail," are inoperative, and therefore are not to have the effect of cutting down the generality of the preceding words; or the gift is a gift of personalty in perpetuity. But that argument is at variance with every principle upon which all former cases have been decided. It amounts, in effect, to a modification of the clause. The Court cannot say that a clause, which the testator intended to operate in a given manner, shall have a different operation because the law prevents its operating according to the testator's intention. The principle upon which Sir W. Grant decided *Leake v. Robinson* was that the Court could not say what the testator would have done if he had been told that the [503] whole of his intention could not be carried into effect. We submit, therefore, that Sir Charles Ibbetson took the plate, pictures, &c., either as residuary legatee or as specific legatee, according to the principle of *Mackworth v. Hinman* and *Tollemache v. Coventry*.

The Plaintiff's counsel referred also to *Carr v. Lord Erroll* (14 Ves. 478), *Lord Deerhouse v. Duke of St. Albans* (5 Madd. 232), *Marshall v. Holloway* (2 Swans. 432), and Lord Eldon's observations on *Trafford v. Trafford* (see 12 Ves. 231 and 232).

Mr. Jacob, Mr. Koe and Mr. Hodgson, for the Defendant Sir Charles Henry Ibbetson. The Plaintiff's counsel have put the case in two ways; one of which must have recently occurred to them; because it is not the way in which the bill puts it. They say, first, that the trust declared of the chattels is wholly void for remoteness, and, therefore, the trustees held the chattels in trust for the late Sir Charles, as residuary legatee. Secondly, they say that if that trust is not absolutely void, then Sir Charles took the chattels absolutely, as being the first person who became entitled to the mansion-house. But we apprehend that neither of those propositions can be sustained. With respect to the first, we say that though a gift to the first person,

(1) 8 Bligh, New Series, 547; reported on the original hearing, under the name of *Lord Dechurist v. The Duke of St. Albans*, in 5 Madd. 232.

who shall be tenant in tail in possession and attain 21, may be void for remoteness ; yet that is not the gift in this case. The gift is necessarily divisible into two parts. There is, it is true, a gift to the person who shall be tenant in tail in possession at the age of 21 ; but that is not all ; because there is a complete disposition of the property during the inter-[504]-vening period, up to the time when there shall be that tenant in tail. The trustees are to permit the chattels to be used and enjoyed by the person and persons who, for the time being, shall be entitled in possession to the mansion-house, by virtue of the settlement or of the limitations contained in the will, until a tenant in tail of the age of 21 years shall be in possession of the mansion-house ; and then the chattels are to belong to such tenant in tail. So that there is, first of all, a distinct gift of the chattels for the use and enjoyment of the owners of the mansion-house ; and the mention of a tenant in tail in possession is not a part of that gift ; but is only the measure of the period during which the testator intended that first gift to endure. Suppose that the existence of the tenant in tail and his attaining 21 are events too remote for the law to contemplate, then a gift of property until those remote events happen is equivalent to a gift for ever. Now there is no doubt that such a limitation is one which the Court executes in a particular way. It is not a limitation that is followed in the exact terms in which it is expressed ; for it purports that the property shall be held by all the successive occupants of the mansion-house ; but the Court cannot give full effect to that intention ; and, therefore, it executes it *cy pres*, and gives the property to the first tenant for life, and then to the first tenant in tail absolutely. The meaning of the proposition that a limitation is bad when it is too remote is that the limitation is bad when it is made *to commence* at a period too remote ; not that it is bad because it is *to end* at a period too remote. The remoteness of the event, on the happening of which the trust for the benefit of the persons in possession of the mansion-house is to end, does not vitiate that trust. If it did so, then a limitation [505] would be bad because it is made to end at a period which is too remote.

Several cases relating to trusts being objectionable, on the ground of perpetuity, have been referred to, and particularly the case of *Leake v. Robinson*. That case decided that where there is a gift to a class of persons to take *concurrently*, if it is bad as to some, on the ground of perpetuity, it is bad as to all ; and for this obvious reason, namely, that it is impossible to determine what shares those as to whom the gift might have been good are to take. But that objection does not arise where, as in the present case, there is a gift to a class of persons who are not to take *concurrently*, but *successively*. Of that description are all the gifts of heirlooms : for all such gifts are gifts to the future owners of the settled estates as a class ; and it is quite clear that although those gifts are void as to the remoter links of the chain, yet they are good as to the nearer ones. Another class of cases, that is to say, *Lord Southampton v. The Marquis of Hertford*, and *Marshall v. Holloway*, has been referred to ; but those cases are totally different from this, for they depend upon a principle which is wholly inapplicable to the present case, namely, that there was a suspension of the enjoyment of the property until a period too remote. In those cases the rents of the property were to be accumulated until the happening of an event which was too remote, and, consequently, the enjoyment of the property was to be suspended until the happening of that event. Those cases, therefore, were exactly the converse of this : for here the property is to be enjoyed by the persons in possession of the mansion-house in the meantime and until there shall be a tenant in tail in possession of the age of 21. Besides, in the two last cases, there could be no apportionment [506] or division of the accumulations ; for the whole was given to one individual, and that individual could not take. The case of *Ware v. Polhill* also has been cited for the Plaintiff : but we apprehend that that case and the cases which have followed it tend to establish the distinction which we contend for. There freehold estates were settled in strict settlement, and leaseholds were to go along with them ; and a power to sell the leaseholds was vested in trustees. The leaseholds had become vested, absolutely, in a person who was tenant in tail of the freeholds ; and according to Sir E. Sugden's view of that case (see *Treat. on Pow.* 4th edit. 147) the real point was that the power being one which enabled one man to sell the estate of another was repugnant to the nature of the estate which had become vested in that other

person. Indeed it does seem extremely absurd that there should be property absolutely vested in one person, and that there should be a power of selling it in another. After that came the case of *Boyce v. Hanning* (2 Crompt. & Jer. 334), in which there was a power of sale over-riding estates in fee, to be exercised by the trustees, with the consent of the tenant for life during his life, and, after his death, at their own discretion; and the power was held to be valid, so far as it was to be exercised during the life of the tenant for life. *Biddle v. Perkins* (*ante*, vol. iv. p. 135), and *Waring v. Coventry* (1 Myl. & Keen, 249; see also *Wallis v. Freestone*, *ante*, 224), also seem to lead to the same result. We refer to those cases as shewing that the rule is not that either a power or a limitation which tends towards perpetuity is altogether void, but that it is good *pro tanto*. Another illustration of the same proposition is *Routledge v. Dorril* (2 Ves. jun. 357), where there was a power in a settlement to appoint to the [507] children, grandchildren or any other issue of the marriage, not limited to issue born within the lives of the parents or within any other given time: and the question was whether the power was not void, as it included objects too remote. The power, however, was held to be good; as the donee might exercise it in favour of such of the issue as were within the line of perpetuity. There we have an instance of a power being good or bad, according to the objects in whose favour it was exercised. In *Phipps v. Kelynge*, (1) a testatrix gave her leasehold estates to trustees, in trust, from time to time during the term of years therein, to lay out the yearly profits in the purchase of lands of inheritance, and to settle the same to the use of the Plaintiff for his life, with remainder to his first and other sons in tail male, with several remainders over. The Plaintiff had a son who attained 21, and the question was to what extent, in point of time, the trust was good. Now it will be observed that there was this peculiarity in that case; the trustees were to receive the rents and invest them every year in the purchase of land, and they were to settle the purchased land on the Plaintiff for life, with remainder to his first and other sons in tail; so that the enjoyment of the rents was not, in effect, suspended, as it was in *Lord Southampton v. The Marquis of Hertford* and *Marshall v. Holloway*, until the termination of the trust: and Lord Camden, before whom the cause was heard, held that the trust was not wholly void, but was good for the life of the Plaintiff and until his first son should attain 21. We cite these cases in order to shew that, where it has been held that a trust was wholly void on the ground [508] of perpetuity, the trust was wholly for the benefit of an individual who was too remote for the law to contemplate. Here that is not so; for, even if the future tenant in tail in possession of the age of 21 is a person too remote to be contemplated by law, the persons for the time being in possession of the mansion-house are not in that predicament. In *Lord Deerhurst v. The Duke of St. Albans* Lord Vere bequeathed chattels to trustees in trust for his wife for life, and, after her death, in trust for his son for life, and, after the death of the survivor of them, in trust for such person as should, from time to time, be Lord Vere; it being his will that the same should, after the death of his wife, go and be held and enjoyed with the title, so far as the rules of law and equity would permit. The testator left his son and two sons of that son living at his death. The son afterwards died, and then his eldest son died leaving a grandson. Sir John Leach held that, under the trust, the testator's son, who was the second Lord Vere, was entitled to the chattels for his life, and that upon the death of the second lord, his eldest son, who became the third Lord Vere, was entitled to them for his life, and that on his death they vested absolutely in his son, who was the testator's grandson, and became the fourth Lord Vere. The House of Lords, however, differed to some extent from Sir John Leach, and held that the chattels vested absolutely in the third lord. Therefore, the House of Lords, as well as Sir John Leach, held that the trust was not wholly void on the ground of remoteness, as had been contended in argument; but that it was good so as to vest the chattels in the third lord: but the House of Lords decided that it was not good so as to divest the chattels from him on his death, and vest them in the fourth lord. It will be observed that the objects of the trust, in that case, were to be the [509] members of a class; and Sir John Leach says: "I think no person can take

(1) 2 V. & B. 57, note; and Fearné Cont. Rem. 616. See Sir W. Grant's observations on this case, 2 V. & B. 62 and 63.

under a description by class, if, prior to him in that class, there might have been persons with respect to whom that limitation would have been too remote: he may take by class, if, prior to him, there could not, by any possibility, have been any person with respect to whom the limitations would have been too remote." (5 Madd. 271.) In that case, the title of Lord Vere descended from father to son, and so on, in a direct line: but, if the title had gone to collaterals, then the case put by Sir John Leach might have arisen. For suppose that the second lord had died without issue, then the third lord would have been a collateral relation of the second: and there might have been some person or persons, between the second and third lords, on whom the title might have devolved, but, with respect to whom the objection on the ground of remoteness would have applied. We apprehend that the opinion expressed by Sir John Leach, in the passage just adverted to, will be found to be consistent with all the authorities on the point, that is, that if there is a trust in favour of a class of persons who are to take successively, the individuals of that class will take, unless they are in a position too remote, or unless, in the language of Sir John Leach, there might have been, in the series of limitations, other persons who might have come in before them, and with respect to whom the limitation would have been too remote. The case of *Mackworth v. Hinxman* is a good deal like the last case. There Admiral Affleck bequeathed personalty in trust for Sir Gilbert Affleck for life, and after his death, in trust for his eldest son for the time being; but, if Sir Gilbert should die without leaving a son, then in trust for the person on whom the [510] baronetcy should devolve, it being the testator's intention that the income of the property should never be alienated from the title, but that each succeeding baronet should enjoy it for his life. Sir Gilbert survived the testator and died without issue male, leaving two brothers, James and Robert, on whom the baronetcy successively devolved. Now all James's male descendants (if he had had any) would have succeeded to the baronetcy before Robert: therefore, Robert stood after persons with respect to whom the limitation would have been too remote, and, consequently, according to the rule laid down by Sir John Leach, it was void as to him. We now call the attention of the Court to the case of *Trafford v. Trafford* (3 Atk. 347), which appears to us to govern the present case. There the testator bequeathed his real estates in trust for S. Boehm and his issue male, in strict settlement, with remainder in trust for Clement Boehm, the Plaintiff's father, and his issue male, with remainder in trust for the Defendant Charles Boehm and his issue male, in like manner: and he bequeathed his plate, books, &c., to such male person, when he should attain 21, who should then be entitled to the trust, in possession, of the real estates thereinbefore devised. Now, if the will had stopped there, it would have been difficult, perhaps, to support that bequest. But the will went on to direct that, until such male person should attain 21, the plate, books, &c., should be kept at Dunton Hall, and be used, in the meantime, by such male person residing there (by which the testator must have meant such male person, being entitled to the property, as should be, from time to time, residing there): it being the testator's intention that the plate, books, &c., in the nature of heirlooms, should go with his estates and be [511] used therewith, as long as the law would permit. That gift, therefore, resembles, as nearly as can be, the gift in the present case. Then the testator bequeathed the residue of his personal estate to such person, when of the age of 21, as, by his will, should be entitled to the trust, in possession of his lands. Now, it is very important to remark that the gift of the residue did not contain that direction for the intermediate enjoyment of the property which was contained in the gift of the plate, books, &c., and which is found in the will in the present case. The testator then, by a codicil, gave to Ann Beveridge the use of his plate, for life; and declared that all his pictures at Dunton Hall should at all times go and be enjoyed, with his mansion-house and estate at Dunton, by the persons who, by his will, should successively hold his estates. Lord Hardwicke declared that the pictures, books, &c., ought to be considered as heirlooms, and to go along with the real estates as far as, by the rules of law and equity, they might, and that the Plaintiff would be entitled to the property thereof in case he should attain 21, and that, in the meantime, he was entitled to the use and enjoyment thereof. In the judgment there is this remarkable passage: "It has been said he has made the gift of his residue equally

an heirloom, and that the Plaintiff might as well contend this should go to him. By no means; for the devise of the residue *wants the very clause which constitutes and makes the other go as heirlooms*;” that is, it wanted the *interim* gift; the will did not declare that, in the meantime, the residue should be enjoyed by the person for the time being entitled to the rents of the real estates. The observations on that case made by Lord Eldon in *Lady Lincoln v. The Duke of Newcastle*, which have been referred by the Plaintiff’s counsel, amount only to this; namely, that [512] the limitation in the will in *Trafford v. Trafford* might have involved a question of perpetuity; but the facts of the case did not involve it; for Clement Boehm, the Plaintiff’s father, was alive when the will was made, so that the limitation was good as to the son of Clement Boehm, but would have been bad as to his grandson.

Some stress was laid in the argument on the other side, on the omission, in this will, of the words, “so far as the rules of law and equity will permit.” Those words may be important in determining the character of the bequest, that is, whether it is executory or not; but they are of no importance in determining on the validity or effect of it: for, in *The Duke of Bridgewater v. Egerton* (2 Vez. 121; and 1 Bro. C. C. 280 note), and *Foley v. Burnell* (1 Bro. C. C. 274), and in other cases on heirlooms, those words were omitted.

In this case Sir Charles Henry Ibbetson was born at the time when the will was made, and, consequently, long before the testator’s death: he, therefore, is clearly within the line of perpetuity; and as he answers the description of tenant in tail in possession of the mansion-house of the age of 21, the chattels in question, to the use of which the late Sir Charles was entitled during his life, are now absolutely vested in him. But suppose that it were possible to say that the time has not yet arrived when there is a tenant in tail in possession of the age of 21, still the chattels are to be used and enjoyed by the person for the time being in possession of the mansion-house. That person is the present Sir Charles Henry; and he having once become entitled to the chattels, there is no valid gift over by which they can be taken away from him. Consequently, in any view of the case, they are now his property.

*[513] In addition to the cases above mentioned, *Gower v. Grosvenor* (5 Madd. 337), and *Ellicombe v. Gompertz* (3 Myl. & Craig, 127), were cited for the Defendant.

Mr. Turner appeared for the executors.

THE VICE-CHANCELLOR [Sir L. Shadwell]. On the 11th of October 1814 Sir Henry Carr Ibbetson made his will. At that time, by virtue of a settlement made on his marriage with Lady Alicia Mary Ibbetson, his mansion-house at Denton Park stood settled to the use of himself for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the marriage, severally and successively, in tail male, with remainder to the use of Sir Henry Carr Ibbetson in fee.

By his will, Sir Henry Carr Ibbetson devised the reversion in fee of his mansion-house to the use of his brother, the late Sir Charles Ibbetson, for his life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of Sir Charles Ibbetson, severally and successively, in tail male, with remainder to the use of his brother, John Thomas Ibbetson, in like manner in strict settlement, with remainder to the use of his own daughters, severally and successively, in tail male, with several remainders over for life and in tail, with remainder to his own right heirs. He then gave in the words following:—“I give and bequeath unto William Charlton and Matthew Wilson, their executors, administrators and assigns, all my plate, pictures, books and household furniture in and about my mansion-house at Denton Park, upon trust to permit the same to be used and enjoyed by the [514] person and persons who, for the time being, shall be entitled in possession to my said mansion-house under or by virtue of the settlement made upon my marriage or of the limitations contained in this my will until a tenant in tail of the age of 21 years shall be in the possession of my said mansion-house, and then the said plate, pictures, books and household furniture are to go and belong to such tenant in tail. I give and bequeath all the rest and residue of my personal estate and effects, after payment of my just debts, funeral and testamentary expenses and legacies, and subject thereto, unto the person who, at my decease, will be beneficially entitled, in possession, to my said mansion-house at Denton Park; and I constitute and appoint my said brother, Charles Ibbetson, executor of this my will.”

He afterwards made a codicil not affecting the mansion-house, the specific gift or the residuary bequest, and died in 1825 without issue. In September 1825 the will was proved by Sir Charles Ibbetson, who, on the testator's decease, became beneficially entitled, in possession, to the mansion-house, and, consequently, was his residuary legatee. He has died lately. Before the testator's death, the present Sir Henry Charles Ibbetson, the eldest son of Sir Charles Ibbetson, was born, and has now attained the age of 21 years.

The question is, who became entitled to the subjects of the specific gift?

The words in this case are singular and unlike the words in any other case. The gift is in the form of a simple declaration of trust, not requiring any settlement to be executed. It has no such qualifying words as are found in the case of *Gower v. Grosvenor* and other cases, namely, "as far as they can by law," or "as far as [515] the rules of law and equity will permit." The gift referring to the limitations of the mansion-house in the settlement and in the will meant to pass the chattels in succession: but the trust is so expressed that, if it were literally carried into effect it might have happened, to use the expression of Lord Eldon in *Ware v. Polhill*, that no tenant in tail of the age of 21 years might have been in possession of the mansion-house for two centuries, and, consequently, the absolute interest in the plate and other articles would not have vested during that time. In *Marshall v. Holloway*, the same great authority says: "The trust in this case for accumulation, I think bad; because it may last for ages:" and, under the will of Sir Henry Carr Ibbetson, the suspension of the vesting of the chattels might have endured for ages.

The fact that a tenant in tail of the age of 21 years has become possessed of the mansion-house within the space of 21 years from the death of the testator is immaterial: for the validity of the gift must be determined by considering how it stood at the death of the testator; and, unless it was then such as that, if it ever took effect at all, it must of necessity have vested the absolute interest in someone within the period allowed by law, it was bad then and must be so now. For, as Sir William Grant said in *Lord Southampton v. Marquis of Hertford*, "An executory devise exceeding the allowed limits is void *in toto*." And in *Tollemache v. Earl of Coventry* Lord Brougham says: "To argue from the fact that the person was *in esse* at the date of the will who became Lord Vere is to rely upon an accident. The event might have been otherwise. He would not, *ex necessitate*, answer the description within the allowed period. The estate must be certain, so as within the time to vest in the person described." And, after [516] the fullest consideration, I am of opinion that, so far as the gift was framed to take effect after the death of Sir Charles Ibbetson, it was void. Whether it was good as a gift to him for life only and void as a gift in remainder after his death, or whether it might be construed as a gift absolutely to Sir Charles Ibbetson, according to what seems to have been the opinion of Lord Brougham upon the gift in Lord Vere's will to the third Lord Vere, it is not necessary to decide; because Sir Charles Ibbetson was residuary legatee.

Upon the whole, I think that, under the will of Sir Henry Carr Ibbetson, Sir Charles took absolutely the subjects of the specific gift.

The decree, which was dated the 8th of May 1840, declared that the bequest of the plate, pictures, books and household furniture contained in the will, so far as it was intended to take effect from and after the death of Sir Charles Ibbetson, was void; and that the plate, pictures, books and household furniture fell into and formed part of the testator's residuary personal estate from and after the death of Sir Charles Ibbetson: and it was referred to the Master to inquire and state to the Court what the plate, pictures, books and household furniture consisted of, and which of them, or what part thereof, were taken possession of by the Defendant Sir Charles Henry Ibbetson, as mentioned in his answer. And it was ordered that the Defendant Sir Charles Henry Ibbetson should deliver up such of the plate, pictures, books and household furniture as were so taken possession of by him to the Defendants John Thomas Selwyn and Dame Alicia Mary Ibbetson, the executor and executrix of the testator Sir Henry Carr Ibbetson.(1)

(1) So in brief.

[517] Sir Charles Henry Ibbetson appealed to the Lord Chancellor from the above decree; but, on the 19th of November 1840, his Lordship dismissed the appeal with costs.

[517] GOOSEMAN v. DANN. Feb. 7, 1840.

Clerk in Court. Injunction.

A Defendant's Clerk in Court is not his agent for the purpose of receiving notice of an injunction granted in the cause.

On the 27th of January the Plaintiff obtained an order for the common injunction for want of answer to restrain an action brought by the Defendant against the Plaintiff; and, on the morning of the 29th, the order was passed and entered. About half-past 12 o'clock on the same day the Plaintiff served the order on the Defendant's Clerk in Court by delivering to him a copy thereof, and, at the same time, shewing him the original. About four hours afterwards the Defendant's town agent left the declaration in the action at the office of the Plaintiff's solicitor.

A motion was now made for the Plaintiff to commit the Defendant and his Clerk in Court for a breach of the injunction, or that all proceedings in the action taken since the 27th of January might be set aside with costs.

Mr. Knight Bruce and Mr. Hislop Clarke, in support of the motion. The order for the injunction was obtained on the 27th of January. At that time the declaration in the action had not been delivered; therefore the injunction stayed all proceedings at law. An order for an injunction stays all proceedings at law; but without notice of it there can be no contemptuous breach. The Clerk in Court is the agent for the party; he had notice of the injunction several hours before the declaration was [518] delivered; therefore, at all events, the action must be restored to the position in which it was at the time when the order for the injunction was obtained. *Tarleton v. Dyer* (1 Russ. & Myl. 1), *Lorimer v. Lorimer* (1 Jac. & Walk. 284), *Boswell v. Tucker* (2 Keen, 188), *Stephens v. Neale* (1 Madd. 550), *Taylor v. Sheppard* (1 You. & Coll. 94).

Mr. Jacob and Mr. Lowndes, for the Defendant, said that the Clerk in Court was not agent for the party for all purposes, but only to receive 20s. costs on the amendment of the bill, and in other cases in which the practice of the Court required service upon him.

Mr. Knight Bruce, in reply, said that independent of notice an injunction operated from the time when the order for it was made. *Ruttray v. Bishop* (3 Madd. 220).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am asked in this case either to commit the Defendant and the town agent of his attorney in the country, or to make void the step which has been taken at law; but I am of opinion that I cannot do either the one or the other of those things.

The Clerk in Court is the agent for the party to receive notice of the proceedings in the cause: but an injunction is extraneous to the cause, and not a proceeding in it: and I have always understood that an injunction has no operation unless it is served either on the Defendant personally, or on some person who, by an order of the Court, has been substituted for the Defendant.

Motion refused with costs.

[519] CHARLES EDWARD MANGLES v. THE GRAND COLLIER DOCK COMPANY.
Feb. 14, 15, 1840.

[S. C. 9 L. J. Ch. (N. S.) 177; 4 Jur. 333. See *Preston v. Grand Collier Dock Company*, 1840, 11 Sim. 327.]

Fraud in obtaining a Local Act of Parliament. Demurrer. Equity.

A bill for forming a dock company passed in the House of Commons, before three-fourths of the capital had been subscribed. As the orders of the House of Lords.

required that proportion of the capital to be subscribed before the bill could be brought into that House, certain of the subscribers to the undertaking subscribed for additional shares, in order to make up the deficiency. Those persons afterwards signed a memorandum declaring that the additional shares were to be held in trust for the company. The bill was then brought into the House of Lords and passed. One of the sections provided that, on the trial of an action to be brought by the company against a shareholder, for money due on a call, it should only be necessary to prove that such call was made, and that twenty-one days' notice of it was given, *without proving the appointment of the directors who made the call*; and that the company should thereupon be entitled to recover, unless it should appear that the call exceeded £5 per share, or that the required notice had not been given. At the first meeting of the company directors were chosen; at another meeting it was resolved that the trust declared, by the memorandum of the additional shares, should be annulled, and that those shares should be transferred to the secretary for the use of the company; but the members present at those meetings did not hold the number of shares required by the Act, to constitute a valid meeting, exclusive of the additional shares. Afterwards the directors having made a call, the company brought an action against one of the original subscribers for the amount of it; whereupon he filed a bill to restrain the action, alleging *that the additional subscriptions were fraudulently made*, and consequently the meetings were not duly constituted, and the appointment of the directors who had made the call, and the other proceedings of those meetings, were invalid; but that, *by the special provisions of the Act, he was prevented from giving evidence at the trial of the action to shew that the appointment of the directors was not duly made*. A demurrer to the bill for want of equity was allowed.

On the 16th of February 1837 certain persons, having agreed to form a company for the purpose of making wet docks at or near Rotherhithe and Deptford, to be called the Grand Collier Docks, and to apply for an Act of Parliament to enable them to carry their project into [520] effect, executed an indenture, called the Parliamentary deed or contract, by which they mutually covenanted with each other that they had subscribed the sums set opposite to their respective names, for the purpose of making and maintaining the projected docks, and authorizing the sale and purchase of the property belonging to the Grand Surrey Canal and East Country Dock Companies (which was to be included in the projected docks) in such manner as should be provided for by an Act to be applied for in the then session of Parliament; and further, that they would pay the amount of their respective subscriptions, within five years from the passing of the Act, in such sums and at such times as the directors or others authorized by the Act should, in conformity to the provisions thereof, direct.

The Plaintiff executed that deed as a subscriber to the undertaking for 50 shares.

By the deed of management, which bore even date with the Parliamentary deed, and was executed by 29 persons, who subscribed the same for 255 shares, but which was not executed by the Plaintiff, eleven of the promoters of the undertaking were formed into a committee for managing the affairs of it until the Act of Parliament should be obtained; and it was agreed, amongst other things, that the capital of the undertaking should be £550,000, to be divided into 11,000 shares of £50 each.

One of the members of the provisional committee neither signed the Parliamentary deed nor subscribed for any shares.

[521] On the 17th of February 1837 a bill for making the proposed docks was brought into the House of Commons, and passed that House on the 29th of June following. At that time the Parliamentary deed was not executed by more than 34 persons, who had subscribed for 455 shares, forming a capital of £22,750; but as, by the Standing Orders of the House of Lords, the bill could not be brought into that House until three-fourths of the capital had been subscribed by the parties to the Parliamentary deed, nine persons, six of whom were members of the provisional committee, executed the Parliamentary deed as additional subscribers for 1000 shares each; and another person executed it as a subscriber for 500 shares; making an additional subscription of £475,000. On the 12th of July 1837 a Committee of the House of Lords reported that they had agreed to the bill; and the bill in this

cause alleged that such report was made on the faith and confidence that the Parliamentary deed had been duly and honestly executed, and that the parties executing the same had, thereby, *bonâ fide* subscribed for and intended to become the owners of the number of shares set against their respective names in the schedule to that deed. On the 15th of July 1837 the bill received the Royal assent, and was intitled: "An Act for making Wet Docks and other Works, on the South Side of the River Thames, at or near Rotherhithe and Deptford, in the Counties of Surrey and Kent, to be called the Grand Collier Docks." By that Act the persons who had subscribed and who should thereafter subscribe to the undertaking were incorporated by the name of "The Grand Collier Dock Company," and they were empowered to raise not exceeding £550,000, to be divided into shares of £50 each; and after reciting that the probable expense of making the docks and other works, [522] thereby authorized, would amount to £550,000, *three-fourths whereof had been already subscribed for by several persons under a contract binding them, their heirs, executors, &c., for the payment of the several sums by them respectively subscribed for; it was therefore enacted that the whole of the £550,000 should be subscribed for, in like manner, before any of the powers given by the Act in relation to the compulsory taking of lands for the purposes of the said docks and other works should be put in force: that the first general meeting of the company should be held within six months after the passing of the Act, at which 12 proprietors of 10 shares each were to be chosen directors of the company; and that, afterwards, there should be half-yearly general meetings in the third week in February and the third week in August in every year, and so many special general meetings as the directors should think proper to convene; that if, at any general or special general meeting, there should not be ten or more proprietors present who should be entitled to vote in respect of at least 1000 shares, no choice of directors should be made nor any business transacted: that no proprietor of any share on which any call should have been made should, after the day appointed for payment of the same, be allowed to vote or act as a director at any meeting, if objected to, until the money called for on such share should have been fully paid; that the orders and proceedings of all meetings and of the directors should be entered in a book and signed by the chairman, and, when so entered and signed, should be allowed to be read in evidence, in all Courts and before all Judges, Justices and others, without proof of such meetings having been duly convened, or of the persons making or entering such orders and proceedings being proprietors or directors or of the signature of the chairman; all of which last-mentioned acts should be [523] presumed; that if any subscriber should make default in payment of such proportion of his subscription as should be called for by the directors, the company might sue for and recover the same in any Court of Record, or the directors might declare his shares to be forfeited; that in any action to be brought by the company against any shareholder, for money due in respect of any call, it should be sufficient for the company to declare and allege that the Defendant, being the proprietor of a share in the undertaking, was indebted to the company in such sum of money as the calls in arrear should amount to, for a call or so many calls of such sums of money upon a share belonging to the Defendant, whereby an action had accrued to the company by virtue of the Act, without setting forth the special matter; and, on the trial of such action, it should only be necessary to prove that the Defendant, at the time of making such respective calls, was a proprietor of a share in the undertaking, and that such call was in fact made, *without proving the appointment of the directors who made such calls, or any other matter whatsoever*; and the company should thereupon be entitled to recover what should appear due on such calls, *unless it should appear that any such call exceeded £5 per share (which was the amount limited by the Act), or was made payable before the end of two calendar months from the day appointed for payment of the preceding call, or that 21 days' notice of the call had not been given as thereinbefore required*; and in order to prove that the Defendant was the proprietor of such share in the undertaking as was alleged, the production of the book in which the company was, by the Act, directed to enter the names and descriptions of the proprietors and the number of shares held by them should be *primâ facie* evidence: that it should be lawful for the proprietors to sell their shares, subject [524] to the following rules and conditions; that is to say, that the deed or conveyance should be kept by the company; and that the clerk or secretary of the company should enter, in a book to*

be kept for that purpose, a memorial of the sale, and endorse the entry on the deed of sale, and make an endorsement of the transfer on the back of the certificate of each share sold, and deliver the same to the purchaser for his security; and that such endorsement, being signed by the secretary or clerk, should be considered, in every respect, the same as a new certificate; and, *until such memorial should have been made and entered, the seller should remain liable for all future calls, and the purchaser should have no share of the profits of the undertaking, nor any vote as a proprietor; that no person should sell any share upon which any call should have been made, after the day appointed for the payment of the same, unless he should have paid the sum called for; and that the Act should be deemed a public Act, and should be judicially taken notice of as such by all Judges, Justices and others.*

The bill, after stating as above, alleged that, on the 12th of January 1838, an illegal or pretended meeting was held for the purpose of choosing directors of the company, and 12 proprietors (eight of whom had subscribed for the additional shares), were then chosen directors; but the persons present at that meeting did not hold more than 321 shares in the whole; that, previously to the holding of such meeting, those eight persons set their initials to a memorandum in the following words: "The shares subscribed for this day by the provisional committee of the Grand Collier Dock Company are to be held in trust for the company, and to be allotted and sold only by a vote of the majority of [525] the said provisional committee similarly subscribing; all benefits and profits in any way arising from the allotting or sale of such shares to be held for the company, and not for the said subscribers. London, 4th July 1837;" that a similar memorandum had been previously signed by the two other subscribers for the additional shares; that no general meeting of the company, save only the said illegal or pretended meeting, was held during the year 1838; but some of the persons so nominated directors as aforesaid met from time to time, and assumed to act as a board of directors; that a special general meeting of the company was held on the 27th of June 1839, at which were present persons holding, *bonâ fide*, 396 shares only; but seven of the holders of the additional shares being also present, their names, in order to give a colour to the meeting, were entered in the books of the company, as then holding those additional shares; and at such meeting the following entry was made in the books of the company: "At a special general meeting of the proprietors of the Grand Collier Dock Company, the following proprietors were present, holding 7000 shares and upwards: (1) Resolved that the trust entered into for the benefit of the company by the memorandum, dated the 4th of July 1837, and on that day lodged in the hands of the solicitor of the company, be hereby annulled, and that the 8000 shares so subscribed for and numbered 1001 to 9000 in the register share book of the company be now transferred to Mr. John Smith, the secretary of the company, to be issued from time to time, for the use of the company, by a vote of the board;" that, by some mistake or omission, the names of the two other subscribers for the additional shares were omitted in that resolution; that, pursuant to such resolution, all the persons therein named made [526] a nominal and fraudulent transfer of their 1000 additional shares each, so fraudulently subscribed for in the Parliamentary deed, into the name of the secretary in trust for the company; that such transfers were colourable and fraudulent, and made to relieve the parties from any responsibility they had incurred by executing the Parliamentary deed or contract; that in the books of the company some colourable entries or entry were or was made, declaring that the other additional 1500 shares fraudulently subscribed for were held by the subscribers in trust for the company; that in the books of the company the shares *bonâ fide* subscribed for were numbered 1 to 605 both inclusive; that 230 shares were entered in the books as if held or subscribed for by the solicitor to the company, and were therein numbered 606 to 835 both inclusive; that, on the 2d of July 1839, another illegal or pretended meeting of the pretended directors was held, when it was resolved that a call of £5 per share should be made, and that the registered proprietors should be requested to pay the said call upon their respective shares, on or before the 21st of August then next; that, on the 2d of August 1839, the Plaintiff, agreeably to the provisions of the

(1) Here followed the names of the proprietors present.

Act of Parliament, transferred his shares to Arthur Molony, and that a memorial of such transfer was duly made in the books of the company, and the entry of such memorial was endorsed on the deed of transfer of the shares, and an endorsement of such transfer was made on the back of the certificate of each share so transferred and signed by the secretary of the company, and by him delivered to Molony, *whereby the Plaintiff ceased to be a member of the company, and, thenceforth, ceased to be liable to pay the call of £5 a share*: that, on the 26th of August 1839, at an illegal or pretended meeting of four of the pretended directors, it was resolved: [527] "That, subject to the confirmation of the proprietors at the half-yearly general meeting to be held on the 13th September, 400 shares of this company, paid up in full, be placed in the hands of Mr. George Burnand, stockbroker, in trust for the following purposes: that, provided the 10,000 shares of the company now remaining unsold shall be disposed of, registered, and the sum of £5 per share paid to the account of this company on or before the 4th of April 1840, or if by any means a clause compulsory on colliers to unload in docks shall be obtained previous to the 4th of April 1840, then and in such case, or in the event of either of them happening, Mr. Burnand is on the 5th of April 1840 to deliver such shares to the order of Major Richardson; (1) but provided neither of the said events occur, Mr. Burnand is, on the 5th of April 1840, to deliver to Captain Gnyon, the chairman of the said company, the said shares for the benefit of the said company:" that the 10,000 shares mentioned in the said resolution were numbered in the books of the company, 1001 to 11,000 both inclusive: that another illegal or pretended meeting of the pretended directors was held on the 11th of September 1839, at which it was resolved that, in pursuance of the agreement that day concluded with the solicitor of the company, 230 shares, upon each of which £5 had been paid, should be issued to him: that the 230 shares mentioned in the last resolution were numbered 606 to 835 both inclusive: that another illegal or pretended meeting of the company was held on the 27th of September 1839, and an entry of such meeting was made in one of the books of the company, which was partly as follows: "At the adjourned half-yearly general [528] meeting of the proprietors of the Grand Collier Dock Company, held on the 27th of September 1839, the following proprietors were present holding 1000 shares and upwards, (2) &c., &c. The secretary was requested to read the resolution passed at a board of directors held on the 13th of September, with reference to the disposal of the remainder of the shares of the company subject to the confirmation of the general meeting to be held this day, and such resolutions being as follows:—'Resolved, subject to the confirmation by the proprietors at the half-yearly general meeting to be held this day, or by adjournment of such meeting, that 400 shares of the company, paid up in full, but not bearing interest, be placed in the hands of Mr. Sewell of Salter's Hall, in trust for the following purpose; that, provided the 10,000 or other remaining shares of the company on hand shall be disposed of and registered, and the sum of £5 per share paid to the account of this company on or before the 4th day of April 1840, then and in such case Mr. Sewell is immediately to deliver up such shares to Mr. George Burnand or to his assigns, to be applied or disposed of in such manner as he may think proper, but in the event of such shares not being disposed of, registered, and the sum of £5 per share paid to the account of the company, then the said 400 shares to be delivered up to the secretary of the company.' It was moved, seconded and carried that the foregoing resolution passed by the board of directors is hereby approved and confirmed, and the directors are requested to carry the purposes of the same into operation without loss of time. (3) J. W. Hulme (one of the subscribers for the additional shares), [529] having signed the Parliamentary subscription list in trust for the company for 1000 shares, and registered No. 9501 to 10,500; it was moved, seconded and resolved that the said trust should be annulled, and that the said shares should be transferred to the secretary of the company for

(1) This gentleman was a director of the company, and one of the subscribers for the additional shares.

(2) Here followed their names.

(3) There appears to be some inconsistency between this resolution and the resolution of the 26th of August 1839.

the benefit of the company, as the board of directors might order:" that the 230 shares mentioned in the entry of the 27th of September 1839, as held by the solicitor to the company, were the 230 shares thereinbefore mentioned: that at no one of the said pretended special meetings of the company 10 or more proprietors ever attended; and that there never were at any period since the passing of the Act any legally appointed directors; and that all the before-mentioned meetings, resolutions and proceedings, and all other resolutions passed at any pretended special meetings of the company, and all entries thereof, and all resolutions passed at any pretended board or boards of any pretended directors of the company, and all entries thereof, and the call of £5 per share were unauthorized by the Act: and that, *in case the facts aforesaid could appear, or evidence thereof be given on the trial of the action after mentioned, a verdict must of necessity pass for the Defendant in such action*; that in consequence of the utter failure of the undertaking, and no more than 605 shares therein having been *bonâ fide* subscribed for, which, if paid up in full, would only raise a capital of £30,250, it had become manifest, as the fact was, that long before the call was made it was impossible to carry on the undertaking, and that the attempt to make the projected docks had wholly failed; and that under these circumstances no call could be made upon the subscribers by virtue of the Act or otherwise; and that long before the said pretended call was made it had become apparent, as the fact was, that the [530] undertaking had become a bubble, and all the parties actively concerned therein, and who pretended to act as directors or officers thereof, well knew it had become impossible to dispose of shares in the undertaking to an extent sufficient to enable the parties engaged therein to carry the Act into effect; and that such call was not only made by persons unauthorized by the Act to make the same; but that if such call had been made by legally constituted directors it would have been, under the circumstances aforesaid, a gross fraud upon the Plaintiff and the other *bonâ fide* shareholders: that notwithstanding the circumstances aforesaid, an action was brought on the 11th of October 1839 by the company against the Plaintiff, for the purpose of compelling him to pay the call of £5 per share on his shares; and on the 29th of November 1839 the Plaintiff pleaded to the action, first, that he never was indebted in manner and form as in the declaration alleged; and secondly, that he was not proprietor of the shares in manner and form as in the declaration alleged: but *in consequence of the special provisions contained in the Act, he would be unable to give on the trial of the action such evidence as would support such pleas*. The bill then contained the usual charge as to documents in the possession of the Defendants; and it prayed that the Defendants might be perpetually restrained from further proceeding in the action, and from commencing or prosecuting any other action against the Plaintiff, in respect of the matters aforesaid; and that all declarations which might be necessary to give effect to the relief which the Plaintiff was entitled to in the suit might be made; and that all orders, directions and accounts might be made and decreed which were necessary to give effect to such declarations; and that in the meantime the Defendants might be restrained from further proceeding in [531] the action, and from commencing any other action against the Plaintiff in respect of the matters aforesaid.

The Defendants demurred to the bill, for want of equity and because Molony was not a party to it.

Mr. Jacob and Mr. James Russell, in support of the demurrer. The Plaintiff insists, by his bill, that he is not bound to pay the call, on the ground that the persons by whom it was made were not legally appointed directors of the company: but the Act of Parliament provides that the appointment of the directors shall not be called in question; and, therefore, we contend that the Plaintiff is bound to pay the call if it is made by directors *de facto*, whether they are directors *de jure* or not. We shall, however, shew that the persons by whom the call was made were duly chosen directors. The bill states that, when the Act of Parliament was passed by the House of Commons, the Parliamentary deed was executed by not more than 34 persons, who subscribed for 455 shares, forming a capital of not more than £22,750: but, as the Standing Orders of the House of Lords required three-fourths of the capital to be subscribed by the persons executing that deed, nine gentlemen (eight of whom were, subsequently, chosen directors) executed the deed, as additional subscribers for 1000 shares each, and another gentleman executed it, as an additional subscriber for 500

shares, in order to make up the required amount of subscription. The bill, however, does not state that those additional subscriptions were colourable; and, consequently, the parties by whom those subscriptions were made became subject to the same legal and equitable liabilities as the other subscribers were subject to. The bill then repre-[532]-sents that eight of the additional subscribers set their initials to a memorandum, dated the 4th of July 1837, which purported that they intended to be trustees of their additional shares for the company: but the bill does not state that the company then accepted them as such trustees, or that they were not to be liable in respect of their additional shares. Therefore more than ten proprietors entitled to vote in respect of 1000 shares were present at the meeting for the choice of directors held on the 12th of January 1838, and the persons who were then chosen directors were duly elected. No other meeting was held until the 27th of June 1839; and then, and not before, the resolution was passed, in pursuance of which the additional shares were transferred to the secretary, in trust for the company. The bill avers that that transfer was colourable and fraudulent; but nothing is stated to shew that it was so; and, if it was, the consequence is that the shares still belong to the parties who subscribed for them. There can be no doubt that there was present at all the meetings a sufficient number of shareholders to comply with the requisitions of the Act.

Another ground on which the demurrer for want of equity may be supported is that the facts stated in the bills constitute, if true, a legal defence to the action: and, therefore, the Defendant ought to have filed a bill for discovery only: but, as the bill is for equitable relief, it must be founded on the hypothesis that the legal right is in the company; and, if the Plaintiff is legally liable to pay the call, what equity is there to exempt him? The Act which creates the legal liability makes certain special provisions; but the party on whom it imposes that liability is not entitled, on that account, to be relieved from it by a Court of Equity. This Court [533] cannot relieve against the provisions of an Act of Parliament; and, consequently, it cannot annul that clause in the Act as to not proving the validity of the appointment of the directors. If the Plaintiff cannot prove the invalidity of the appointment at law, this Court cannot allow him to prove it. Again, the Plaintiff says that the transfer of his shares to Molony has put an end to his liability to pay the call; but, supposing that to be so, is it a ground for coming into a Court of Equity? [THE VICE-CHANCELLOR. I do not observe that the bill anywhere states that the subscriptions which were made in order to comply with the Standing Orders of the House of Lords were subscriptions which, *ab origine*, were not intended to be binding.] There is no such statement.

The second ground of demurrer is that Molony ought to have been made a party to the bill. Supposing that the Plaintiff has, as he alleges, duly assigned his shares to Molony, and thereby got rid of his liability to pay the call, still the shares are liable to be forfeited: and, moreover, Molony, having purchased the shares, subject to the payment of the call, is bound to indemnify the Plaintiff from it: Molony, as between himself and the Plaintiff, is bound to pay the call. Besides, he may file a bill against the company, stating that they intend to bring an action against him for the amount of the call, and seeking to restrain the action on the same grounds as are stated in this bill; he, therefore, ought to have been made a party to the record.

Mr. Wakefield and Mr. Lovat, in support of the bill. The subscriptions required by the Standing Orders of the House of Lords are *bonâ fide* subscriptions: but, in [534] this case, they were fictitious: and, therefore, the parties who were instrumental in procuring this Act of Parliament practised a fraud upon the Legislature. The total number of shares is 11,000; but only 605 have been subscribed for *bonâ fide*, consequently, none of the meetings which have been held have been legally constituted; and the appointment of directors, and all the other proceedings of those meetings, are invalid, and no call has been legally made. The compulsory powers of the Act do not come into operation until the whole of the capital is subscribed for; and, as the Act allows the company no more than 18 months, from the passing of it, to purchase the Surrey Canal, (1) it is manifest that the project cannot be carried

(1) None of the sections of the Act relating to the purchase of the Surrey Canal or the East Country Docks were set forth in the bill.

into effect. Besides, the allegations in the bill (which, on the present occasion, must be taken to be true) shew that the company are unable to sell any more of their shares, and, therefore, the funds necessary to complete the undertaking cannot be raised: and, that being the case, this Court, according to the doctrine laid down by Lord Eldon in *Agar v. The Regent's Canal Company* (see 1 Swanst. 250), will restrain the company from exercising any of the powers given them by the Act.

As the Plaintiffs in the action are not required to prove that the persons by whom the call was made were duly appointed directors, a call made by any of the members of the company, whether directors or not, might be enforced at law. [THE VICE-CHANCELLOR. The Act assumes [535] that the persons by whom the call is made must be directors *de facto*. All that the Legislature meant was that, if the call was made by persons appearing to be directors, it should not be necessary to prove their appointment.] It was said that the Defendant ought to have filed a bill for discovery only: but, if he had done so, the evidence obtained would have been of no use, as it would have been shut out in a Court of law. That circumstance constitutes a sufficient equity to support this bill. [THE VICE-CHANCELLOR. If the Act of Parliament has said that the company shall recover a verdict in the action, provided there be a certain state of circumstances, is not that the law of the land?] According to the statements in the bill, no binding call has been made; consequently, nothing is justly due from the Plaintiff. If that be so, and the Plaintiff is, notwithstanding, to have a verdict pass against him in a Court of law, is not this Court to interfere to protect him; more especially in a case where the project has totally failed and become a bubble? *Colt v. Woollaston* (2 P. W. 154), *Green v. Barrett* (*ante*, vol. i. p. 45).

Whatever may be the result of this suit Molony's interest will not be affected by it either in one way or another: therefore, he is not a necessary party.

Mr. Jacob, in reply. Mangles is still liable to pay the call; but, as between him and Molony, Molony is bound to pay it. If the company recover one-half of the amount of the call from Mangles, they may declare the shares to be forfeited for the remainder.

[536] If the company were going to take the Plaintiff's land under the compulsory powers of their Act of Parliament the Plaintiff might say that they should not take it, because they had not the means of paying for it; and might fortify himself by citing *Agar v. The Regent's Canal Company*: but Lord Eldon did not say in that case that, because the company had got but little money, they should be prevented from making calls on the shareholders in order to raise more, and thereby place themselves in a condition to complete their works. For anything that appears on this bill the docks may be half completed. A *mandamus* would, perhaps, lie to compel the company to complete them; and if they were to answer that they had no funds, the Court would direct them to make calls on their shareholders. In *Colt v. Woollaston* and *Green v. Barrett* the projects were bubbles in their concoction. Does this Plaintiff profess to call back his money on the ground that the project in this case was a bubble in its concoction? [THE VICE-CHANCELLOR. In neither of those cases had any attempt been made to obtain an Act of Parliament.] If the Act of Parliament has said that calls made by directors, *de facto*, shall be paid, that is conclusive; but if the Plaintiff is at liberty to prove at law that the directors were not duly appointed, then the bill ought to have been for discovery, to enable him to get evidence of the irregularity of the appointment. The defence, if any, is at law; but, supposing that there is no defence at law, there is not a particle of equity to support this bill.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill presents this case: that, when the bill for making the projected docks was in progress through [537] the House of Commons, only a small number of shares was subscribed for: but, as the Standing Orders of the House of Lords required that a much larger number of shares should be subscribed for, the deficiency was made up by the additional subscriptions of the 10 gentlemen whose names appear in this bill, and who, altogether, subscribed for 9500 shares; that the House of Lords was satisfied, and the bill actually passed on the 15th of July 1837.

Now it was for the House of Lords to determine what was the subscription for shares which would satisfy them; and I must suppose that the House of Lords were satisfied that the subscription which had taken place was a subscription that ought to

satisfy them. And then the only question is whether, on this bill, there is enough stated to shew that there was a fraud practised on the Legislature so gross that a Court of Equity ought to interfere.

It does not appear on the face of the bill that the memorandum, dated the 4th of July 1837, was signed at the particular time when the parties subscribed for the additional shares.

Mr. Wakefield. It is expressly charged to be at the very time.

THE VICE-CHANCELLOR [Sir L. Shadwell]. What is stated is that, previously to the holding of the meeting of the 12th of January 1838, eight of the additional subscribers had set their initials to the memorandum of July 1837, and then the bill states that a similar memorandum had also been previously signed by the two other additional subscribers; so that it is quite clear [538] that there was no simultaneous signing by the ten, and that the thing could not have been done at one time; and I am not aware that it is meant to be said that this memorandum was signed at the time. Then if it was not signed at the time, of course it must have been signed afterwards; for there is no pretence to say that it was signed before. And then if the House of Lords were satisfied that the subscription was a sufficient compliance with their orders, can it be said that that subscription could be of no avail because, at some subsequent time, the gentlemen who had entered into that very large subscription took some steps by means of which they might be saved from the necessity of advancing out of their own pockets the whole amount of their subscriptions. As soon as the House of Lords were satisfied that a sufficient subscription had been made within the meaning of their orders, and passed the bill, did not the House of Lords leave the person who had subscribed the 9500 shares at liberty to deal with those shares in the same manner as any previous subscriber for a less quantity of shares was left at liberty to deal with his shares? In my opinion, therefore, it would be most presumptuous for this Court, under such circumstances as are represented here, to say that, *ab origine*, the subscriptions were altogether false and fraudulent, and that the House of Lords allowed themselves to be entrapped into the measure of passing the bill by so simple a contrivance as such a compliance with their orders. I do not think that I am at liberty to say that.

Then some steps were taken for the purpose of disposing of the shares; but the shares were not disposed of. What then is the consequence? Why, that those persons whose subscriptions the House of Lords thought [539] authorized them to pass the bill remain just as liable now as ever they were.

Let me put this case: suppose that, shortly after the bill had passed, these 10 persons had become bankrupts; could it be said that because they were bankrupts, therefore the whole thing was to be treated as a nullity? The question is whether the House of Lords had not good reason at the time to be satisfied with what had been done; and I must say that nothing appears on the face of the bill which tends to shew that that subscription, which these 10 gentlemen made, is to be considered as a fraud and a nullity. The conclusion to which the Court ought to come upon this part of the case would rather be this, namely, that the subscription was good, and that the means taken to escape from the effect of it were void. If (which I do not admit) the true effect of the memorandum of the 4th of July 1837 was to enable the parties who had subscribed to escape from their subscriptions, I think this Court, as well as every other Court, would say that the first act was good, and the second void, and that therefore those parties remained bound to make good their subscriptions. Then, if that be so, the meetings which took place were not illegal or pretended meetings, but were properly constituted according to the requisitions of the Act; as, at each of those meetings, there were present 10 persons or more, holding collectively 1000 shares at the least, notwithstanding any reservation in their own minds, that they would, if they could, get rid of the obligations imposed on them by their subscriptions. Then, that being the case, the whole bill fails; because it is nothing to say that it became apparent that the undertaking had utterly failed and become a bubble. There is no one fact alleged to shew that it has become [540] impossible to carry the Act of Parliament into effect, any farther than as it may be said that there is a difficulty in raising the money required for that purpose. But I do not see any difficulty represented as to raising the money, except the difficulty which the Plaintiff

has himself created ; because he is sued at law and does not choose to pay, and then files a bill to evade the payment ; that is, to a certain extent, creating a difficulty. It does not follow, because the time has elapsed within which the company was bound to purchase the tenements which belonged to the Surrey Canal Company, that therefore the undertaking has failed ; for, in the first place, it is not averred that the purchase of those tenements is absolutely necessary for the completion of the projected docks ; and it is not averred that there has not been some purchase actually made, or, at least, a binding contract entered into for the purchase of those tenements. An inference only is drawn that the undertaking cannot be proceeded with, on the supposition that the 10 additional subscriptions were not binding. Whereas, my opinion is that the gentlemen who made those subscriptions are now compellable by law to pay up the whole of their subscriptions ; and that it would be no defence for them to say that they intended to commit a fraud upon the House of Lords, but would rather make the matter worse. Therefore I think that, as far as the main ground of the bill is concerned, it is quite plain that it cannot be supported.

Supposing, however, that the meetings were not duly constituted, and that, consequently, the directors were not duly elected, and the call sought to be enforced was not made by proper authority ; those circumstances do not entitle the Plaintiff to file a bill in equity to restrain the action, but form the grounds upon which he [541] ought to rest his defence to the action in a Court of law. It never has been the course of this Court to restrain an action merely because the Plaintiff at law cannot make out his case. That certainly is not the rule of the Court.

I cannot but think that, according to the proper construction of those clauses of the Act which regulate the action, there is, *prima facie*, enough to support the action. If, however, in point of fact, the call was not properly made, I am inclined to think that the Defendant at law will be at liberty to shew that it was not properly made.

I am not, however, sitting here to determine whether the action at law can be supported or not ; the only question which I have to decide is whether there is any equity to support this bill : and I am of opinion that there is not.

Then, with respect to the question relating to Mr. Molony : I rather think that the true construction of the Act of Parliament is that, if a person holding a share has a call made on him, and prior to the time appointed for payment of the call he transfers his share, in that case the directors would have the power to declare that transferred share to be forfeited. It rather seems to me to be so ; but it is not necessary to determine that question. It is sufficient to say that there is a question the decision of which may affect Mr. Molony's interest.

On both grounds, therefore, this demurrer ought to be allowed.

[542] TUNSTALL v. SIR W. BOOTHBY AND OTHERS. Feb. 22, 1840.

[S. C. on appeal 9 L. J. Ch. (N. S.) 294.]

Pension. Compensation Allowance. Assignable Interest.

The Commissioners of Customs, by the direction of the Lords of the Treasury, granted to A., as a compensation for the loss of an office which he had held in the Custom House, £500 a year, payable quarterly by the Receiver-General of Customs. A. assigned the allowance to B. for a valuable consideration, and subsequently took the benefit of the Insolvent Debtors Act. The Court, in a suit by B. against A. and the assignees of his estate, but to which neither the Lords of the Treasury nor the Commissioners of Customs were parties, restrained the Receiver-General from paying over to the Defendants monies in his hands on account of the arrears of the allowance, unless the Lords of the Treasury or the Commissioners of Customs should order the contrary.

Semble, that such compensation allowance, though revocable at the pleasure of the Government, is assignable.

In June 1832 the Commissioners of Customs, in pursuance of an authority granted to them by the Lords of the Treasury, made an order whereby they granted to the

Defendant W. R. Browne, the sum of £500 per annum, payable quarterly, as a compensation for the loss of the office of cocket-writer at the Custom House in London, which he had held and which had been recently abolished. That sum was not granted to Browne for his life or any other definite period; but was paid by the Defendant Sir Wm. Boothby, the Receiver-General of Customs, in obedience to orders made from time to time by the Commissioners of Customs.

In September 1836 and May 1837 Browne granted two annuities, one of £96, 3s. 6d., and the other of £9, 4s. 6d. to the Plaintiff, and assigned his compensation allowance of £500 a year to the Plaintiff, as a security for the due payment of these annuities. On the 12th of June 1837 the deeds by which the annuities were secured were entered at the Audit Office in Somerset House; which, it was said, was the proper mode of giving notice of assignments of pensions and compensation allowances payable by the Receiver-[543]-General of Customs. In November or December 1837 Brown took the benefit of the Act then in force for the relief of insolvent debtors,(1) and, in January

(1) 7 Geo. 4, c. 57. The 29th section of the Act enacts as follows:—"That nothing in this Act contained shall extend to entitle the assignee or assignees of the estate and effects of any such prisoner, being or having been an officer of the army or navy, or an officer or clerk, or otherwise employed or engaged in the service of His Majesty, in the customs or excise, or any civil office or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk or otherwise employed or engaged in the service of the court of directors of the said Company, or being otherwise in the enjoyment of any pension whatever under any department of His Majesty's Government, or from the said court of directors, to the pay, half-pay, salary, emoluments or pension of any such prisoner, for the purposes of this Act; provided always, nevertheless, that it shall be lawful for the said court to order such portion of the pay, half-pay, salary, emoluments or pension of any such prisoner as on communication from the said court to the Secretary at War, or the Lords Commissioners of the Admiralty, or the Commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, under which such pay, half-pay, salary, emoluments or pension may be enjoyed by such prisoner, or the said court of directors, he or they may respectively under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to, in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of the Paymaster of His Majesty's forces, or of the Treasurer of the Navy, or of the secretary of the said court of directors, or of any other officer or person appointed to pay, or paying any such pay, half-pay, salary, emoluments or pension, such portion of the said pay, half-pay, salary or emoluments as shall be specified in such order and consent, shall be paid to the said assignee or assignees until the said court shall make order to the contrary."

The 30th section, which also was referred to in the course of the argument, is as follows:—"And be it enacted that if any person who shall petition the said court for his or her discharge from imprisonment under this Act, shall at the time of his or her arrest or other commencement of such imprisonment, by the consent and permission of the true owner thereof, have in his or her possession, order or disposition any goods or chattels whereof such prisoner was reputed owner, or whereof he or she had taken upon him or her the sale, alteration or disposition as owner, the same shall be deemed to be the property of such prisoner so petitioning, so as to become vested in the provisional assignee of the said court, by the conveyance and assignment executed in pursuance of this Act; provided that no transfer or assignment of any ship or vessel, or any share thereof, made as a security for any debt or debts, either by way of mortgage or assignment, duly registered according to the provisions of an Act made in the fourth year of the reign of His present Majesty, intituled An Act for the Registering of Vessels, or according to the provisions of an Act made in the sixth year of His said Majesty's reign, intituled An Act for the Registering of British Vessels, shall be invalidated or affected by reason of such possession, order or disposition of the same as aforesaid." See 1st & 2d Vict. c. 110, sects. 56 and 57.

1838, the usual assignment of his estate and effects was made to the Defendants, Asprey and Chart.

Down to the 5th of April 1839 the Plaintiff had been paid his annuities out of Browne's compensation allowance; but afterwards, in the same year, two orders were made by the Insolvent Debtors Court, with the consent of the Board of Customs, by which, first, £150, part of the compensation allowance, and afterwards £350, the remainder of it, were ordered to be paid to Asprey and Chart, for the benefit of Browne's general creditors; and, under those orders, Sir William Boothby had paid £87, 10s., being one quarterly payment of the £350 to Asprey and Chart.

[544] The bill, which was filed on the 9th of January 1840, alleged that the Defendants pretended that the Plain-[545]-tiff's annuities were not well charged upon the compensation allowance of £500 a year, and that such allowance was not assignable or chargeable, and that the assignments thereof to the Plaintiff were void; but the Plaintiff charged that the allowance was assignable and chargeable in equity, and that the Plaintiff, under the assignments to him, had a valid and subsisting lien thereon and on the arrears and future payments thereof for securing his two annuities and the arrears and growing payments thereof; that the allowance was granted to the Defendant Browne as a compensation for the loss of his office of a cocket writer, and not in consideration of any future services to be performed by him, and that it had never been revoked or determined; that a considerable sum of money was due and payable on account of the arrears of the allowance down to the 5th of January 1840, and that £250 had been paid to Sir William Boothby, for the purpose of answering such arrears, and that the same sum was then in his hands, and had been carried by him to the account of Browne's compensation allowance, or otherwise set apart or appropriated by him for or towards the payment of the arrears thereof, and that Boothby was a trustee of the last-mentioned sum for the Plaintiff and the other persons entitled thereto.

The bill prayed that the Plaintiff might be declared to have a good equitable charge or lien upon the compensation allowance and the arrears and growing payments thereof, as a security for his annuities and the [546] arrears and growing payments thereof; and that an account might be taken of the last-mentioned arrears and growing payments,(1) and also of the monies which had been received by the Defendants, Asprey and Chart, on account of the compensation allowance; and that they might be charged therewith, for the Plaintiff's benefit, and be decreed to pay the same accordingly: that an account might be taken of the monies then in Sir William Boothby's hands for the purpose of paying the arrears of the allowance, and that the same might be paid to and divided amongst the Plaintiff and the other parties entitled thereto, according to their respective rights; and that, in the meantime, Sir William Boothby might be restrained from paying over, to the other Defendants or any of them, any monies then being in his hands or power on account of or for the purpose of paying the arrears of the allowance; and also any monies which should thereafter be in his hands or power for the purpose of answering the future payments of the allowance, and that Asprey and Chart might be restrained from receiving the allowance or the arrears or growing payments thereof, and from commencing or prosecuting any proceedings at law for recovering or compelling payment of the same, or in any manner interfering with the payment thereof; and that a receiver of the allowance might be appointed.

A motion was now made, on behalf of the Plaintiff, for the receiver and injunctions as prayed by the bill, except that the injunctions were confined, by the notice of motion, to the monies then in Sir William Boothby's hands or power.

It appeared, from an affidavit made by Browne, that the cocket writers at the Custom House were clerks in [547] the service of the Government in the office of the collector of the customs outwards, and were appointed by the Lords of the Treasury upon the nomination of the Commissioners of Customs, *and might be dismissed at the pleasure of either of those Boards*; that the Lords of the Treasury fixed the sum of £500 a year as the compensation to the deponent for the loss of his office; that the payment of the compensation *was entirely under the control and direction of the Commissioners*

(1) So in brief.

of Customs, who had, hitherto, made orders, quarterly, upon Sir William Boothby for payment thereof, and that, until such orders were made, neither the deponent, nor any person on his behalf, had any right to receive the allowance, nor had Sir W. Boothby any right to pay the same.

Mr. G. Richards and Mr. J. H. Palmer, in support of the motion, said, first, that Browne's compensation allowance, although it was revocable at the pleasure of the Government, was assignable in equity, and had been duly assigned to the Plaintiff for valuable consideration; that it was not, like military pay or half-pay, granted with reference to future services, and, therefore, there was not the same ground for holding it not to be assignable as there was with regard to those payments: *Alexander v. The Duke of Wellington* (2 Russ. & Myl. 35), *Ellis v. Earl Grey* (*ante*, vol. vi. p. 214), *Stone v. Lidderdale* (Anst. 533). Secondly, that, under the 29th section of the Insolvent Debtors Act, the allowance in question did not, like the goods and chattels of the insolvent, pass to his assignees by virtue of the assignment under the Act; that the Board of Customs could not consent to any part of the allowance being paid to the assignees, as the insolvent had assigned it to [548] the Plaintiff, and therefore was not in the *enjoyment* of it within the meaning of the 29th section of the Act: that the Legislature could not have intended to deprive a particular assignee for value of the benefit of his security, in favour of the general creditors of the insolvent: that, as the subjects to which the 29th section of the Act related were expressly excluded from the operation of the assignment under the Act, no notice of the assignment to the Plaintiff was necessary in order to take the allowance out of the operation of the 30th section; but, if any notice was necessary, the entering of the Plaintiff's deeds at the Audit Office was sufficient to take the allowance out of the order and disposition of the insolvent. *Burn v. Carvalho* (*ante*, vol. vii. p. 109).

Mr. Wray, for Sir W. Boothby, submitted that the motion ought to be refused, as the compensation allowance was payable only during pleasure, and therefore was not assignable.

Mr. Knight Bruce and Mr. Coleridge, for Asprey and Chart, said that the allowance was not assignable: that it was a mere expectancy. [THE VICE-CHANCELLOR. Expectancies are assignable in equity.] Supposing that the allowance was assignable, the notice of the assignment to the Plaintiff, which was given at the Audit Office, was not sufficient to take it out of the order and disposition of the insolvent: for nothing that is entered at the Audit Office is communicated to the Commissioners of Customs, to whom the notice ought to have been given. But no such precaution was taken until after the insolvent had been discharged under the Act; and no notice was ever given to Sir William Boothby; therefore, the allowance remained in Browne's order and [549] disposition at the time of his insolvency; and we are entitled to it under the orders which have been made by the Commissioners of the Insolvent Debtors Court, with the consent of the Board of Customs. *Clay v. St. John* (2 Sim. & Stu. 32), *McCarthy v. Gould* (1 Ball & Beat. 387).

THE VICE-CHANCELLOR [Sir L. Shadwell]. With regard to the sums in the hands of Sir W. Boothby, I have to observe that this Court has given effect to an assignment of even military full pay, with respect to money which was actually in the hands of the agent for the party who had made the assignment; for, in *Spencer v. Cox & Drummond* (2 Anst. 535, note), an officer in the Army had assigned his pay to the Plaintiff to secure an annuity, and had given notice to the Defendants, the agents of his regiment, to pay it over to the Plaintiff. The officer being abroad on service, the Plaintiff demanded payment of the arrears of the annuity from the Defendants; and on their refusing, he filed his bill. The Defendants proved that officers in the Army were at liberty to take up their pay from the regimental paymaster, and that the agent was answerable over to him. The Master of the Rolls, however, decreed that the Defendants should pay the money in their hands, in discharge of the arrears of the annuity; and should discharge the growing payments of it, out of such monies as they should receive on account of the assignor. But the Lord Chancellor varied the decree, by ordering the Defendants to discharge the annuity out of what should remain in their hands after satisfying the demands of the paymaster; so that the Court gave the assignee the benefit [550] of his lien with respect to the balance of the monies in the hands of the agents.

In my opinion Sir W. Boothby stands in the same situation, with respect to the sums in his hands which he has been directed to pay to the insolvent, as the Defendants did in the case which I have alluded to. And the Plaintiff's deeds, as I understand, were entered at the Audit Office; which appears, from one of the affidavits, to be the proper mode of giving notice of assignments of pensions and compensation allowances; therefore, all the notice of the transaction between the Plaintiff and the Defendant, which was requisite, has been given.

I cannot think that the meaning of the 29th section of the Insolvent Debtors Act is that a pension or compensation allowance which has been assigned is to be dealt with just in the same manner as if there had been no assignment, and that, too, in the absence of the assignee. I feel, however, some delicacy in interfering in this case, without having the Lords of the Treasury and the Commissioners of the Customs before the Court; and in their absence I cannot make the order which is asked on this motion, to its full extent; but the order which I shall make is that Sir W. Boothby be restrained from paying over, either to Asprey or Chart or to Browne, any monies in his hands or power on account of the arrears now due of the compensation allowance granted to Browne, unless the Lords of the Treasury or the Commissioners of Customs shall make order to the contrary; and that Asprey and Chart be restrained from commencing or prosecuting any proceedings, at law or in the Insolvent Debtors Court or [551] elsewhere, against Sir W. Boothby, for recovering or compelling payment of such monies now in his hands or any part thereof.(1)

[551] HAMMOND v. HALL. Feb. 26, 28, 1840.

[S. C. 4 Jur. 694.]

Water-Right. Well.

Whether the owner of an old well can prevent his neighbour from sinking a well in his own land, on the ground that thereby the supply of water to the old well will be drawn off or diminished. *Qu.*

The Plaintiffs were the trustees, appointed under a local Act of Parliament (2d & 3d W. 4, c. 66), for repairing and keeping in repair the iron railing round the centre or middle space of Queen's Square in the parish of St. George the Martyr, Middlesex, and for improving and regulating the use and enjoyment of the garden of the square, cleaning the foot-pavement, and *repairing the pump and well in the square*. The Defendants were the commissioners appointed, under the same Act, for paving, cleansing, lighting, &c., the squares, streets, &c., within the united parishes of St. Andrew, Holborn, above the Bars, and St. George the Martyr, and were empowered to sink wells and erect pumps within the limits of the Act, for the purpose of watering the squares, streets, &c., within those limits.

The Defendants having, under the Act, begun to sink a well at the distance of twenty-three yards from an old well and pump situate within and close to the iron railings round the garden of Queen's Square, the bill was filed alleging that the old well and pump had been always repaired at the expense of the inhabitants of the square, who at all times had had the control of the pump, and had been in the habit of having the handle of it [552] locked during the night, in order to prevent the water, with which it was but scantily supplied, being exhausted; and that the new well was intended to be sunk deeper than the old one, and would, when completed, draw off the water from it. The bill prayed for an injunction to restrain the Defendants from further sinking their well, or doing any other act tending to diminish the supply of water to the old well.

(1) Affirmed by the Lord Chancellor on the 13th of May 1840. His Lordship relied particularly upon the injunction being confined to the sums in Sir W. Boothby's hands.

The injunction having been granted *ex parte*, the Defendants now moved to dissolve it. One of the affidavits in support of the motion stated that the water in the new well stood five inches higher than the water in the old one.(1)

Mr. Jacob, Mr. Wigram and Mr. Sharpe, for the Defendants, in support of the motion. The Plaintiffs are not entitled to sustain this suit. They have no ownership or estate either in the pump or in the soil in which the well is sunk. It appears by the affidavits not to be known in whom the ownership is. The Plaintiffs are trustees only of certain naked powers vested in them by the Act; but the Act does not authorize them to institute suits for protecting the supply of water to the pump, but only to repair it. If the right claimed by the bill is a public right, the suit ought to have been instituted by the Attorney-General; if it is a private right, the bill ought to have been filed by some of the individuals having that right, on behalf of themselves and the others.

[553] The Defendants have, under the Act, the power of sinking wells and erecting pumps for the purpose of watering the squares and streets within the limits of the Act: and in exercise of that power they have dug a well in the open space on the south side of Queen's Square. That well is already sunk to its greatest depth, that is about 22 feet: the depth of the old well is about 18 feet. It is said in one of the affidavits that the new well will drain the water from the old one: but no one can tell what the effect will be, except by experience. If, when the new pump is erected, the commissioners draw off an excessive quantity of the water, it will then be time enough to apply to this Court to prevent the commissioners from making that excessive use of the pump. This Court will not interfere to prevent an act from being done, unless it is manifest that the act, when done, will cause an irreparable injury. *Earl of Ripon v. Hobart* (3 Myl. & Keen, 169; see 173, *et seq.*). The owner of a pump cannot prevent his neighbour from erecting a pump on his land, because it may *perhaps* lessen the supply of water to the other pump. It is evident that there is no communication between the water which supplies the old well and that which supplies the new one; for, if there were any communication, the water would not stand higher in the new well than it does in the old one.

There is no instance of an action being brought to sustain such a right as is claimed by this bill, or of an injunction being granted by this Court to prevent the infringement of such a right. But the Courts both of law and Equity will interfere to sustain and protect rights-of-way, rights to running water and also rights [554] to light and air, so far as may be necessary for the preservation of health or for the purposes of trade, but not further. A right-of-way or to running water is founded on acquiescence, which affords a ground for presuming a grant of the right. But there can be no acquiescence with regard to subterranean water: for no one standing on the surface can tell how the water gets to the well. If the party against whom the right is claimed has stood by and *seen the right enjoyed* for a series of years, the Courts will presume that he has granted the right: but, if he could have no knowledge of the enjoyment of the right, there is no ground for making the presumption.(2)

Mr. Knight Bruce and Mr. G. Richards, for the Plaintiffs. Wherever the legal estate in the centre of the square may have originally been, it is now in the trustees. *Trent v. Hanning* (10 Ves. 495, and 7 East, 97). Every power that the owner of the inheritance could have is now vested in them.

It has been suggested that the only origin of rights *in alieno solo* is by permissive

(1) A report is given of this case, because a question was raised in arguing it, which was said never to have been discussed before, namely, whether a right or easement could be claimed with respect to *subterranean* water.

(2) Mr. Sharpe referred to the following passages in the Digest of the Roman Civil Law: "Marcellus scribit, cum eo, qui in suo fodiens, vicini fontem avertit, nihil posse agi nec de dolo actionem; et sanè non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi, id fecit.—L. 1, § 12, ff. de aq. et aq. pl. arc. Si in meo aqua irrumpat quæ ex tuo fundo venas habeat; si eas venas incideris, et ob id desierit ad me aqua pervenire, tu non videris vi fecisse, si nulla servitus mihi eo nomine debita fuerit; nec interdicto quod vi aut clam teneris."—L. 21, ff. de aq. et aq. pl. arc.

user : but that is not so. [555] Could it be contended that after the owner of a mine had enjoyed a right of drainage for a century, the owner of an adjoining mine could intercept the drainage so as to drown his neighbour's mine?

The owner of land has a right to all watercourses under it until some person has acquired a right inconsistent with it. That principle was recognised in *Balston v. Bensted* (1 Camp. N. P. C. 463), where Lord Ellenborough, C.J., held that a person who for 20 years had had the uninterrupted enjoyment of a spring of water had acquired an absolute right to it.

Mr. Jacob, in reply. In the case referred to Lord Ellenborough was speaking with reference to the facts before him. That was the case of a watercourse ; and it was manifest that the water came from the Plaintiff's land. This is not the case of a watercourse or stream of running water, but of an accumulation of water under the land ; and from whence it arises no one can tell.

THE VICE-CHANCELLOR [Sir L. Shadwell]. There can be no doubt that under the Act of Parliament the commissioners have, *prima facie*, the right to do that which they propose to do ; for the Act expressly authorizes them to sink wells and erect pumps wherever they may think proper within the district over which their powers extend for the purpose of watering the squares, streets and other places within that district. The question then is whether the trustees have any right to prevent the exercise of that general power which is clearly given to the commissioners by the Act : and, after the best consideration which I have [556] been able to bestow upon the case, I am inclined to think that they have not. Any opinion, however, that I can express upon the question is of but little, if any, value ; as, if the cause is proceeded with, the point must be decided by a Court of law.

The powers which the Act gives to the trustees to be appointed under it do not, as I understand, extend to the whole of the spaces included within the houses of the squares in the district to which the Act relates ; but are confined, principally at least, to the gardens of those squares and the iron railings round them. The trustees, however, are empowered to cleanse the foot-pavements of the squares and to repair the pumps and wells therein. But, in my opinion, it would be a very forced construction of the Act to say that the power to repair the pumps and wells was an authority which was intended to contravene the general power given to the commissioners to make pumps and wells for the purpose of watering the squares and streets within their district. The powers given to the trustees seem to me to have reference to the comfort and enjoyment of the inhabitants of the squares ; but the powers vested in the commissioners seem to be intended for the benefit of the public at large : therefore it is but reasonable to suppose that the former was not intended to control or interfere with the latter. Supposing, then, the opinion which I have formed upon this part of the case to be correct, the consequence is that the trustees have no right to ask the Court to restrain the commissioners from doing the act which forms the subject of the present suit.

It may, however, be said that although my opinion is unfavourable to the right claimed by the Plaintiffs, yet, [557] as the question whether they have that right or not is a legal one, I ought to restrain the Defendants from doing the act complained of until that question has been decided in a Court of law. It appears, however, that the two wells are at the distance of twenty-three yards from each other ; and that the level of the water in the new well is higher than the level of the water in the old one ; which shews that the water, if it flows at all, would flow from the new well to the old one ; so that an injury would be done to the old well if the supply of water to it from the new one were to be intercepted. There is, however, no evidence at all that the wells are supplied by a stream of flowing water, or in what other manner they are supplied : but there is evidence to shew that the one cannot be supplied from the other ; because it has been sworn that the water in each of them does not stand at the same level. There is, therefore, quite sufficient evidence to warrant me in believing that there will be no danger in dissolving this injunction. As, however, the Plaintiffs may wish to carry the matter further, I shall leave them at liberty to bring such action or actions as they may be advised : and, when they have established their right at law, they may apply to this Court to revive the injunction.(1)

(1) See 22 Vin. Ab. p. 528, Watercourse, C. 9. *Prickman v. Tripp*, Skin. 389 ;

[558] WORTHINGTON v. REMNANT. March 7, 1840.

Practice. Certiorari. Court of Common Pleas at Lancaster.

A *certiorari* issued out of the Court of Chancery, on an order made by a Judge at common law, is irregular.

The Court of Chancery has issued a *certiorari* to the Court of Common Pleas at Lancaster.

The Plaintiff having brought an action of *replevin* against the Defendant, founded on a distress for the rent of an inn, at Ulverston in Lancashire, held by the Defendant as his tenant, the Defendant caused the proceedings in the action to be removed from the County Court into the Court of Common Pleas at Lancaster, and then, under an order made by Mr. Justice Coltman, on an *ex parte* application, obtained a writ of *certiorari*, from the High Court of Chancery, for removing the cause into the Court of Common Pleas at Westminster.

A motion was now made on the Plaintiff's behalf that the *certiorari* might be quashed; and that the record in the cause might be sent back to the Court of Common Pleas at Lancaster, to be proceeded with according to law; or that a writ of *procedendo* might issue to enable that Court to proceed in the cause according to law; and that the record, together with the last-mentioned writ, might be sent back to that Court for that purpose; and that the Defendant might pay to the Plaintiff the costs of the motion.

Mr. Romilly, in support of the motion. The Courts of the County Palatine of Lancaster are not Inferior Courts, but have a co-ordinate jurisdiction with the Courts at Westminster; and there is no case in which a *certiorari* has issued to those Courts. In *Zink v. Langton* (Doug. 749), Lord Mansfield says that the Court of King's Bench may, in a case which calls strongly for [559] a trial at Bar, grant a *certiorari* to remove proceedings from a County Palatine: but that is merely a *dictum*; and, moreover, this is not a case which calls for a trial at Bar.

Secondly. Neither Mr. Justice Coltman nor any other Judge of the Courts of Common Law, could have any power to order a *certiorari* to issue out of this Court. Indeed, in *Edwards v. Bowen* (2 Russ. 153), Lord Eldon intimates that even the Vice-Chancellor has no authority to direct a *certiorari* to issue out of this Court.

Thirdly. The *certiorari* in this case was granted on an *ex parte* application, and without any sufficient ground being laid for it. *Jones v. Davies* (1 Barn. & Cres. 143), *Williams v. Thomas* (Doug. 751, note), *Pierce v. Thomas* (Jac. 54).

Mr. Knight Bruce, for the Plaintiff. There is no Court, either in England or Wales, to which either this Court or the Court of King's Bench has not the power of issuing a *certiorari*. It appears, from some of the cases that have been referred to, that this Court has the power to issue the writ to the Courts of Great Sessions in Wales. Upon what principle can there be any distinction between those Courts and the Courts of the County Palatine of Lancaster? It did not occur to any of the learned counsel who argued the case of *Zink v. Langton* to question the power of the Courts at Westminster to issue the writ to the Courts of the County Palatine.

In *replevin*, the Defendant is substantially the Plaintiff; and the title to the freehold will, of necessity, [560] come in question: therefore, there were sufficient grounds for granting the writ.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have been informed by Mr. Herbert, the Clerk of the Petty Bag, that there is no single instance in which a writ of *certiorari* has issued from this Court to the Court of Common Pleas at Lancaster, (1) and that

S. C. Comb. 231; 1 Com. Dig. 306, Actions on the Case (C.); 2 Williams's Saunders, 175, note 2; *Cooper v. Barber*, 3 Taunt. 99.

(1) This information appears not to be correct; for, on the 18th of July 1822, the Lord Chancellor ordered the writ to issue to the Court of Common Pleas at Lancaster, on an application made by the Defendants in an action for false imprisonment. The application seems to have been made *ex parte*, supported by affidavit.

he so told the party in this case when he applied for the writ ; but, notwithstanding, he chose to take it on his own responsibility.

Supposing, however, that this Court has jurisdiction to direct the writ to issue to the Court of Common Pleas at Lancaster ; I think that, according to the view taken by Lord Eldon, in *Pierce v. Thomas*, an application for it ought to be made to this Court : for, in that case, a *certiorari* had issued as of course, without any affidavit or application to the Court ; and on an application being [561] made to quash it on those grounds, his Lordship held that the objections taken were fatal, and that the writ must be quashed : and when we see that in *Edwards v. Bowen* the same learned Judge doubts whether the Vice-Chancellor has jurisdiction to order the writ to issue, it is quite manifest that it cannot be issued without any order of the Court at all.

“Whereas Mr. Romilly, of counsel for the said M. Worthington, this day moved, &c., &c., this Court doth order that the said writ of *certiorari* be superseded, and the proceedings taken off the file of this Court : and it is ordered that a writ of *procedendo* do issue to Her Majesty's Court of Common Pleas for the County Palatine of Lancaster : and it is ordered that the Defendant, F. W. Remnant, do pay to the Plaintiff his costs incurred by issuing the said writ of *certiorari*, such costs to be taxed by the Master in rotation.”

[562] R. T. PERKIN v. THOMAS STAFFORD ; R. T. PERKIN v. WILLIAM STAFFORD, MARY ANN STAFFORD AND THOMAS STAFFORD. Dec. 4, 1841.

Mortgagor and Mortgagee. Decree. Foreclosure. Disclaimer.

If some of the Defendants in a foreclosure suit disclaim, the Court will decree them to be foreclosed, and not simply dismiss the bill as against them.

The original bill was filed by the personal representative of the mortgagee against the mortgagor, to foreclose a mortgage for 500 years, of certain tenements in the borough of Southwark. The Defendant appeared to the bill, but died before he had answered it, having devised the mortgaged premises to William Stafford in fee, in trust for his widow, Mary Ann Stafford, and appointed them executor and executrix of his will. The Plaintiff thereupon filed a bill of revivor and supplement against William Stafford, Mary Ann Stafford and Thomas Stafford, the younger (the testator's heir) ; and they put in a joint and several answer, admitting the Plaintiff's title and the will, but disclaiming, on the part of the widow and heir, any interest in the mortgaged premises or the equity of redemption thereof.

Mr. Girdlestone, for the Plaintiff, contended that a decree of foreclosure ought to be made against the two Defendants who had disclaimed, as well as against the other Defendant. He referred to 2 Daniell's Prac. 235, 236, and also to *Collins v. Shirley* (1 Russ. & Myl. 638 ; Reg. Lib. A. 1839, fol. 2326) and *Ablett v. Edwards*.(1)

The grounds of it were that a material witness, being out of the jurisdiction of the local Court, could not be compelled to attend at the trial of the action, and that many material and legal questions were likely to arise at the trial, in discussing a bankruptcy of which the Defendants were the commissioners, and, in that character, had committed the Plaintiff for not answering questions propounded to him on his examination. *In re Ashworth*, Reg. Lib. A. 1821, fol. 1800.

A *subpoena ad testificandum* issued out of the Common Pleas at Lancaster may now be effectually served in any part of England and Wales ; see 4 & 5 W. 4, c. 62, s. 29.

(1) Not reported. Rolls, 3d June 1840.

The decree in *Collins v. Shirley*, after reciting that two of the Defendants had disclaimed any interest in the mortgaged premises, decreed that they should be foreclosed. It then directed an account of the principal and interest due on the mortgage, &c., and decreed that on non-payment by the Defendant, who had not disclaimed, of the amount found due and of the Plaintiff's costs, within the usual time, that Defendant should be foreclosed.

The decree in *Ablett v. Edwards* recited and decreed in like manner, except that it ordered the Plaintiff to pay the disclaiming Defendant's costs, and add them to the mortgage debt.

[563] Mr. Wakefield, for the Defendants, contended that a decree of foreclosure ought not to be made against the Defendants who had disclaimed, but that the bill ought to be dismissed, as against them, with costs.

THE VICE-CHANCELLOR [Sir L. Shadwell] held that the Plaintiff was entitled to have a decree of foreclosure made against the Defendants who had disclaimed, as it was of essential importance to his title.

The minutes of the decree, after reciting that the widow and heir had, by their answer, disclaimed all interest in the premises, proceeded to foreclose them; and then directed an account to be taken of the principal and interest due on the mortgage, &c., and decreed that, on non-payment thereof and of the Plaintiff's costs within the usual time, William Stafford should be foreclosed.

[564] EMERY v. NEWSON. Dec. 10, 11, 1841.

New Orders of August 1841. Practice. Construction. Infant Defendant.

The 21st Order of August 1841 does not apply to the case of an infant Defendant.

Mr. Jeremy applied for leave to proceed against an infant Defendant in the manner pointed out by the 21st Order of the 26th of August 1841.

THE VICE-CHANCELLOR [Sir L. Shadwell] was of opinion that the order did not apply to the case of an infant Defendant: and, on the following day, His Honor said that he had ascertained that the Master of the Rolls, the Vice-Chancellor Wigram and a learned counsel, were of the same opinion.

[564] CLOUGH v. DIXON. COLLINS v. BOND. COLLINS v. COLLINS.
Dec. 14, 15, 1841.

[For previous proceedings, see S. C. 8 Sim. 594; 59 E. R. 235; 3 My. & Cr. 490; 40 E. R. 1016.]

Administrator. Parties.

A bill was filed by a residuary legatee, against A. and B., the administrators of the deceased's effects, for an account of the assets received by them. A. died without having appeared to the bill: and C. obtained letters of administration of his goods, limited for the purpose only to attend, supply, substantiate and confirm the proceedings in the suit, until a final decree should be made and executed; and C. was brought before the Court, by a supplemental bill. Held that, owing to the limited nature of those letters of administration, an account of A.'s receipts could not be taken; but that a general administrator to A. must be brought before the Court.

The hearing of the original cause is reported *ante*, vol. viii. p. 594. The decree then made was affirmed by the Lord Chancellor, see 3 Myl. & Craig, p. 490. It was afterwards discovered that Mrs. Clough had died in India before the original cause was heard; and consequently the decree was nugatory.

[565] On the 10th of May 1839 letters of administration to Mrs. Clough were granted to C. W. Collins, for the use and benefit of Mr. Clough, who was resident in India. In March 1841 W. C. Collins died; and, on the 18th of May following, letters of administration to Mrs. Clough were granted to Caleb Collins and Anne Elizabeth Collins for the use and benefit of Mr. Clough.

On the 21st of July 1841 Caleb Collins and Anne Elizabeth Collins filed a bill of revivor against Mrs. Bond and the personal representatives of her late husband, John Bond; alleging that the Plaintiffs, as the personal representatives of Mrs. Clough, were entitled to what might be recovered, in the original suit, in respect of Mrs. Clough's share of the undisposed-of residue of Ann Dixon's estate, and also to revive that suit, which had become abated by Mrs. Clough's death; and praying that the

suit might be revived against Mrs. Bond and the personal representatives of John Bond. On the 10th of August 1841 the suit was revived accordingly.

In August 1841 Caleb Collins and Anne Elizabeth Collins filed a bill of supplement, alleging that Thomas Reup Dixon, as had been lately discovered, died in 1838, without having appeared to the original bill, and that, on the 10th of July 1841, letters of administration of his goods, chattels and credits, limited for the purpose only of the proceedings had and to be had in the original suit, and in any other suit for the same purpose, until a final decree therein and complete execution thereof were granted, by the Prerogative Court of the Archbishop of Canterbury, to Mary Collins; and praying that Mary Collins might answer the supplemental matter, and that the Plaintiffs might [566] have the benefit of the original suit and the proceedings therein against her, as the personal representative of Thomas Reup Dixon, in like manner as if he had appeared to and answered the original bill; and if necessary, that the usual accounts might be taken of Dixon's personal estate, and that the same might be applied in a due course of administration, and in or towards payment of what was or might be found due to the Plaintiffs as Mrs. Clough's personal representatives.

The original and supplemental causes now came on to be heard. Copies of the decree made on the original hearing, and of the letters of administration granted to Mary Collins, were produced. By the decree, it was referred to the Master to take an account of the personal estate of Ann Dixon, not specifically bequeathed, come to the hands of Mrs. Bond, Thomas Reup Dixon, and the late John Bond; and it was ordered that what, on taking the account, should appear to have come to Mrs. Bond's hands since John Bond's death, or to Dixon's hands, should be answered by them respectively; and that what should appear to have come to John Bond's hands should be answered by the other Defendants, his executors, they admitting assets; and that the Master should take an account of Ann Dixon's debts, funeral and testamentary expenses, &c., and that her personal estate not specifically bequeathed should be applied in payment of her debts, &c., in a due course of administration: and that the Master should ascertain the amount of the clear residue of her personal estate and of Mrs. Clough's share therein; and should inquire and state whether any and what part of such share had been paid or satisfied, and by what means; and that Bond's executors, they admitting assets, [567] should be personally charged with the sum of £1348., admitted, in their answer, to have been drawn out of Child's bank by Dixon, with interest at 4 per cent; and it was declared that the sum of £988 and interest after the rate aforesaid, part of the £1348, formed the share or part of the share of Mrs. Clough, &c., &c.

The letters of administration granted to Mary Collins recited the bill in the original suit, and that it was alleged that Thomas Reup Dixon was late of Boulogne, in France, and died on the 1st of March 1838, having, at the time of his decease, *goods, chattels and credits, in divers dioceses* within the province of Canterbury, sufficient to found the jurisdiction of the Prerogative Court, and *having made his will, and thereof appointed his wife, Eliza Dixon, sole executrix and universal legatee*, who had not then proved the will in the Prerogative Court; and that it was further alleged that Mrs. Clough was dead, and that Caleb Collins and Anne Elizabeth Collins, as the administrators of her estate and effects, intended to file their bill of revivor in the suit of *Clough v. Dixon*, but were unable to do so, with effect, for want of a representative of Thomas Reup Dixon to be made a party thereto; and that it was further alleged that the Surrogate therein named had, on the petition of Caleb Collins and Anne Elizabeth Collins, decreed letters of administration of the goods, chattels and credits of Thomas Reup Dixon, limited as after mentioned, to be granted to Mary Collins, as a person for that purpose named by and on behalf of Caleb Collins and Anne Elizabeth Collins, Eliza Dixon having consented thereto. The letters of administration then proceeded thus: "We do, therefore, by these presents, grant full power and authority to you, [568] the said Mary Collins, to administer and faithfully dispose of the goods, chattels and credits of the said Thomas Reup Dixon, *limited for the purpose only to attend, supply, substantiate and confirm the proceedings which shall have been had or may, at any time hereafter, be had in the aforesaid cause or suit about to be revived in the High Court of Chancery, or in any other cause or suit which may, hereafter, be commenced in the same or any other Court, between the aforesaid or any other parties, touching and*

concerning the said premises, and until a final decree shall be had and made therein, and the said decree carried into execution, and the execution thereof fully completed, but no further or otherwise." The letters of administration then constituted Mary Collins administratrix of the goods, chattels and credits of T. R. Dixon, limited for the purpose before expressed.

Mr. Whitmarsh, sen., Mr. Girdlestone, and Mr. Whitmarsh, jun., for the Defendants Mrs. Bond and her late husband's executors, said that the letters of administration to T. R. Dixon, which had been granted to Mary Collins, did not enable her to receive and deal with his assets; that the parties for whom they appeared were entitled to have Dixon's assets first applied to make good the sum which he had drawn out of Child's bank; but that could not be done unless a *general* representative of Dixon, who was the delinquent party, was a party to the suit.

Mr. Richards and Mr. Walker, for the Plaintiffs, said that the limited letters of administration which had been granted to Mary Collins were amply sufficient for the purpose for which Dixon's estate was required to [569] be represented in the suit; for that no relief was prayed, by the original bill, against Dixon; (1) that the object of the suit was to make Bond's estate answerable for the sum which had been drawn out of the bank; that, where a suit was instituted for the purpose of making one of two trustees responsible for a breach of trust, the only purpose for which the other trustee was made a party to the suit was that he might attend the taking of the accounts in the Master's office; which he was entitled to do, as his co-trustee might institute a suit against him for contribution.

Mr. Rolt, for Mary Collins, was about to argue against the objection raised by the Defendant's counsel; but

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he could not be heard for that purpose, as the objection which had been raised affected the Plaintiffs only. His Honor added that he could not dispose of the objection until he had heard what decree the Plaintiffs intended to ask for.

[570] Mr. Richards. We ask for a decree in the same terms as the original decree.

Mr. Whitmarsh. The original bill prays that T. R. Dixon, as well as the other Defendants, may account for Ann Dixon's estate; and the supplemental bill asks for an account of E. R. Dixon's estate. How can those accounts be taken without having his general personal representative before the Court?

Mr. Richards. If we are not entitled to a decree to the extent which we ask, we are willing to waive the account against T. R. Dixon.

Mr. Girdlestone. The suit is not confined to the sum abstracted from Child's bank. The original bill states that T. R. Dixon and Mr. and Mrs. Bond possessed assets of Ann Dixon to the amount of £20,000; and then it prays for a general account and for a general administration of her estate. Is it then possible to sustain this suit as against Mrs. Bond and her late husband's executors, without having a complete personal representative of T. R. Dixon before the Court? Dixon died without having even appeared to the original bill; therefore, so far as the purposes of the suit are concerned, he may be fairly considered to have been dead at the time when that bill was filed. The question then is, if he had been dead when the original bill was filed, could this decree have been made, with this limited administratrix before the Court. It is perfectly manifest that the decree could not [571] have been made without a full administrator to Dixon

(1) The original bill prayed for an account of Ann Dixon's estate, possessed by T. R. Dixon, Mr. and Mrs. Bond, and the executors of Mr. Bond, and of her funeral and testamentary expenses and debts; and that the clear residue of her estate, and Mrs. Clough's share therein, might be ascertained; and that Mrs. Bond and her late husband's estate might be declared to be liable for the monies which had been paid into Child's bank, and drawn out by Dixon, with interest thereon; and that Mrs. Bond and her late husband's executors might be decreed to pay what should be found due from them on taking the before-mentioned accounts; and, if Bond's executors should not admit assets, that the usual accounts might be taken of his estate; and that Mrs. Clough's share of Ann Dixon's residuary estate might be paid to her and her husband.

being a party to the suit. The letters of administration to him which have been granted shew that he left goods and chattels in divers dioceses, and that he made a will and appointed his wife executrix : but those letters of administration give his administratrix no power either to receive or apply his assets, or to bind them by any admission in her answer : nor, as the suit is now constituted, can any decree or report be made which will have the effect of binding his assets. The Plaintiffs have no right to waive the accounts prayed against Dixon and his estate ; for my clients have a right to have those accounts taken, and a decree made which will have the effect of binding his assets. But the Court can do neither of those things, except in the presence of a person who fully represents those assets. It cannot declare the liability of Bond's estate in the absence of a full administrator to Dixon : for it is one of the best established principles of a Court of Equity to do complete justice and prevent multiplicity of suits. *Knight v. Knight* (3 P. W. 331). In that case Lord Talbot, C., held that the executor was a necessary party to a bill against the heir of a deceased covenantor ; for the Court would not first decree the heir to perform the covenant, and then put him to file another bill against the executor, in order to reimburse himself out of the personal assets. Your Honor's judgment in *Munch v. Cockerell* (*ante*, vol. viii. p. 231, *et seq.*) also shews that a Plaintiff who seeks relief in this Court in respect of a breach of trust cannot select one or more of the parties to the act complained of, but must make them all Defendants to the suit. If, as the Plaintiffs in this case admit, an administrator to T. R. Dixon is a necessary party to this suit, the Court must have before [572] it a complete administrator to him ; for, otherwise, it cannot do complete justice between the parties.

Mr. Richards. The Plaintiffs are entitled to have the liability declared, in the first instance, against the wholly solvent executor ; *Walker v. Symonds* (3 Swanst. 1) ; but the Court cannot, in this suit, decree Dixon's assets to make contribution to Bond's estate, in respect of the sum which Bond's estate may be compelled to pay. Consequently the Defendants have no right to have Dixon's assets either accounted for or administered in this suit. The letters of administration, though limited, are sufficient to enable Bond's executors to institute a suit for contribution against any person taking out a more extended administration to Dixon ; and, therefore, they are sufficient for the purposes of this suit.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The object of this suit is to have Mrs. Clough's share of Ann Dixon's residuary estate determined ; but, as that cannot be done without ascertaining what the assets of Ann Dixon were, the original bill prays, and the decree directs, a general account to be taken of her assets. But the Court cannot determine what the assets of that lady were without having an account of her assets received by Thomas Reup Dixon. As, therefore, the main object of the suit cannot be attained without taking that account, the Plaintiffs are not at liberty to waive it.

I do not, however, see how that account can be taken without having before the Court some person who repre-[573]sents, generally, the personal estate of T. R. Dixon. Mary Collins, under the limited letters of administration which have been granted to her, has no dominion over the general assets of T. R. Dixon, nor could she, under those letters of administration, recover any part of his assets. I do not, therefore, see how the account of the assets of Ann Dixon, received by Thomas Reup Dixon, can be taken as against her.

The defect, in my opinion, is a substantial one ; and the cause must stand over in order that either the executrix or a general administrator to T. R. Dixon may be brought before the Court.

[573] In the Matter of P. F. GRANT. And In the Matter of 11 GEO. IV. AND 1 WILL. IV. C. 60. Dec. 14, 1841.

New Orders. Construction of 48th Order of August 1841. Master's Report.

Under the 48th Order of August 1841 it is not sufficient for the Master to give a short description of the documents laid before him, and then to state his finding ;

but he ought to mention on which of those documents he proceeded, and to shew what were the contents thereof from which he drew his conclusion, and then to state his finding.

This was a petition to confirm the Master's report finding certain persons to be trustees within the intent and meaning of the Act above mentioned.

The Master, intending to comply with the 48th Order of the 26th of August 1841, framed his report in the following manner: "In pursuance of an order made, in these matters, on the petition of John Hill and Henrietta Gordon, his wife, and Henrietta Mary Johnstone Hill, spinster, bearing date, &c., whereby it was referred to me to inquire and state whether Helena Dallas [574] and Barbara Gordon Grant, in the said petition named, are trustees of the hereditaments and premises comprised in the indenture of mortgage of the 1st of May 1830 in the petition mentioned, within the intent and meaning of the said Act: I have been attended by the solicitors of the said Petitioners, and have proceeded to make the inquiry directed by the said order; and a state of facts hath been laid before me by or on behalf of the said Petitioners, together with the several documents and affidavits hereinafter mentioned, that is to say, an office copy of an indenture of settlement, dated the 2d day of November 1827, also of a deed-poll, dated the 27th day of April 1840, also of the will of Robert Browne, Esq., dated the 12th of October 1830, also an affidavit of the said Petitioners, sworn the 27th of July 1840, also an affidavit of the Petitioner Henrietta Mary Johnstone Hill, sworn the 25th day of February 1841. Upon consideration of which said state of facts and the several documents and affidavits aforesaid, I find that the said Helena Dallas and Barbara Gordon Grant, as the co-heirs at law of Peter Fraser Grant, deceased, the mortgagee of the hereditaments and premises comprised in the said indenture of mortgage of the 1st day of May 1830, and who was a trustee of the mortgage money upon the trusts of the said indenture of settlement of the 2d day of November 1827, set forth in the said state of facts, are trustees of the said mortgaged hereditaments and premises within the intent and meaning of the Act of Parliament in the said order mentioned.

Mr. Toller, for the Petitioners, having applied to confirm the report,

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Master had not stated the grounds on which he had formed the conclusion [575]-sion which he had come to, and, therefore, the Court, before it could confirm the report, must peruse and consider the contents of all the documents referred to in the report, in order to see whether the Master's finding was correct. His Honor added that, in future, he should direct the Masters to state the grounds upon which they had formed their opinion.

On a subsequent day His Honor said as follows:—I have had a conversation with a learned Judge, as it had been mentioned to me that a petition had been brought before him in which the same thing had been done by another Master that was done in this case; but that learned Judge was of opinion that the report which he was asked to confirm was wrong in point of form, and that the Master, in that instance, had misconceived the 48th Order; the real object of which was not to direct the Master to omit from his report the statement of the grounds on which he proceeded; but to leave that as it formerly was, and to make this additional circumstance necessary, that, when the Master does state the grounds on which he came to the conclusion, he shall also state the evidence from whence he deduces those grounds; and that the order was made for preventing disputes which frequently arise on the Master's report, on this question, namely, on what evidence does the Master proceed. Whereas, if the terms of the 48th Order are adhered to by the Master, then he will state on the face of his report what depositions, examinations, &c., he has gone upon, and also what are the facts which he has inferred from those matters of evidence, and what is the ultimate conclusion to which he comes.

I really think, in this case, it must be sent back to the Master to review his report.(1)

(1) The above note of the judgment is given *ex relatione*; but it was perused by the Vice-Chancellor before it was sent to press.

[576] BANKES v. THE BARONESS LE DESPENCER, an Infant, AND OTHERS.

March 5, 6, 10, 1840.

[S. C. 11 Sim. 508; 9 L. J. Ch. (N. S.) 185; 4 Jur. 601. See *Stanley v. Coulthurst*, 1870, L. R. 10 Eq. 264; *Bell v. Holtby*, 1873, L. R. 15 Eq. 188. For *Dorchester v. Effingham*, 10 Sim. 587 (n.); (S. C. G. Coop. 319; 35 E. R. 572; 3 Beav. 180 (n.); 49 E. R. 71). See *Sackville-West v. Viscount Holmesdale*, 1870, L. R. 4 H. L. 557.]

Executory Trust. Settlement of Estates to go along with a Barony in Fee.

Perpetuity. Remoteness.

Lord Le Despencer, being seised of the ancient Barony of Le Despencer in fee, conveyed real estates to trustees in trust, after the death of himself and his eldest son, to settle the estates to the use of such persons, for such estates, and in such manner that the same should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the settlor, and be held and enjoyed by the person for the time being possessed of the same dignity, and being such lineal descendant as aforesaid; and that, during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents of the estates might be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male such suspension or abeyance should be for the time being occasioned. Held, that the above trust was not void for remoteness; and the Master was directed to approve of a proper settlement accordingly.

By indentures of lease and appointment and release, of the 7th and 8th of August 1826, made between Thomas Lord Le Despencer and the Honourable Thomas Stapleton, his eldest son and heir apparent of the first part, the Earl of Roden, the Honourable Hercules Robert Pakenham, the Plaintiffs, William John Bankes and John Horace Thomas Stapleton of the second part, and the Earl of Falmouth and Freeman Willis Elliot, of the third part, after reciting that, by virtue of divers conveyances and assurances, executed and made by or by the direction of Thomas Lord Le Despencer and Thomas Stapleton or one of them, the manor or lordship and castle of Mereworth in the county of Kent, and divers other manors or lordships, messuages, farms, lands and hereditaments in the same county, or the right or equity of redemption thereof, stood limited and assured to the use of such person and persons, for such estate or estates, intents and purposes, &c., as Thomas Lord Le [577] Despencer and Thomas Stapleton should, by any deed or deeds, instrument or instruments in writing, to be by both of them sealed and delivered in the presence of and attested by two or more credible witnesses, from time to time or at any time, jointly direct or appoint, subject, nevertheless, to the several mortgages and other incumbrances then affecting the same premises or parts thereof and thereafter mentioned (that is to say), &c. (several mortgages and other charges were here enumerated, and, amongst them, one for £27,300 to John Eldred Walters, and another for £9000 to Henry Bankes and George Bankes). And after further reciting that the execution of the mortgages for £27,300 and £9000 respectively, and the limitations of certain parts of the before-mentioned premises to the joint appointment of Thomas Lord Le Despencer and Thomas Stapleton, which were not previously subject to such joint appointment, were parts of an arrangement then lately agreed upon between Thomas Lord Le Despencer and his son respecting their estates in the county of Kent; and that the greater part of the mortgage debt of £27,300 was incurred for the purpose of enabling Thomas Lord Le Despencer to repurchase certain life annuities granted by him, and other part thereof was incurred for his exclusive benefit; and that it was part of the arrangement that Thomas Lord Le Despencer should effect and keep up insurances on his own life to such an amount as would, at his death, be sufficient to pay off the mortgage for £27,300, except £12,700 thereof, which it was agreed should remain an incumbrance upon the premises: and after further reciting that Thomas Lord Le

Despencer and Thomas Stapleton were desirous, and that it was a further part of the arrangement, that some provision should be made for securing, during the life of Thomas Lord Le Despencer, [578] the due payment of the interest of the said several principal sums, and also the due payment of the premiums on the policies of insurance effected or intended to be effected or appropriated for the purpose aforesaid, until the money due on the said principal sum of £27,300 should be reduced to £12,700 : and that Thomas Lord Le Despencer and Thomas Stapleton were further desirous, and that it was the ultimate object of the arrangement, that, subject to the aforesaid charges and incumbrances, all the estates should be settled upon Thomas Lord Le Despencer and Thomas Stapleton, successively, for their lives, and that, from and after the decease of the survivor of them, *all the estates should, so far as the law would permit, be strictly settled so as to go along with the baronial dignity of Le Despencer, and be held and enjoyed by the person for the time being possessed of the same dignity, for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of Thomas Lord Le Despencer, but with a provision that, in case the dignity should, at any time or times within the limits prescribed by law, for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs per stirpes of the person or persons respectively by reason of whose death or deaths without issue male such suspension or abeyance should be for the time being occasioned : and that it had been agreed between Thomas Lord Le Despencer and Thomas Stapleton that their several objects then remaining to be accomplished as aforesaid should be effected in the manner thereafter mentioned : it was witnessed that, in order to effect the said objects of Thomas Lord Le Despencer and Thomas Stapleton, and in consideration of their having mutually concurred in the execution of the [579] mortgages to John Eldred Walters and Henry Bankes and George Bankes respectively, they, the said Thomas Lord Le Despencer and Thomas Stapleton, by force and virtue of every power and authority in them vested or enabling them in that behalf, appointed, and also conveyed unto the Earl of Roden, Hercules Robert Pakenham, and the Plaintiffs William John Bankes and John Horace Thomas Stapleton and their heirs, the manors or lordships of Mereworth, West Peckham, &c., and the capital messuage called Mereworth Castle, and also the park called Mereworth Park, &c., &c., and all other the manors, messuages and other hereditaments in the county of Kent, which Thomas Lord Le Despencer and Thomas Stapleton, or either of them, were or was entitled to appoint, or were or was seised of or entitled to, at law or in equity, for an estate of freehold or inheritance in possession, reversion or remainder : to hold the same unto the Earl of Roden, Hercules Robert Pakenham, and the Plaintiffs William John Bankes and John Horace Thomas Stapleton, their heirs and assigns, subject to the several charges and incumbrances aforesaid, and also to a term of years thereby limited to Lord Falmouth and F. W. Elliot, to the use of Thomas Lord Le Despencer and his assigns, for his life, without impeachment of waste (except voluntary waste) and, immediately after the decease of Thomas Lord Le Despencer, to the use of Thomas Stapleton and his assigns, for his life, without impeachment of waste (except voluntary waste), and, immediately after the decease of the survivor of them, to the use of the Earl of Roden, H. R. Pakenham, and the Plaintiffs W. J. Bankes and J. H. T. Stapleton, their heirs and assigns, in trust that they should, with all convenient speed after the decease of the survivor of Thomas Lord Le Despencer and Thomas Stapleton, convey, settle and assure all and singular the [580] manors and other hereditaments thereinbefore appointed, granted and released, to the use of such persons, for such estates, and with, under and subject to such powers, provisoes, declarations and agreements, and in such manner, in all respects, consistently with and in order to effect the said intent of Thomas Lord Le Despencer and Thomas Stapleton, that the same estates should, *so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a lineal descendant of the said Thomas Lord Le Despencer, and be held and enjoyed by the person, for the time being, possessed of the same dignity, and being such lineal descendant as aforesaid ; and that, during every suspension or abeyance of the same dignity, within the limits prescribed by law for strict settlements, the rents and profits of the same premises should or might be equally divided amongst the co-heirs**

per stirpes of the person or persons respectively by reason of whose death or deaths without issue male such suspension or abeyance should be, for the time being, occasioned, as, by three counsel in the law, whereof the Attorney or Solicitor-General for the time being, whichever would undertake the reference, should be one, and whereof the others should be named by him, or as, by the majority of such three counsel, should be advised and directed: and in case both the Attorney and Solicitor-General for the time being should decline the reference, or if, upon such reference as aforesaid, no two of the referees should agree as to the mode of settlement, then in such manner as should be directed by the High Court of Chancery, upon a bill to be filed by the trustees or the survivors or survivor of them, or the heirs and assigns of such survivor, and which they and he were and was thereby directed to file against such person or persons as they or he might think proper, for the purpose of obtaining [581] such direction of the Court; and to and for no other use, intent or purpose whatsoever.

Thomas Stapleton died on the 1st of June 1829, leaving issue one child only, the Defendant Baroness Le Despencer. Thomas Lord Le Despencer died on the 3d of October 1831. After Lord Le Despencer's death, the Plaintiffs, who, by the disclaimer of Lord Roden and H. R. Pakenham, had become the sole trustees of the indenture of the 8th August 1826, caused it to be referred to the Solicitor-General and two other counsel named by him, to approve of the settlement to be made in pursuance of the trusts of that indenture: but no two of the referees agreed as to the form of the settlement. In consequence of which the bill was filed against all the surviving lineal descendants of the late Lord Le Despencer, praying that the trusts of the indenture of the 8th of August 1826 might, so far as was necessary, be carried into execution under the decree of the Court; and that the rights and interests of all parties in the manors and hereditaments might be declared, and that a proper settlement, conveyance and assurance thereof, in pursuance of the trusts of the indenture, might be settled, prepared and executed under the direction of the Court.

By the decree at the hearing, the following, amongst other inquiries, were directed:— In what manner the Barony of Le Despencer was created, and who was then entitled to the same, and to whom, and in what manner the same stood limited and was descendible: what lineal descendants of Thomas Lord Le Despencer were living at each of the three periods after mentioned, namely, the date of the indenture of the 8th of August 1826, at Lord Le Despencer's death, and at the date of [582] the report, and which of them might succeed to the dignity of Le Despencer.

The Master found that the Barony of Le Despencer was created, by writ of summons, in the person of Hugh Le Despencer, Chief Justice of England, in the 49 Hen. 3, and was afterwards restored and confirmed, by letters patent of 2 Jas. 1, in the person of Maria Fane, only daughter and heiress of Henry, Baron of Abergavenny, who was a lineal descendant from Hugh, first Baron Le Despencer; and that it was descendible to her heirs general. The Master further found that, at the date of the indenture of the 8th of August 1826, Lord Le Despencer had four sons and five daughters living; that all of them were living at his death, except his three eldest sons, of whom the second alone had died without issue; and that all his other children (except one of his daughters, who had died without issue) were living at the date of the report; and that Lord Le Despencer had several grandchildren living at each of the before-mentioned periods; and that all his issue then living might succeed to the dignity. It appeared too, from the report, that the co-heirs presumptive of the Baroness Le Despencer were the four daughters of the late lord's third son, and that his fourth and only surviving son had issue two sons and two daughters.

The cause now came on to be heard for further directions.

Mr. G. Richards and Mr. Follett, for the Plaintiffs the trustees of the deed of the 8th August 1826.

Mr. Knight Bruce and Mr. Loftus Wigram, for Sir Francis Jarvis Stapleton, the youngest and only surviving son of the late Lord Le Despencer. The object of the parties to the deed of August 1826, [583] which this Court is now asked to carry into effect, was not to create an entail to be governed by the ordinary rules of law, but to create a course of limitation unknown to the rules of law. It is a new device, and, therefore, to be checked. Of the three eminent counsel to whom it was referred

to point out the mode in which the intention of the late Lord Le Despencer, and his eldest son, was to be carried into effect, no two could agree upon the subject: indeed it is impossible to give effect to that intention without creating a perpetuity, which the law will not permit. If the dignity of Le Despencer were to become in abeyance in consequence of a former lord having died leaving only daughters or the issue of daughters, it might continue in abeyance for more than 200 years; and, according to the language of this deed, the trust for the co-heirs of the former lord is to continue for the same length of time; and, on the abeyance being determined, the estates are to go back to the title. It is manifest that such a provision cannot be carried into effect without transgressing the rules of law against perpetuity. Besides, this deed makes no provision for the case of attainer. An attainer would not be a suspension of the dignity: the term "suspension," as used in this deed, applies only to an abeyance. The intention expressed, with regard to the settlement to be made, is one and entire; and, consequently, if it fails in part, it must, according to the doctrine laid down by Sir William Grant in *Leake v. Robinson* (2 Mer. 363), fail altogether.

The case of *Tollemache v. The Earl of Coventry* (1) is very strikingly analogous to the present. There the [584] principle of the decision invalidated the gift altogether, that is, so far as it extended beyond the widow of the testator and his son. It may be said, perhaps, that the Baroness Le Despencer stands in a position similar to that of the third Lord Vere in the case referred to; but it must be observed that the effect of the decision in that case was just as adverse to the title of the third lord as it was to the title of the fourth lord; and the principle of it was that the gift was wholly void (except to the extent before mentioned), notwithstanding the words "so far as the rules of law or equity will permit." *Lord Southampton v. The Marquis of Hertford* (2 Ves. & Beam. 54), *Stonor v. Curwen* (ante, vol. v. p. 264), *Ware v. Pollhill* (11 Ves. 257).

Mr. Loftus Wigram. The intention expressed in the deed of August 1826, with regard to the manner in which the estates are to be settled, is one entire intention. The sentence in which that intention is expressed consists of two branches; and though that part of it which is comprised in the first branch of the sentence ending with the words "being such lineal descendant as aforesaid" might be given effect to, yet, as the other part, which is comprised in the second branch of the sentence, exceeds the limits allowed by law, and therefore cannot be carried into execution, no effect can be given to any part of that intention.

THE VICE-CHANCELLOR. The question is whether the words in the second branch of the sentence, "within the [585] limits prescribed by law for strict settlements," do not apply to the words that follow, that is, to the words which direct to whom the rents and profits of the estates are to be paid during the suspension or abeyance of the dignity.

Mr. Wigram and Mr. Sharpe appeared for the daughters of the late Lord Le Despencer, and their husbands.

Mr. Jacob and Mr. Tyrrell, for the Baroness Le Despencer, who was born at the date of the deed of August 1826. The argument for Sir Francis Jarvis Stapleton is founded on two fallacies: the first consists in taking an erroneous view of the decision in *Tollemache v. Lord Coventry*, and the second, in treating the trust in this case as a trust executed; whereas it is a trust executory.

According to the report of *Tollemache v. Lord Coventry*, in 2d Clark & Fin., the House of Lords did not hold the gift of the chattels to be wholly void, but decided that it was good so far as to vest them in the third Lord Vere (see 8 Bligh, 563), and that too in a case where the trust was executed and not executory. The decision, therefore, in that case is in favour of our client; for it shews that the intention expressed in the deed of August 1826 might be carried into effect, so far as to vest the estates in the baroness for her life at the least. Secondly, where a trust is executory, the Court, if it cannot give effect to it *in toto*, must give effect to it so far as it can consistently with the rules of law and equity. [586] And, in this case, the

(1) 8 Bligh, N. S. 547; S. C. 2 Clark & Fin. 611. This case is reported on the original hearing, in 5 Madd. 232, under the name of *Lord Deerhurst v. The Duke of St. Albans*.

parties to the deed of August 1826 have provided, most expressly, that the limitations of the settlement directed to be made shall not exceed the limits prescribed by law.

With respect to the objection that the settlement does not provide for the case of attainder, it may be observed that attainder is an event which provides for itself: for, when a peer is attainted, he loses his estates and his title together, and nothing that the settlors could have done would have provided against those consequences.

Mr. Girdlestone and Mr. Lee, for the four daughters and only issue of the late Lord Le Despencer's third son, three of whom were born at the date of the deed of August 1826. The parties for whom we appear are the presumptive heirs of the present baroness.

The Court has been asked in this case to come to the conclusion that no settlement at all can be made, because some part of the direction respecting it, which is contained in the deed of August 1826, is void. [THE VICE-CHANCELLOR. That is applying the same rule where the parties are to take in succession, as is applicable to a case where all the parties are to take at once, as a class.] The case of *Tollemache v. Lord Coventry*, which has been so much relied on by the counsel for Sir F. J. Stapleton, does not apply to the present: for, first, it related to personal chattels and not to real estates, and secondly, the trust was executed and not executory. An executory trust may be carried into execution within the limits allowed by law, although there may be something in the direction which would go beyond those limits. All that the late Lord Le Despencer and his [587] eldest son have required to be done is that their estates should be settled according to a certain course of limitation, so far as the rules of law and equity would permit: and therefore the Court, if it makes the settlement as far as those rules will permit, does effectuate the intention of the settlors. At the time when the deed of August 1826 was executed the late lord's second son was dead without issue; and his third son was dead, leaving only female issue; and therefore it was then highly probable that the dignity might become in abeyance within no great distance of time. It was said that the principle of the decision in *Tollemache v. Lord Coventry* was that the gift was void altogether; but Lord Brougham admits that the gift was good so far as the objects of it who were *in esse* at the death of the testator were concerned: therefore, that case is an authority that the direction in this case ought to be carried into effect as to the parties who were *in esse* at the time when the deed of August 1826 was executed. What Lord Eldon says at the conclusion of his judgment in *Ware v. Polhill*, namely, that the power of sale was void, must be taken in connexion with what he had said before; and then it will be seen that what his Lordship meant was that, as soon as the party had acquired the absolute interest in the property, the power ceased. The case of *Stonor v. Curwen* also was cited in the argument against the settlement; but, in our opinion, it has very little application to the present case. The authorities in favour of the settlement which have not been yet observed upon are *Lord Dorchester v. The Earl of Effingham*, (1) *Humberston v. Humberston* [588]-ton (1 P. W. 332), *Gower v.*

(1) Rolls, 19 March 1813. Mr. Lee produced an office copy of the decree in this cause, from which it appeared that Guy Lord Dorehester had made a settlement by which life-estates in his landed property were given to his sons who were living, with remainders to their first and other sons in tail; reserving, however, to himself, a power to revoke the uses of the settlement, and to appoint new uses either by deed or will; and that his lordship made his will, which was partly as follows —“All my landed estates to be attached to my title as closely as possible; all the timber, woods and trees on my estates I leave to my executors, in trust to increase my landed property; all debts due to me from Government, and all my personal property not otherwise disposed of, I leave to my executors, in trust to increase my landed property.”

Sir William Grant declared that, by the effect of the testator's will, the estate tail of the Plaintiff, Arthur Henry Lord Dorehester (who was the testator's grandson), in the settled estates, and the estates tail of all the other male issue or descendants of the testator *in esse* at the time of the testator's death were abridged to estates for life only, with remainder to their first and other sons in tail male, in strict settlement: and His Honor ordered the timber on the settled estates to be cut and sold, and the proceeds to be invested in the purchase of lands, to be settled to the same uses as the

Lord Grosvenor (5 Madd. 337), *Lord Deerhurst v. The Duke of St. Albans* (*Ibid.* 232; see 271), *Pelham v. Gregory* (1 Eden, 518), *Phipps v. Lord Mulgrave* (3 Ves. 613), *The Duke of Newcastle v. The Countess of Lincoln* (*Ibid.* 387), in which Lord Loughborough seems to have anticipated this very case, *Bacon v. Proctor* (Turn. & Russ. 31), *Woolmore v. Burrows* (*ante*, vol. i. p. 512), *Mackworth v. Hinzman* (2 Keen, 658), Litt sect. 352.

Mr. Knight Bruce, in reply, said that either the direction for making the settlement could not be carried into effect at all, or that the utmost that the Court could do was to give a life-estate to the baroness: that it could not give her an estate tail, as it was impossible so to mould that estate as to make it go along with the title.

March 10. THE VICE-CHANCELLOR [Sir L. Shadwell]. Since this case was opened I have had time to look into the question, and my opinion remains the same as it was from the first, namely, that it is a case in which it is the duty of the Court to try to give effect to the intention of the parties by making a settlement.

The words of the trust on which the question arises are that the trustees should, after the decease of the survivor of Lord Le Despencer and Thomas Stapleton, convey, settle and assure all the manors and other hereditaments thereinbefore appointed, granted and released, to the use of such persons, for such estates, and with, under and subject to such powers, provisoes, declarations and agreements, and in such manner, in all respects, consistently with and in order to effect the intention of the settlors, that the same estates should, so far as the law would permit, be strictly settled so as to go along with the dignity of Le Despencer, so long as the person possessed of the same dignity should be a [590] lineal descendant of the said Thomas Lord Le Despencer, and be held and enjoyed by the person for the time being possessed of the same dignity and being such lineal descendant as aforesaid.

If it had stopped here, there would have been no doubt that the Court would have directed a settlement to be framed for the purpose of effectuating the general intention of the parties, the meaning of which no human being can doubt. Many instances may be found in which the Court has given effect to the intentions of parties expressed in the like general manner.

In *The Countess of Lincoln v. The Duke of Newcastle* (12 Ves. 218; see 227), for example, it was not even suggested that the Court could not execute a covenant, in a marriage settlement, to settle leasehold estates so as to go along with real estates, so far as the law would allow; but the question was in what manner the covenant ought to be executed. Lord Eldon in that case did not object to the decree because it had directed a settlement; nor did he object to the House of Lords reforming the decree; but he objected to the alteration proposed to be made by Lords Erskine and Ellenborough in the decree as it originally stood.

There is another instance of the Court carrying such a general intention into effect in the case of *Woolmore v. Burrows*. There the direction was that the residue of the testator's fortune should be laid out in land as contiguous as practicable to Stradone in Ireland, to be added and closely entailed to the family estate then in the possession of the testator's relative Thomas Burrows: [591] and, by a codicil, the testator added that his object in wishing to improve the Stradone estate was to have a head to the family who, he hoped, would be kind and attentive to the different branches. And then he directed that, if Thomas Burrows should die without leaving male issue or dispose of Stradone out of the family line, the residue of his fortune should go over to Arnold Burrows or his nearest relative in the male line. On the hearing of the cause for further directions it was referred to the Master to approve of a proper settlement of the estates then purchased and thereafter to be purchased with the testator's

other estates were settled or subject to under the settlement and according to the effect and operation before declared of the testator's will: and the residue of the testator's personal estate to be laid out in the purchase of land to be settled in like manner. (See a note of this case in 3 Beavan, 180.)

The Vice-Chancellor, on this case being cited to him, observed that Sir William Grant's meaning was to give effect to the direction, in the testator's will, that his landed estates should be attached to his title as closely as possible.

residuary estate, upon the uses and trusts, and according to the directions expressed in the will and codicil. The Master approved of a settlement accordingly. The Defendants, however, objected to the settlement on several grounds; and they excepted to the Master's report. The exceptions were argued before Sir A. Hart, V.-C.: and it has always struck me that the observations made by that able Judge, in deciding on those exceptions, were extremely good; and, in my opinion, they are applicable to the present, and indeed to every case of the same nature. He says: "It often happens that the Court is called on to expound a meaning and execute a purpose, which the testator himself could not have explained in their detail; and the Court is then driven to the necessity of giving such directions as it conceives to be nearest to a probable and rational purpose in the testator's mind." Then Sir A. Hart states the words of the will, and proceeds as follows:—"The important words 'closely entailed' would require the limitations to be as strict as the rules of law would permit; and every person *in esse* at the testator's death must have taken a life-estate and no more." Then he says: "In giving effect to the executory directions of a will, the [592] Court will guard all rights by restrictions and covenants in the way of limitations."

The case of *Lord Dorchester v. Lord Effingham* was as follows:—Lord Dorchester having settled certain estates, which he had purchased, on his sons and their issue, so as to make the sons tenants for life and their sons tenants in tail, and having a general power of revocation and new appointment by deed or will, did, by his will, use this expression, "all my landed estates to be attached to my title as closely as possible." The next Lord Dorchester filed a bill immediately after the death of the former lord, who was his grandfather, and, after setting forth the deeds which contained the limitations, he prayed that he might be declared to be tenant in tail of the settled estates under the limitations of the deeds. So far as that point was concerned, he was opposed by those who took other interests; and the result was that the Court declared that, by the effect of the will, the estate tail of the Plaintiff Lord Dorchester in the settled estates, and the estates tail of all the other male issue, were reduced to estates for life, with remainders to their first and other sons in tail male: and it was ordered that the timber-money and the testator's residuary personal estate should be laid out in lands to be settled to the same uses as the other estates were subject to under the settlements and according to the operation and effect before declared of the testator's will. So that the Court in this case decided what was the effect of the very general words used by the testator; and directed the estates which were to be purchased with the timber-money and the residuary personal estate to be settled accordingly.

The books are full of instances in which the Court has interfered to carry into effect the general intention [593] of the parties of having a settlement made where only general words are used. So that it is beyond all doubt that the Court, in the simple case which arises on the first part of the direction in this case, can order a settlement to be made.

The only question then is whether there is anything, in the second part of the direction, which is so illegal as to tie up the hands of the Court and prevent it from making any settlement. That part of the direction is in the following words:—"And that, during every suspension or abeyance of the same dignity within the limits prescribed by law for strict settlements, the rents and profits of the same premises shall be equally divided among the co-heirs *per stirpes* of the person or persons respectively, by reason of whose death or deaths without issue male, such suspension or abeyance shall be for the time being occasioned, as, by three counsel learned in the law, whereof the Attorney or Solicitor-General for the time being shall be one, and whereof the others shall be named by him, or as, by the majority of such three counsel, shall be advised and directed: and in case both the Attorney and Solicitor-General shall decline the reference, or no two of the referees shall agree as to the mode of settlement, then in such manner as shall be directed by the Court of Chancery upon a bill to be filed by the trustees."

For the purpose of construing this passage, I think that it is not material to consider whether the words "within the limits prescribed by law for strict settlements" ought to be taken in connection with the words that precede them, namely, "during every suspension or abeyance of the same dignity," or in connection with the words that

follow them, namely, "the [594] rents and profits of the same premises shall be equally divided between the co-heirs *per stirpes*," &c. The truth is that, in whichever of those two ways you take those words, you find an intention that that division of the rents and profits shall continue no longer than the rules of law allow.

Suppose that the settlement were to be made in this form, namely, that the estates were to be limited to trustees for a term of 1000 years, determinable at the end of 21 years from the death of the survivor of all the persons *in esse* at the time of the late Lord Le Despencer's death, and then capable of succeeding to the dignity, and that, subject thereto, the estates were then limited to the different persons so *in esse* and capable of succeeding to the dignity, for their lives, successively, with remainder to their sons in tail, with remainder to their daughters in tail: and that then the trusts of the term of 1000 years were declared to be that, in the event of there being any abeyance such as is here contemplated, the rents should, during the time (which could not exceed the limits fixed by law) be disposed of in the manner prescribed: there can be no doubt that that would be a legal mode of settlement. I do not say that that is the only or the best method of executing the trust: but it is one mode which appears to me to be unobjectionable in point of law. And when you find that the intention of the parties is to do that only which the rules of law will permit, or as it expressed, which may be done within the limits prescribed by law for strict settlements, my firm opinion is that it is the duty of the Court to refer it to the Master to approve of a proper settlement according to the language of the trust. (*Ibbetson v. Ibbetson*, ante, p. 495.)

[595] JANE BOYD, Widow, v. BUCKLE. March 21, 1840.

Annuity. Will. Construction.

Testator, after reciting that the income of his wife, in case she survived him, would consist, in part, of the rent of a leasehold estate, which he had settled on her, directed his trustees, in case the lease should expire in her lifetime, to pay to her, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, so much *per annum* as would be an equivalent for the rent lost thereby; and he gave his residuary personal estate to the trustees, in trust to invest it in the usual securities, and to accumulate the income until the lease should expire in his wife's lifetime, and then, during the remainder of her life, to pay her the income of the accumulated fund, and after her death to stand possessed of the capital for his grandchildren. The lease expired in the wife's lifetime; but the income of the residuary fund was not equivalent to the rent lost. Held, that the wife was entitled to have the deficiency of her income made good out of the capital of the residuary fund.

William Boyd, by his will, dated the 15th of May 1830, after reciting that, by the settlement on his marriage with the Plaintiff, he had settled on her, during her life, in case she should survive him, the yearly rent of a leasehold estate, called the Battle Bridge estate, and also the dividends of £4000 stock in the London Dock Company, ratified and confirmed the settlement as far as regarded the property settled upon the Plaintiff: and, after further reciting that the leasehold estate would, in case the Plaintiff should survive him, form a material part of her income, and as the lease under which he held the same might expire in her lifetime, he directed the trustees therein-after named, in case of such an event happening, out of and from *the dividends and interest arising from a sufficient part of his personal estate, at their discretion*, to pay to the Plaintiff so much *per annum* as would be equivalent to the rent so lost by such lease having expired; and he gave to the Plaintiff the sum of £500 sterling, to be paid to her within three calendar months next after his decease; and he gave to the trustees all his shares, amounting to £600, in the capital stock of the Commercial Salerooms Company in Mincing Lane, London, [596] upon trust, during the life of the Plaintiff, to pay the interest thereof to her; and he also gave to the trustees so much of the consolidated Bank three per cent. annuities standing in his name at the time of his

decease as would produce the sum of £100 per annum ; or, if there should not be so much of that stock standing in his name at the time of his decease, then he directed the trustees to purchase, out of his residuary estate, so much three per cent. consolidated Bank annuities as would produce the sum of £100 per annum in their names, upon trust to receive the said sum of £100 per annum produced from the dividends and interest of such stock, and pay the same to the Plaintiff during her life. The testator then gave several legacies to different persons, and bequeathed to the trustees all his ready money, monies in any of the public stocks or funds, and all such sums of money as should be due to him at his decease upon mortgage or other specialty and by simple contract, and all other his personal estate and effects whatsoever, not thereinbefore by him otherwise disposed of, upon trust, with all convenient speed after his decease, to call in and to compel payment of such part of his said personal estate as should consist of monies due and owing by judgment, bond, or simple contract, and also all other such part or parts, as they should deem proper and necessary, of his personal estate which should consist of monies invested in any of the public stocks or funds, or be due and owing upon real securities, and to sell and convert into money such part or parts thereof as should consist of specific chattels, and to stand possessed of and interested in the monies, stocks, funds, and securities which should arise from the sale and conversion of his general personal estate, or which should continue part thereof unconverted, and the dividends, interest and annual produce thereof, upon trust, in the [597] first place, to pay and satisfy, out of such of the same monies as should first come to hand and be received, all his just debts and funeral and testamentary expences and the pecuniary legacies thereinbefore bequeathed: and, as to the residue or surplus of the trust monies which should remain after answering the several purposes aforesaid, he directed that his trustees should lay out and invest the same in their or his names or name, in some of the Parliamentary stocks or public funds of Great Britain or at interest upon real securities in England, and should, from time to time, alter and vary and transpose, at discretion, as well the same stocks, funds or securities, or any of them, as also such of the stocks, funds or securities, being part of his personal estate at his decease, which they should not think fit to convert into money or call in as aforesaid, and should stand possessed of and interested in all and singular the monies, stocks, funds and securities which should be so invested, produced and acquired respectively as last mentioned, or which should continue part of his personal estate unconverted, and the dividends, interest and annual produce thereof, respectively, upon trust, in the first place, in the meantime and until his term and interest in the Battle Bridge estate, whereof two years or thereabouts were then unexpired, should expire and determine or the Plaintiff should die, which should first happen, to accumulate and improve the interest, dividends, and annual produce of all the residuary monies, stocks, funds or securities, by investing the same and the produce thereof, from time to time, in the names or name of the trustees or trustee for the time being, in some or one of the Parliamentary stocks or public funds of Great Britain, or at interest on real security in England, to be from time to time altered and varied as occasion should [598] require, and such accumulations to be added to and form part of the capital of the residuary monies, stocks, funds or securities, and to be applied and disposed of accordingly: and upon further trust, in case his term and interest in the Battle Bridge estate should expire and determine in the lifetime of the Plaintiff, then and from thenceforth, during the residue of the life of the Plaintiff, to pay the interest, dividends and annual produce of all the residuary monies, stocks, funds or securities and accumulations unto, or permit the same to be received by the Plaintiff or her assigns for her life; and, from and after her decease, his will was that all the residuary monies, stocks, funds and securities and accumulations, if any, should be held in trust for such of his grandchildren as should be living at his decease, in equal shares.

The testator died on the 10th of December 1830. His term in the Battle Bridge estate expired on the 24th of June 1834; and thereby the Plaintiff sustained a loss of yearly income to the amount of £290.

The interest and dividends of the testator's residuary estate being insufficient to make good the whole of that loss, the Plaintiff claimed, by her bill, to have the deficiency supplied out of the capital.

Mr. Knight Bruce and Mr. Teed, for the Plaintiff. The interest and dividends of the testator's residuary estate are not sufficient, with the dividends of the £4000 London Dock stock, to make up to the Plaintiff the same amount of income which she had before the lease of the Battle Bridge estate expired. The executors and residuary legatees contend that the deficiency is to be supplied out of the interest and dividends only of the residuary estate, and that the capital cannot be touched for that purpose. But this is nothing more than the common case of an annuity directed to be paid out of the interest of a fund; in which case, if the interest is not sufficient to pay the annuity, the capital is applicable to supply the deficiency. If a testator, at the commencement of his will, gives an annuity, and afterwards directs a fund to be set apart and the interest of it applied in payment of the annuity, he does not thereby cut down the annuity. Here the testator directs his trustees, in case the lease should expire in the lifetime of his wife, out of the dividends and interest arising from a sufficient part of his personal estate, at their discretion, to pay to his wife so much per annum as would be an equivalent to the rent lost by the lease having expired. That direction charges the income of the residuary estate for all time; and, therefore, it charges the capital. The will clearly shews that the testator was most anxious that his wife's income should be maintained at its full amount during the whole of her life; and the directions which he afterwards gives respecting his residuary estate are only subordinate to that object. *Arundell v. Arundell* (1 Myl. & Keen, 316), *May v. Bennett* (1 Russ. 370), *Davies v. Wattier* (1 Sim. & Stu. 463).

Mr. Jacob and Mr. Paley, for the executors and trustees, declined to argue the question, as the persons beneficially interested in the residue were parties to the suit.

Mr. Elderton, for some of the *cestuis que trust* of the residue. The testator directs his trustees, out of and from the dividends and interest arising from a sufficient part of [600] his personal estate, at their discretion, to pay to his wife so much per annum as would be an equivalent to the rent lost by the lease having expired. It is quite clear that, under those words, the interest and dividends are alone applicable, *de anno in annum*, to make good the loss. I do not mean to contend that it was to be in the discretion of the trustees whether they should make good the loss or not; but it was to be discretionary in them what part of the estate should be applied for that purpose. If the income of the estate is not sufficient to make good the loss, the consequence is that the legatee, as frequently is the case, cannot have all that the testator intended to give to her.

The cases that have been cited are clearly distinguishable from the present. In *Arundell v. Arundell* the rent-charge was not directed to be paid out of the rents of the Ashgrove and Tollard Royal estates; but was charged upon the *corpus* of the estates. In *May v. Bennett* the testator gave an annuity to his widow; and directed his executors to lay out in Government security as much money arising from his estate as would produce the annuity. The executors, instead of purchasing a sufficient sum in the three per cents., as this Court would have directed them to do, purchased £1092 in the five per cents.; which were afterwards converted, by Act of Parliament, into four per cents.; and, thereby, the dividends became inadequate to satisfy the annuity. It is quite plain that, under those circumstances, the annuitant was entitled to have the deficiency of the dividends made up from the *corpus* of the fund. The facts of those cases are totally different from a case of this kind, where a certain portion of the income of the estate is directed to be paid to the widow. I submit, therefore, that the utmost that this lady is entitled to is the income of the residuary estate.

[601] Mr. Perry, for the assignee of the share of one of the *cestuis que trust* of the residue. I submit that the widow is entitled to have her income made good, not out of the capital, but out of the dividends of the residuary estate. The difficulty of the case arises from the inconsistent dispositions made by the testator in the first and last clauses of his will. In the first clause he directs that his wife shall receive compensation out of his estate (1) for what she may lose by the expiration of the lease; but, in

(1) The will was stated in the answer of the executors and trustees, as well as in the bill; but it nowhere appeared that the testator had, *in terms*, charged his estate as above mentioned.

the last clause, he directs that she shall receive compensation out of the interest of his residuary estate: and, where there are two inconsistent clauses in a will, the rule is to reject the first and give effect to the last.

Mr. Romilly, for the other *cestuis que trust* of the residue, merely submitted the point to the decision of the Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It really appears to me that there is nothing in the point.

I do not think that the limited way in which the trust subsequently is declared with respect to the estate takes away from the widow the benefit of the first charge; because the first charge is made with quite a different view.

I think that the Plaintiff is entitled to have the deficiency of her income made good, from time to time, out of the *corpus* of the residuary estate.

[602] ABURROW v. ABURROW.(1) March 27, 1840.

New Orders. Vice-Chancellor. Jurisdiction.

Petition by tenant in tail, on the death of the tenant for life, for payment of a fund in Court, arisen from the sale of timber improperly cut by the tenant for life. The decree on further directions was made by the Master of the Rolls, but it did not reserve liberty to apply. Held, that the case was not affected by the 11th Order of May 1837, and therefore the application was not improperly made to the Vice-Chancellor.

This was a petition for payment of money out of Court.

The suit was instituted by an infant tenant in tail under a will against the first tenant for life and the other parties interested, to restrain the tenant for life from committing waste, and for an account of the proceeds of certain timber cut by him.

By the decree on further directions, made on the 27th July 1804, the tenant for life was ordered to pay into Court the amount of the proceeds of the timber cut by him, and, in default of payment, a receiver was appointed of the estates of which he was tenant for life.

By subsequent orders, made on interlocutory applications, the receiver was discharged on payment by the tenant for life of the sum ordered by the decree on further directions to be paid by him; and certain other sums, the proceeds of further cuttings of timber, were paid into Court; and all such sums were invested, and the dividends were ordered to be paid to the tenant for life.

No liberty to apply was given either by the decree or by the subsequent orders.

The decree on further directions was made by the Master of the Rolls, and the subsequent orders by the Lord Chancellor.

[603] The first tenant in tail having barred the entail, and having subsequently died in the lifetime of the tenant for life, his representatives petitioned, on the death of the tenant for life, for the transfer to them of the fund in Court.

Mr. Jacob and Mr. Freeling, for the Petitioners, suggested a doubt whether the application was made to the right Court; and submitted that, as this was neither an interlocutory application, nor a petition presented under or pursuant to the liberty to apply contained in any decree or decretal order (see 11th Order of May 1837), the case was not within the provisions of the General Orders of the 5th of May 1837.

THE VICE-CHANCELLOR [Sir L. Shadwell] was of opinion that the case was not affected by those orders; and referred it to the Master to inquire and state whether the tenant for life was dead, and whether the Petitioners were entitled to the fund in question; with liberty to state special circumstances.

(1) *Ex relatione.*

[604] LOGAN v. BAINES. March 31, 1840.

New Orders. Accounts and Inquiries.

If on an application by the Plaintiff, under the 5th Order of the 9th of May 1839, for preliminary accounts to be taken, the Defendant objects that certain persons ought to have been made Co-plaintiffs, the Court will not make the order.

Mr. Jacob and Mr. Koe, for the Plaintiff, moved, under the 5th Order of the 9th of May 1839, that certain preliminary accounts might be taken in the cause.

Mr. Knight Bruce opposed the application, on the ground that two persons, whom he named, ought to have been made Co-plaintiffs in the suit.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as it had been objected that the suit could not be sustained in its present form, and as the decision upon that objection must be reserved until the hearing of the cause, he could not direct the accounts to be taken on an interlocutory application.

[605] *In re KING.* April 22, 1840.

[S. C. 9 L. J. Ch. (N. S.) 257.]

Construction of 11 Geo. 4 and 1 Will. 4, c. 60. Trustee. Costs.

A person beneficially entitled to part of the dividends of a sum of stock has a sufficient interest to support a petition under 11 Geo. 4 and 1 Will. 4, c. 60, for the appointment of a new trustee of the stock.

The words in the 10th section of the Act, which empower the Court to order "any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said Court shall direct," authorize the Court to direct one of the officers of the bank to receive the dividends of the trust stock and pay them over, not to the party beneficially entitled, but to the new trustee.

If a motion is made to enforce an order under the Act, and the order appears to be an improper one, the Court has jurisdiction to give the party resisting it the costs of the motion.

A tenant for life of a sum of stock standing in the name of one Hodsoll, the surviving trustee thereof, granted an annuity to Margaret Charlotte King, and assigned to her his life interest in the stock, in trust to apply the dividends in payment of the annuity, and to pay over the surplus to him. For several years Hodsoll received the dividends of the stock, and paid the annuity out of them. Afterwards he went to reside abroad; and the annuity becoming in arrear, M. C. King presented a petition, under 11 Geo. 4 and 1 Will. 4, c. 60, s. 10, praying for a reference to the Master to inquire and state whether Hodsoll was a trustee within the meaning of the Act; and if the Master should find in the affirmative, then that the Court would direct such person as it should think proper to appoint in Hodsoll's place to receive the dividends and to pay them to the Petitioner during the continuance of the annuity. The usual order having been made on the hearing of the petition, and the Master having reported that Hodsoll was a trustee within the meaning of the Act, and that he was such trustee for the Petitioner during the continuance of the annuity; the Petitioner presented another petition, upon which an order was made confirming the report and directing *one of the officers of the bank*, in [606] Hodsoll's place, to receive the dividends of the stock then remaining unreceived and thereafter to become due, and to pay them to the Petitioner upon the trusts of the assignment, so long as the annuity should remain payable.(1)

(1) The section of the Act above referred to enacts that, if a trustee of stock shall be out of the jurisdiction of the Court, or it shall be uncertain whether he is living or dead, or he shall refuse to transfer the stock or to receive and pay over the dividends thereof to the party entitled thereto; it shall be lawful for the Court to

The bank, considering the above order to be irregular, declined to comply with it.

Mr. Jacob and Mr. Burmester, for M. C. King, now moved that the bank might be ordered to act in obedience to the order.

Mr. Knight Bruce, for the bank, said that the order was not authorized by the Act: that it had directed the bank to pay the dividends of the stock to an equitable claimant, and, therefore it had, in effect, converted the bank into an accountant-general or a trustee of the stock; that all that the Act authorized the Court to do was to order the bank to give effect to a new appoint-[607]-ment of trustees by the Court; that it was questionable whether the Petitioner in this case had such an interest in the trust fund as entitled her to present a petition under the Act.

THE VICE-CHANCELLOR [Sir L. Shadwell]. There can be no doubt that the Petitioner's interest in the stock was sufficient to support her petition, for she was beneficially entitled to part at least of the dividends of the stock; and, therefore, in my opinion, she was one of the persons beneficially entitled to the stock.(1)

In this case, the tenant for life of the stock, having assigned his life interest to M. C. King in trust to secure an annuity which he had granted to her, and Hodsoll, the trustee in whose name the stock was standing, being out of the jurisdiction of the Court, M. C. King presented a petition praying that it might be re-[608]-ferred to the Master to inquire and state whether Hodsoll was a trustee of the stock within the meaning of the Act, and whether he was out of the jurisdiction of the Court; and, if the Master should find in the affirmative, then that some person might be appointed in Hodsoll's place to receive the dividends of the stock, and pay them over to the Petitioner, so long as her annuity should continue payable; that is, in effect, that some person might be appointed a trustee of the stock in Hodsoll's place. The Master found that Hodsoll was a trustee within the meaning of the Act, and that he was out of the jurisdiction of the Court. The order, which ought to have been made on the petition to confirm the Master's report, was not that the bank should be converted into trustees of the stock; but that some person should be appointed as a trustee, and that the secretary, or some other officer of the bank, should transfer the capital of the stock into his name, and pay to him the dividends accrued due and remaining unreceived: for the words towards the end of the 10th section of the Act: "And also to order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock in such manner as the said Court shall direct," authorize the Court to order the dividends to be paid, not to the party beneficially entitled, but to the new trustee.

The consequence is that the order made on confirming the report is wrong, and the motion, which seeks to enforce that order, must be refused.

direct such person as it shall think proper to appoint for that purpose in the place of such trustee, to transfer such stock to or into the name of such person, and in such manner as the Court shall direct, and also to order any person appointed as aforesaid to receive and pay over or join in receiving and paying over the dividends of such stock, in such manner as the Court shall direct; and that every such transfer, receipt and payment shall be as effectual as if the said trustees had transferred or joined in transferring the stock, or had received and paid, or joined in receiving or paying, the said dividends.

(1) The 11th section of the Act enacts that every order to be made in pursuance of the Act shall be made either in a cause, or upon a petition in a lunacy or matter; and that such person as thereafter mentioned should be the Petitioner (that is to say) if the same should relate to a conveyance, transfer, receipt or payment to or in such manner as might be directed by any person beneficially entitled, then upon the petition of the person or some or one of the persons beneficially entitled to the land, stock or dividends to be conveyed, transferred, received or paid; and if the same should relate to a conveyance in order to vest any land or stock in a new trustee duly appointed by virtue of some power or authority in some instrument creating or declaring the trusts of such land or stock, or by the Court of Chancery, either alone or together with any continuing trustee, then upon the petition either of the trustee, or some or one of the trustees in whom the same shall be proposed to be vested, or of any person having an interest therein.

Mr. Knight Bruce, for the bank, asked for their costs of the motion.

Mr. Jacob said that this was a case in which the Court had no jurisdiction to make an order as to costs.

[609] THE VICE-CHANCELLOR. I cannot but think that this Court has jurisdiction, in a case like this, to make an order as to costs.

Motion refused with costs.

[609] COOPER v. EMERY. Feb. 20, April 23, 1840.

[S. C. varied, 1 Ph. 388; 41 E. R. 679.]

Vendor and Purchaser. Covenant to Produce Title-Deeds. Title.

The vendor of a piece of copyhold land, enfranchised in 1799, delivered to the purchaser two abstracts, commencing in 1736, one of the title to the land, and the other of the title to the manor. The deed of 1799, which was 40 years old, recited that the then lord and the then owner of the land were respectively seised in fee; and several of the deeds relating to the lord's title were bargains and sales enrolled, and, therefore, copies of them, as well as of the surrenders and admittances, which would be good evidence, might be procured by the purchaser at any time. The vendor was unable to deliver to the purchaser the deed of 1799, or any of the prior instruments, but was willing to covenant to produce that deed.

Held, that he was bound to give the purchaser covenants for the production, not only of that deed, but of all the prior instruments mentioned in the abstracts.

This was a suit by the vendor against the purchaser, for the specific performance of a contract for the sale of an estate consisting, in part, of two roods and nine perches of land, formerly copyhold of the manor of Barton-under-Needwood in Staffordshire. The question was whether the Defendant was entitled to covenants for the production of certain copies of court roll relating to the vendor's title, and also of certain deeds relating to the title of the lord of the manor who had enfranchised the small piece of land. The abstracts of the vendor's and lord's titles were numbered two and three respectively. Their contents were, shortly, as follows:—

Abstract No. 2.—8th May 1736: Surrender of the piece of land and other hereditaments, by John Belcher, [610] W. Dearbank and Sarah his wife, to Isaac Hawkins, by way of mortgage in fee, with a proviso for resurrender to Dearbank and wife, for their lives and the life of the survivor, with remainder to William Dearbank, their son, in fee. Admittance of Hawkins.—30th April 1737: Surrender by William Dearbank, the son, of his reversion, to Richard Newton for life, with remainder to such uses as Richard Newton should appoint by deed or will, with remainder to his right heirs. Admittance of Richard Newton.—14th October 1750: Devise by Richard Newton to Thomas and Matthew Newton in fee, in trust for his children, Alice, Ann, Kenworth, William, Sarah and Elizabeth, as tenants in common in fee.—22d October 1763: Surrender by Isaac Hawkins to William Newton, the brother and heir of Kenworth Newton deceased, the son and heir of Richard Newton deceased, in fee. Admittance of William Newton.—22d October 1777: Surrender by William Newton to the use of his will.—9th May 1794: Admittance of Sarah Newton, sister of William Newton, and devisee in fee under his will, dated 5th January 1794.—24th November 1798: At a Court then holden a power of attorney, dated 22d November 1798, from Elizabeth Newton, the only child and heir of Matthew Newton, the surviving trustee of Richard Newton's will was read, whereby, after reciting that will, Kenworth Newton's death intestate, William Newton's death and devise to his sister Sarah, an indenture of the 30th October 1794, by which Ann Newton released her share in the premises to her sister Sarah in fee, an indenture bearing even date with the power of attorney, whereby, after reciting that Alice and Ann Newton and their sister Sarah, then the wife of William Greaves, had given the premises to Greaves in fee, they requested Elizabeth Newton, as the heir of the surviving trustee of Richard [611] Newton's will, to surrender the premises to the use of Greaves in fee; Elizabeth

Newton appointed four tenants of the manor as her attornies, to surrender the premises; and she, by her said attornies, surrendered them to the use of Greaves in fee; and, at the same court, he was admitted.—30th April 1799: Feoffment, whereby, after reciting that Eusebius Horton was seised of the manor in fee, and that Greaves was seised of the copyhold premises, to him and his heirs, according to the custom of the manor, which premises Eusebius Horton had agreed to enfranchise, Horton conveyed those premises, discharged of the copyhold tenure, to Greaves in fee.—23d and 24th of June 1817: Lease and release of the small piece of land alone, from Greaves to Coulston in fee.—16th and 17th April 1818: Lease and release of the same, from Coulston to the Plaintiff in fee.

Abstract No. 3.—19th and 20th of March 1736: Lease and release by Edward Busby, settling the manor, on his marriage, on himself for life, with remainders to his intended wife and their issue (which never took effect), with remainder to himself in fee.—13th July 1749: Will of Busby, devising the manor to his three sisters and their issue, in strict settlement, with remainder to John Shadwell Horton in tail.—6th November 1782: Bargain and sale enrolled, whereby, after reciting that Busby and his sisters had all died without issue, John Shadwell Horton conveyed the manor to John Harewood, in fee, as tenant to the *precipe* for the purpose of suffering a recovery to the use of J. S. Horton in fee.—Michaelmas Term, 23d Geo. 3: Exemption of the recovery.—3d of April and 1st May 1783: John Shadwell Horton mortgaged the manor to Timothy Williamson in fee.—15th September 1785: John Shadwell Horton conveyed the manor to Thomas Skinner in [612] fee, in trust to sell.—26th and 27th February 1787: Williamson, on being paid his mortgage money together with J. S. Horton and Skinner, conveyed the manor to Eusebius Horton in fee.—27th February 1787: Bargain and sale enrolled to the same effect.

It having been referred to the Master to inquire and state whether the Defendant was entitled to any and what covenant for the production of the copies of court roll and deeds above mentioned, relating to the small piece of land together with other hereditaments, the Master reported that the Defendant was not entitled to a covenant for the production of any of them, except the indenture of feoffment of the 30th of April 1799. The Defendant excepted to the report, insisting that he was entitled to a covenant for the production of all the copies of court roll and title-deeds above mentioned, relating to the small piece of land together with other hereditaments.

Mr. Knight Bruce and Mr. Hodgkin, in support of the exception. The copies of court roll are part of the purchaser's title, and, therefore, ought to be placed within his reach. It will be said that he may obtain copies of the different surrenders and admittances from the steward of the manor; but, for anything that we know to the contrary, some former owner may have created an equitable mortgage, by deposit of the muniments relating to the copyhold title: and, therefore, the non-production of them is an objection to the title. *Berry v. Young* (2 Espinasse's N. P. C. 640, n.), *Whitbread v. Jordan* (1 You. & Coll. 303; see Sir E. Sugden's observations on this case, 3 Vend. & Pur. 471, 472, 10th edit.). It will be said also that the pur-[613]-chaser is not entitled to the production of some of the deeds relating to the title to the manor because they are enrolled. There is, however, no decision to that effect. The case of *Campbell v. Campbell* (2 Sugd. Vend. & Pur. p. 119) decides that the purchaser is not entitled to have attested copies of such deeds; but that is a very different question. Moreover, it appears in that case that the purchaser had had inspection of the originals and procured a covenant to produce them, and, having the means of referring to the inrolment, he was not allowed to put the vendor to the expense of giving him attested copies. Besides, several of the deeds mentioned in Abstract Number 3 are not inrolled; and the bargain and sale of the 27th of February 1787 is not an instrument properly of record, and, therefore, an office copy of the inrolment is not evidence. (Gilb. Evid. 86; Phill. Evid. 410, 3d edit.; 2 Sugd. Vend. & Pur. 119, 120.)

Mr. Wigram and Mr. Stratton, for the Plaintiff. It is not necessary that the vendor should give any covenant for the production of the copies of court roll; for the purchaser may, at any time, inspect the originals and obtain copies of them from the steward of the manor. Besides, in October 1763, which is 77 years ago, the copyholds were surrendered to William Newton in fee; and possession has ever

since gone along with that surrender. Then the enfranchisement deed of 1799, which the Master has decided that we are to give a covenant to produce, is 40 years old: so that the purchaser will have a good 40 years' title. That deed, too, recites that Eusebius Horton was seised of the manor in fee; and that William Greaves was seised of the copyholds in fee: and recitals in deeds 30 years old are [614] good evidence of the facts recited. In *Whitbread v. Jordan* Boulnois, before he took his security, had, at the least, constructive notice of the deposit made by Jordan. He knew that Jordan, who was a publican, was indebted to the Plaintiffs, who were his brewers; and he was aware that it was the ordinary practice of publicans, when indebted to their brewers, to secure the debt by a deposit of their title-deeds; and, therefore, he had sufficient notice to induce him to make further inquiry respecting the copies of court roll, and was guilty of gross negligence in not doing so. *Coussmaker v. Sewell* (3 Sugd. Vend. & Pur. App. 31), *Nouaille v. Greenwood* (1 Turn. & Russ. 26; see judgment).

There can be no necessity for the vendor's giving a covenant to produce the title-deeds of the manor; because the deed of 1799 recites that the then lord was seised of it in fee, and also because copies of the inolments of bargains and sales are made evidence by 10th Anne, c. 18, sect. 3.

THE VICE-CHANCELLOR, in the course of the argument, said: In *Goodtitle v. Morgan* (1 T. R. 755), Mr. Justice Buller decided that if a first mortgagee left the title-deeds in the hands of the mortgagor, and the second mortgagee got possession of them without notice of the prior mortgage, he would be entitled to priority over the first mortgagee: but that was a proposition to which Lord Eldon never would accede.

I will look over the abstracts before I decide on the exception.

[615] *April 23.* THE VICE-CHANCELLOR [Sir L. Shadwell]. The general rule is that, where the purchaser cannot have the title-deeds, and there is no stipulation in the contract for the purchase regarding them, the purchaser is entitled to have, from the vendor or other holder of the deeds, a covenant to produce them.

I have read over both the Abstracts No. 2 and No. 3, and I see nothing whatever upon the face of them which shews that the purchaser ought not to have a covenant for the production of all the instruments mentioned in the exception. The vendor plainly has shewn that he considered that, in order to make out his title, it was necessary that all those instruments should be abstracted which are found in the abstract; and, according to what I understand to be the practice of conveyancers, the purchaser is entitled to have a covenant for the production of them. I well remember what Lord Eldon said in *Howarl v. Ducane* (1 Turn. & Russ. 86): "Whatever other people may say upon the subject, I think that the practice of conveyancers has settled a great deal of law. I put this case on the practice of conveyancers; and I am not sorry to have this opportunity of stating my opinion that great weight should be given to that practice."

In my opinion, therefore, the purchaser is entitled to have a covenant for the production of all the title-deeds and documents mentioned in the exception.

[616] FORT v. THE GOVERNOR AND COMPANY OF THE BANK OF ENGLAND
AND OTHERS. *April 1, 1840.*

Plaintiff. Costs.

A Plaintiff resident abroad having made default in giving security for costs, the Court ordered that he should give the security within four days, or that an injunction which he had obtained, *ex parte*, should be dissolved; but it refused to order the bill to be dismissed.

The Plaintiff being resident abroad, the Defendants obtained the usual order that he should give security for the costs of the suit.

The Plaintiff not having complied with the order.

Mr. Knight Bruce and Mr. Goldsmid, for the Defendants, now moved that the

Plaintiff might be ordered to give the required security within four days from the date of the order to be made on the motion, or that an injunction which he had obtained, *ex parte*, to restrain the Governor and Company of the Bank from delivering to the other Defendants certain bullion, in their hands, to which he laid claim, might be dissolved and the bill be dismissed. They cited *Camac v. Grant* (*ante*, vol. i. p. 348).

Mr. Sharpe, for the Plaintiff, said that the Court had no jurisdiction to order the bill to be dismissed, on the Plaintiff making default in giving the security; and that Sir A. Hart, V.-C., had desired that the order in *Camac v. Grant* should not be drawn up, as he did not consider himself to be warranted by the practice of the Court in making it.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the Defendants were not entitled to have the bill dismissed, but that they were entitled to have the injunction dissolved, on the Plaintiff making default in giving the security; and His Honor made an order accordingly.

[617] WILKINS v. STEVENS. April 22, 23, 1840.

New Orders. Practice. Setting down Cause.

A party is not at liberty to disregard an order of the Court, although it is irregular; but ought to move to discharge it. Consequently, if a party has obtained an order for setting down a cause before the Master of the Rolls, which, under the orders of May 1837, ought to have been set down before the Lord Chancellor, the opposite party has no right to treat that order as a nullity, and to proceed before the Lord Chancellor or the Vice-Chancellor just as if no such order had been obtained.

Before the orders of May 1837 came into operation, a cause was heard at the Rolls, both originally and for further directions; and exceptions to a report on a reference ordered at the latter hearing were heard before the Vice-Chancellor, who merely referred it back to the Master to review his report. Held (the New Orders being then in operation) that the cause was a Rolls' cause.

The decree in this cause was made by the Master of the Rolls on the 14th of June 1803; and the order on further directions was made, by the same Judge, on the 30th of May 1834. On the 3d of March 1837 the cause was heard by the Vice-Chancellor for further directions and on exceptions to a report made by Master Martin, in pursuance of the order of May 1834. On that occasion, the Vice-Chancellor referred it to Master Dowdeswell to review Master Martin's report, and to proceed on the general reference to Master Martin; and the consideration of the costs of the exceptions was reserved until after Master Dowdeswell should have made his report; and it was ordered that the matter of the further directions should stand over. On the 12th of March 1838 the Vice-Chancellor, on the motion of the Plaintiffs and with the consent of the Defendants, ordered that the order of the 3d of March 1837 should be referred to the Master in rotation, who was Master Wingfield. On the 30th of May 1839 Master Wingfield made his report, to which the Plaintiffs took exceptions; and, on the 10th of June 1839, they obtained an order at the Rolls (1) for setting down [618] the exceptions before the Master of the Rolls; and, on the 14th of that month, they served that order on the Defendants' Clerk in Court. The Defendants, however, disregarded the order, considering that the exceptions ought to have been set down to be heard before the Lord Chancellor, and, on the 19th of June and the 6th of July 1839, they obtained two orders from the Vice-Chancellor, one for confirming the report *nisi*, and the other for confirming it absolutely. On the 13th of July 1839 they obtained, by petition, an order from the Lord Chancellor for setting down the cause to be heard, for further directions, before his Lordship.

(1) Mr. Fry, the registrar, stated that, since the issuing of the General Orders of 1833, orders for setting down exceptions before the Master of the Rolls were not drawn up by the registrar, but by the Secretary at the Rolls.

A motion was now made for the Plaintiffs to discharge the orders of the 6th and 13th July 1839 for irregularity.

Mr. Knight Bruce and Mr. Mylne, in support of the motion, said that there was a dispute between the parties as to whether the cause was a Rolls' cause or a Chancellor's cause; that the Plaintiffs insisted that it was the former, and the Defendants that it was the latter; that, supposing the Defendants were right, they were not justified in treating the exceptions and the order for setting them down as a nullity, as they had done by confirming the report; but ought, before they took that step, to have discharged the order for setting down the exceptions for irregularity. *Boddy v. Kent* (1 Mer. 361; see 363).

THE VICE-CHANCELLOR. When a petition is presented to have a cause set down before the Lord Chancellor, [619] his Lordship makes the order; and, therefore, I cannot discharge it.

Mr. Knight Bruce said that he had applied to the Lord Chancellor, and that his Lordship wished the Vice-Chancellor to dispose of the motion as he might think fit.

Mr. Jacob and Mr. Bethell, for the Defendants, said that, by the order of the 3d of March 1837, the cause had been reserved by the Vice-Chancellor, to be heard for further directions; and, therefore, His Honor's Court was the only tribunal in which the exceptions and further directions could be heard; and, consequently, the order for setting down the exceptions at the Rolls was a mere nullity; that exceptions, unless they were regularly set down, went for nothing; that, at all events, the Plaintiffs ought to have notified to the registrar that they had set down the exceptions; and then the registrar would not have certified as he had done that no cause had been shewn, and the Defendants would not have been able to confirm the report absolutely; that the confirmation of the report might have been delayed for ever; as the Master of the Rolls would never hear the exceptions; and, therefore, the Plaintiffs, if they meant to get any result from their exceptions, ought to have transferred them from the Rolls to the Chancellor's Court; that a party who has done an act that is inefficacious could not have the same benefit of it as he might have had if he had taken the right course; and, lastly, that the Plaintiffs had not moved to discharge the order for confirming the report *nisi*.

Mr. Knight Bruce, in reply. The Plaintiffs did everything that was incumbent [620] upon them, when they served the order for setting down the exceptions upon the Defendant's Clerk in Court. [THE VICE-CHANCELLOR. Was cause ever shewn against the confirmation of the report?] Yes, by filing the exceptions, setting them down and serving the order. It is not necessary for counsel to appear in Court and shew cause against the confirmation of the report, on the day mentioned in the order *nisi*, for making that order absolute. All that is necessary is that exceptions should be filed, and that the order for setting them down should be served. *Mole v. Smith* (1 Jac. & Walk. 665; see 670).

Every order of the Court, whilst it stands, must be considered as to be obeyed.

The question is whether these exceptions ought to have been set down to be heard before the Lord Chancellor or before the Master of the Rolls. The fourth section of the Sixth General Order of the 5th of May 1837 directs that exceptions taken to any report made by a Master, in pursuance of a decree or order of reference made by the Lord Chancellor or the Vice-Chancellor, shall be set down to be heard before the Lord Chancellor; and the fourth section of the tenth of those orders directs that exceptions taken to a report made pursuant to a decree of an order of reference made by the Master of the Rolls shall be set down to be heard before that Judge. Now, in this case, the original decree and the order of May 1834, on further directions, were both made at the Rolls. By the latter a further inquiry was directed; and further directions were again reserved. The Master having made his report, exceptions were taken to it; and in March 1837 the Vice-Chancellor heard the exceptions, [621] and referred it back to the Master to review his report. But that was a mere order on exceptions: it was not an order of reference in the sense in which those words are used in the fourth section of the Sixth General Order of May 1837; for it sent no new subject to be inquired into by the Master. The reference on which the Master made his report was a Rolls reference, and a Rolls reference only: and, consequently, the Plaintiffs are not within the influence of the fourth

section of the Sixth Order. [THE VICE-CHANCELLOR. If there be two orders of reference, one by the Master of the Rolls and the other by either the Lord Chancellor or the Vice-Chancellor, what is the unfortunate client to do? He cannot be shut out from both branches of the Court.] He ought to go to the jurisdiction in which the question originated. I submit that the report which is excepted to having been made pursuant to an order of reference made by the Master of the Rolls, the cause must be heard, on the exceptions to that report and also for further directions, before the same Judge.

THE VICE-CHANCELLOR [Sir L. Shadwell], after stating the facts of the case, said : Mr. Knight Bruce has contended that the report which is now excepted to was made in pursuance of the order of reference made at the Rolls, or, in other words, that the exceptions which have been taken to that report are merely a continuance of that reference ; and that, for the purposes of the General Orders of May 1837, the case is the same as if the exceptions which were heard before me had been heard before the Master of the Rolls. But I am not of that opinion : for the General Orders of May 1837 were made on the assumption that the Judge who heard the matter last would most probably recollect it best : and as the exceptions which are now pend-[622]-ing were taken to a report made on a reference directed by the Vice-Chancellor to a new Master, I have not the slightest doubt that those exceptions ought to have been set down to be heard before the Lord Chancellor ; and that they have been set down at the Rolls, in direct contravention of the General Orders of May 1837.

It was said that an order made by any one of the Judges of this Court remains an order of the Court until it is discharged. That is true as a general proposition : but if an order has been improperly obtained, it is not to be treated as right for all collateral purposes. I admit that the Defendants were aware that the exceptions had been set down before the Master of the Rolls ; but they were aware also that those exceptions had been set down under such circumstances that the Master of the Rolls, on being informed of those circumstances, would, as a matter of course, have refused to hear them, that is, they knew that the order which the Plaintiffs had obtained for setting down the exceptions was a nullity in substance though not in form ; and it does not lie in the mouths of those who had themselves done wrong in obtaining that order to complain that the other parties did wrong in disregarding it.

Moreover, the last-mentioned order was served on the Defendant's Clerk in Court on the 14th of June ; but the order *nisi* for confirming Master Wingfield's report was not made until the 19th of that month : how, then, could the service of the order for setting down the exceptions be, as it was said to be, a compliance with the subsequent order for confirming the report *nisi*, that is, a shewing cause against the confirmation of the report? The order *nisi* refers to something prospective and not antecedent : it directs that the report shall be con-[623]-firmed, unless the other parties, "shall shew good cause to the contrary." It is manifest, therefore, that the serving of the order for setting down the exceptions could not be a compliance with the order *nisi*.

The Plaintiffs, having taken upon themselves to depart from the General Orders of May 1837, ought to have informed the registrar that they had filed exceptions to the report ; or they ought, when the motion was made to confirm the report absolutely, to have appeared, by their counsel, and stated that the report had been excepted to. But they did not think proper to take either of those steps : so that the parties who had disobeyed the orders of May 1837, and thereby created the difficulty, did not think proper to remove it.

My opinion, therefore, is that the Defendants were right in obtaining the order for confirming the report absolutely ; and that there is no ground for my setting aside either that order or the order of the 13th of July 1839 for setting down the cause for further directions.

Motion refused, with costs.

The Plaintiffs appealed from the above decision to the Lord Chancellor ; and on the 9th of May 1840 his Lordship reversed the decision and discharged the orders of the 6th and 13th of July 1839, with costs, on the ground that a party was not at liberty to disregard an order made by one of the Judges of the Court, and to proceed before another Judge, just as if no such order had been made. His Lordship

intimated that, as the decree and the order, on further directions, by which the reference was directed, had been made at the Rolls, [624] and as the Vice-Chancellor's order of the 3d of March 1837 (which was before the General Orders of May 1837 came into operation) had done nothing more than refer it back to the Master to review the report, the cause ought to be set down to be heard for further directions before the Master of the Rolls.

[624] ARCHER v. SLATER. *March 2, 3, 4, 5, 9, April 16, 1840.*

[S. C. 11 Sim. 507.]

Vice-Chancellor. Jurisdiction. Fraud. Copyholds. Will.

A suit to set aside a decree at the Rolls, on the ground of fraud, may be heard by the Vice-Chancellor.

There is no case in which the Court has established a will of copyholds. *Semble*, the probate copy of a copyholder's will is sufficient to lead the uses of a surrender to the use of his will.

The object of the suit was to set aside a decree made by the Master of the Rolls in 1823, on the ground that it had been obtained by fraud.

A doubt having been suggested as to whether the Vice-Chancellor had jurisdiction to hear the cause, as the object of it was to interfere with a decree at the Rolls, His Honor said that he would consult the Lord Chancellor on the subject.

On a subsequent day, THE VICE-CHANCELLOR said that he had conferred with the Lord Chancellor, and that his Lordship was of opinion that His Honor might hear the cause.

In the course of the argument, THE VICE-CHANCELLOR said that he knew of no case in which the Court had established a will relating to copyholds; and that he had always understood that, if a copyholder surrendered his tenements to the use of his will, and then made an instrument which the Ecclesiastical Court, on his death, admitted to probate, the probate copy was sufficient to guide the uses of the surrender.

[625] Mr. Knight Bruce, Mr. Wakefield, Mr. Norton, Mr. G. Richards, Mr. Bethell, Mr. K. Parker, Mr. James Parker and Mr. Goodeve were the counsel in the cause.

[625] WRIGHT v. IRVING. HAYNES v. HAWKINS. *April 28, 1840.*

New Orders. Vice-Chancellor. Jurisdiction.

The Vice-Chancellor has no jurisdiction, under the 12th Order of May 1837, to order a fund standing in trust in a Lord Chancellor's cause to be transferred to a Rolls' cause.

A petition was presented in these two causes, praying that a fund, which was standing in the name of the Accountant-General in trust in the first cause, might be carried over from the credit of that cause to the credit of the second cause.

The first was a Lord Chancellor's cause, and the second was a Rolls' cause.

THE VICE-CHANCELLOR [Sir L. Shadwell] held that, under the 12th Order of the 5th of May 1837, he had no jurisdiction to make the order prayed; and dismissed the petition with costs.

Mr. Knight Bruce and Mr. Hubback supported the petition; and

Mr. Jacob and Mr. Campbell opposed it.

[626] LENDEN v. BLACKMORE. April 3, 1840.

Will. Construction.

Testatrix bequeathed her residue to A. T.: after A. T.'s death to be equally divided between S. L. and M. S., the daughters of her sister E. S., and E. B., the daughter of her sister S. M., and her children. E. B. had eight children living at the testatrix's death, and one born afterwards and during A. T.'s life. Held, that the residue, on A. T.'s death, was divisible equally amongst S. L., M. S. and E. B. and her nine children.

Frances Turner, by her will, dated the 31st of October 1825, disposed of her residuary personal estate in the following words:—

"After my funeral expenses and debts paid, I give the residue to Martha Turner, of Bideford, Devon, and Anne Turner, to be equally divided; the survivor to enjoy the whole: after both their deaths to be equally divided between Sybilla Lenden and Mary Seyer, daughters of my sister Elizabeth Seyer, and Elizabeth Blackmore, daughter of my sister Susannah May, and her children."

The testatrix died on the 15th of November 1828, leaving Martha Turner, Anne Turner, Sybilla Lenden, Mary Seyer and Elizabeth Blackmore her surviving.

Mary Seyer afterwards died intestate; and letters of administration to her effects were granted to Sybilla Lenden, her sister and sole next of kin. Anne Turner survived Martha Turner, and died in August 1828. Elizabeth Blackmore had eight children living at the testatrix's death; and she had another child born afterwards and during the lifetimes of Martha and Anne Turner.

The bill was filed by Abel Lenden, the executor of the testatrix's will, and Sybilla Lenden, his wife, against Mrs. Blackmore and her nine children: and the question was whether, on Anne Turner's death, the testa-[627]-trix's residuary estate became divisible into three equal parts, Sybilla Lenden being entitled to one-third in her own right, and to another third as the personal representative of Mary Seyer; and Elizabeth Blackmore being entitled to the remaining third for her life, with remainder to her children: or whether it became divisible into eleven equal parts, Sybilla Lenden being entitled to one part in her own right, and to another part as the personal representative of Mary Seyer; and Elizabeth Blackmore and her eight children born at the testatrix's death being each entitled to one of the remaining nine parts: or whether it was divisible into twelve parts, so as to let in the child of Elizabeth Blackmore, who was born after the death of the testatrix and in the lifetimes of Martha and Anne Turner.

Mr. Jacob and Mr. F. Bayley, for the Plaintiffs, contended that Mrs. Blackmore took one-third part of the residue for her life, with remainder to her children, and that Sybilla Lenden took the two other third parts, as above mentioned. *Newman v. Nightingale* (1 Cox, 341); *Jeffery v. Honywood* (4 Madd. 398).

Mr. Knight Bruce and Mr. Wilcock appeared for the Defendants, Elizabeth Blackmore and her children who were living at the testatrix's death; and Mr. Bethell and Mr. Abraham, for the child born in the lifetimes of Anne and Martha Turner; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, held that the residue was divisible into twelve shares; that Sybilla Lenden was entitled to one share, in her own right, and to another share as the personal representative of Mary [628] Seyer; and that Mrs. Blackmore and her children, including the one that was born after the testatrix's death and in the lifetimes of Martha and Anne Turner, were entitled to the remaining shares as tenants in common. (See *Butler v. Stratton*, 3 Bro. C. C. 367; *Blackler v. Webb*, 2 P. W. 383; and *Longmore v. Broom*, 7 Ves. 124.)

[628] STRICKLAND v. STRICKLAND.(1) April 15, 1840.

Practice. Dismissal.

A Plaintiff amended his bill, not requiring an answer; the Defendant, however, answered the amendments. Held, that he could not move to dismiss until the expiration of two months from the time when the answer was to be deemed sufficient.

On the 10th January 1840, which was more than two months after all the Defendants had answered the bill, the Plaintiffs obtained leave to amend, not requiring an answer from any of the Defendants; and on the 25th January 1840 they amended the bill accordingly. On the 30th January one of the Defendants put in an answer to the amended bill; and on this day

Mr. Shadwell moved, on behalf of that Defendant, to dismiss the bill for want of prosecution.

THE VICE-CHANCELLOR [Sir L. Shadwell], however, was clear that the answer, though not required, might have been excepted to; and could not be deemed sufficient until two months after it was filed; and refused the motion with costs.

A similar motion, on behalf of the Defendants who had not answered the amendments, was granted.

Mr. Jacob appeared for the Defendants.

[629] DE LA VIESCA v. SIR JOHN WILLIAM LUBBOCK. April 24, 1840.

[See *Eames v. Hacon*, 1881, 18 Ch. D. 352.]

Administrator.

Pending a litigation in a Spanish Court, as to which of two testamentary papers of a deceased Spaniard ought to be established, the Plaintiff, who was resident in Spain, was appointed, by the Spanish Court, the judicial administrator of the deceased's goods; and the Plaintiff, under the authority of that Court, afterwards appointed the Defendant to be his attorney to recover and receive £10,000 due to the deceased's estate from C. & Co., of London. The Defendant, after litigation, in the Prerogative Court of Canterbury, with one of the parties to the Spanish suit, obtained letters of administration to the deceased, to be granted to him as the Plaintiff's attorney, limited to receive the £10,000, *until the Plaintiff should obtain administration* to the deceased. The Defendant afterwards received the £10,000. Held, that he might safely pay it over to the Plaintiff, although he had not obtained administration to the deceased.

Pending a litigation, in the Civil Court of First Instance at Cadiz, between the sister and the nephew of Don Domingo Aramburn, late of Cadiz, deceased, as to which of two testamentary papers of the deceased, the one dated in 1829, and the other in 1814, ought to be established, the Plaintiff, who resided at Cadiz, was appointed by that Court the judicial administrator of the goods, chattels and credits belonging to the deceased's testamentary estate. Afterwards the Plaintiff, in pursuance of an authority given to him by the Court at Cadiz, executed an instrument, under his hand and seal, by which he appointed the Plaintiff to be his attorney for the purpose of recovering and receiving from Messrs. James Campbell & Co. of London, merchants, a sum of £10,000, or thereabouts, belonging to the deceased's estate. Accordingly the Defendant, after some opposition on the part of Don Angel de Aramburn, the deceased's nephew, obtained a decree of the Prerogative Court of

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the Archbishop of Canterbury, under which limited letters of administration to the deceased were granted to him in the following words:—

“William, by Divine Providence Archbishop of Canterbury, &c., to our well-beloved in Christ, Sir John [630] William Lubbock, Bart., greeting: Whereas it hath been alleged before the worshipful Jesse Adams, Doctor of Laws, surrogate of the Right Honourable Sir Herbert Jenner, Knight, Doctor of Laws, Master, Keeper or Commissary of our Prerogative Court of Canterbury lawfully constituted, on the part and behalf of the said Sir J. W. Lubbock, Bart., that Don Domingo de Aramburn, late of Cadiz, in Spain, merchant, deceased, having, whilst living and at the time of his death, goods, chattels or credits in divers dioceses or jurisdictions within the province of Canterbury, sufficient to found the jurisdiction of our said Prerogative Court of Canterbury, departed this life some time since, being, at the time of his death, domiciled in Spain; and that, in a suit, now depending in the Civil Court of First Instance in the said city of Cadiz, touching and concerning the validity of certain testamentary paper writings of said deceased, bearing date respectively the 29th December 1814, and the 12th of June 1829, Don Jose de la Viesca, of said city, merchant, was, by a decree or order of said Court, bearing date the 16th October 1838, appointed the judicial administrator of said deceased's property. And whereas it was further alleged that, by an official Act of the said Court, bearing date the 14th May 1839, the said Jose de la Viesca was, amongst other things, authorized and empowered to receive, in London, of and from the house of Messrs. James Campbell & Co., all such amount of pounds sterling, not exceeding the sum of £11,000 belonging to the testamentary estate of said deceased, as might be in their hands, as in and by an official copy of the said Act of Court, and also by an affidavit duly made and sworn to by James Dennington, brought into and now remaining in the registry of our said Court, reference being thereunto had, will more fully and at large appear: And whereas it was further alleged that [631] said Don Jose de la Viesca now resides at the said city of Cadiz, and hath, in and by a certain power of attorney under his hand and seal, *duly appointed the said Sir J. W. Lubbock his lawful attorney as to the estate and effects of said deceased*, as in and by an official copy of said power of attorney, also brought into and now remaining in the registry of our said Court, &c.: and whereas it was further alleged that, in a certain cause or suit lately depending in our said Court, intituled ‘Viesca, by his attorney, against De Aramburn’ touching the grant of administration, under certain limitations, of the goods, chattels and credits of said deceased, the right honourable our master, keeper or commissary aforesaid was pleased, on the second session of Michaelmas term (to wit), Saturday the 16th day of November instant, having heard proctors and advocates thereon, at the petition of the proctor of the said Sir John William Lubbock, by his interlocutory decree, to decree letters of administration of the goods and chattels and credits of the said deceased, to be granted and committed to said Sir John William Lubbock, *as the lawful attorney of the said Don Jose de la Viesca*, limited to receive, from the said Messrs. James Campbell & Co., all such amount of pounds sterling, as they may have in their hands belonging to said testamentary estate of the said deceased, provided the same does not exceed the sum of £11,000, and, in case the property of the said deceased now remaining in their hands, should exceed the said sum of £11,000, then to receive so much only thereof as shall amount to the sum of £11,000 and no more, for the use and benefit of the said Don Jose de la Viesca *and until he shall duly apply for and obtain letters of administration of the goods, chattels and credits of said deceased to be granted to him*, on his exhibiting an inventory and his sureties *justifying* (justice so requiring): and we, being desirous that the goods, chattels and credits of the said deceased may be well and faithfully administered, applied and disposed of according to law, do therefore, by these presents, grant full power and authority to you, in whose fidelity we confide, to administer and faithfully dispose of the goods, chattels and credits of the said deceased, limited to receive, from the said Messrs. James Campbell & Co., all such amount of pounds sterling as they may have in their hands belonging to the testamentary estate of the said deceased, provided the same does not exceed the sum of £11,000; and, in case the property of the said deceased now remaining in their hands, should exceed the said sum of £11,000, then to receive so much only thereof as shall

amount to the sum of £11,000 and no more, you having been already sworn well and faithfully to administer the same, and to make a true and faithful inventory of the said limited goods, chattels and credits, and to exhibit the same into the registry of our said Court on or before the last day of May next ensuing, and also to render a just and true account thereof on or before the last day of November 1840 : and we also, by these presents, ordain, depute and constitute you administrator of the goods, chattels and credits of the said Don Domingo Aramburn deceased, as the lawful attorney of the said Don Jose de la Viesca, limited, &c. (as before), for the use and benefit of the said Don Jose de la Viesca, *and until he shall duly apply for and obtain letters of administration of the goods of the said deceased to be granted to him.*"

The Defendant having, under the letters of administration, received £10,568 from Campbell & Co., the bill was filed to compel him to pay over that sum to the [633] Plaintiff. The question, at the hearing of the cause, was whether, having regard to the litigation in the Spanish Court (which was still pending), and also to the litigation which had taken place in the Prerogative Court, and, more especially to the fact that the letters of administration were granted to the Defendant until the Plaintiff should obtain letters of administration to the deceased, the Defendant could safely pay the sum in question to the Plaintiff until he had obtained such letters of administration.

Mr. Knight Bruce and Mr. Coleridge, for the Plaintiff.

Mr. G. Richards and Mr. Hull, for the Defendant.

THE VICE-CHANCELLOR said that Sir John Lubbock was bound by the recitals of the letters of administration ; and that they were granted to him, expressly, as the attorney of De la Viesca ; and, therefore, he might safely pay over the sum which he had received to De la Viesca.

Declare the Plaintiff entitled to the fund in the pleadings mentioned ; and order that the Defendant do pay to the Plaintiff so much of the sum of £10,568 received by him under and by virtue of the letters of administration in the bill mentioned as shall remain after deducting therefrom the sum of £454, the amount of his costs incurred in the proceedings to obtain such administration and otherwise relating thereto, and the costs of this suit to be taxed as between solicitor and client.

[634] PHIPPS v. HENDERSON. April 28, 1840.

New Orders. Scandal and Impertinence. Master. Report.

The Master's decision, on a question of scandal or impertinence brought before him under the 73d Order of 1828, is not final ; and therefore he ought to issue a certificate of his decision.

Under the 73d General Order of 1828, a party who wishes to complain of any matter introduced into any state of facts, affidavit or other proceeding before the Master, on the ground that it is scandalous or impertinent, may, without any order of reference by the Court, take out a warrant for the Master to examine such matter, and the Master may expunge any such matter which he shall find to be scandalous or impertinent.

Under a reference directed in this cause, the Defendant carried into the Master's office an affidavit with four schedules thereto. The Plaintiff, considering part of the affidavit and two of the schedules to be impertinent, proceeded, in the manner pointed out by the 73d Order, to obtain the Master's decision on the subject. The Master, having been attended by the solicitors on both sides, was of opinion that the matter complained of was not impertinent ; but refused to certify to that effect. Whereupon the Plaintiff, being dissatisfied with the Master's decision and wishing to bring the question before the Court by way of exception, presented a petition praying that the Master might be ordered either to issue a certificate of his decision, or to expunge the matter alleged to be impertinent.

Mr. Knight Bruce and Mr. G. L. Russell, in support of the petition. The 73d Order enables a party who objects, on the ground of either scandal or impertinence, to any affidavit or other document brought by his opponent into the [635] Master's

office, to obtain the Master's judgment on the matter objected to, without incurring the expense of obtaining an order of reference from the Court. That order does not make the Master's decision final; but merely enables the party to put the Master in motion just as he might have done before by obtaining an order of reference. If, then, the Master's decision is not final, he ought to issue his certificate; for, otherwise, there would be no means of reviewing his judgment.

Mr. Wakefield and Mr. Faber, for the Defendant. The 73d Order was intended to enable the Master to determine the question of scandal or impertinence in any proceeding before him, summarily and cheaply. It authorizes him to expunge, *instantly*, the matter that he deems to be either scandalous or impertinent. But the 22d Order of 1833, which relates to scandal or impertinence in an answer or other proceeding before the Court, provides that the scandalous or impertinent matter shall not be expunged until the expiration of four days from the filing of the report, in order that the adverse party may have an opportunity to file exceptions to such report. Therefore it may be fairly inferred that, as the 73d Order of 1828 contains no such provision, the Master's judgment, as to matter alleged to be scandalous or impertinent in the proceedings to which that order relates, was not intended to be excepted to. The Master certifies his dissatisfaction, but not his satisfaction with an examination or other proceeding before him.

THE VICE-CHANCELLOR referred to the 97th Proposition of the Chancery Commissioners, which is: That if any party wishes to complain of any matter introduced into any state of facts, affidavit or other proceeding before the Master, on the ground that it is scandalous or im-[636]-pertinent, he shall be at liberty, without any order of the Court, to take out a warrant for the Master to examine into the matter; and the Master shall have authority to expunge any such matter which he may find to be scandalous or impertinent; and his decision thereon shall be final: and that, in cases of impertinence, the costs of the reference shall be in the discretion of the Master. His Honor added that the 73d Order did not direct that the Master's decision should be final, nor did it say anything about the costs of the reference; and that, as the language of the order was so different from the proposition, he was of opinion that the Master's decision on a matter brought before him under the order was not intended to be final; and, therefore, he should order the Master to issue his certificate.

[636] BENN v. DIXON.(1) May 1, 1840.

[S. C. 9 L. J. Ch. 259; 4 Jur. 575.]

Will. Construction. Executor. Leaseholds. Perishable Property. Conversion.

Testator gave to his wife the whole of the interest arising from his property, both real and personal, during her life; and, in case he should die without issue, he gave, after the death of his wife, the whole of his property, both real and personal, to his brothers and sister. The testator died possessed of leasehold, and also of real property. Held, that the widow was not entitled to the leasehold property, in specie, during her life, but only to the dividends of stock to be purchased with the proceeds of the sale of it.

Peter Dixon, by his will, dated in November 1822, disposed of his real and personal estate in the following words:—

"I give and bequeath unto my dear wife, Sarah Dixon, the whole of the interest arising from my property, both real and personal, during the period of her [637] natural life, and, at her decease, to be disposed of as hereinafter named. I give and bequeath also unto my dear wife, Sarah Dixon, all my household furniture, linen, plate and books to her for ever. At her decease, if I leave issue at my death, I give and bequeath the whole of my property to my child, if only one, or, in equal shares, if more than one, on attaining the age of 21 years: the same being held in trust by

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C. W. Thompson and my dear wife, Sarah Dixon, for the use and benefit of such child or children as I may have at the time of my decease ; but, should I die without leaving issue, then I give and bequeath, after the death of my dear wife, Sarah Dixon, aforesaid, the whole of my property, both real and personal, in equal proportions to my brothers, T. Dixon, O. Dixon and J. Dixon, and my sister, Jane Benn ; but, should any of my brothers or sister die without leaving issue, I then give and bequeath such share to the survivor or survivors of them ; but, leaving issue, I then give such share to their children, in equal proportions, on attaining the age of 21 years, to them and their heirs for ever."

The testator appointed his wife his executrix, and died in January 1835, without leaving issue. The will was proved by his widow : and the bill was filed by his brothers and sister for the administration of his personal estate, which consisted in part of a leasehold house at Kennington, in which the testator lived at his death, and in which his widow continued to reside afterwards. The testator also was seised of a small real estate in Cumberland.

The only question in the cause was whether the widow was entitled to the possession of the house during her life, or whether it ought to be sold and the proceeds invested, and the interest of the same paid to her.

[638] Mr. Knight Bruce and Mr. Stinton, for the widow, said that, as the testator in disposing of his property had united his personal with his real estate, it was his intention that they should be both enjoyed together in their then existing state : and that by the word "interest" the testator must have meant "income," as he had used that word with reference to his real as well as his personal estate. They cited *Alcock v. Soper* (2 Myl. & Keen, 699) ; *Collins v. Collins* (*Ibid.* 703) ; and *Pickering v. Pickering* (2 Beav. 31 ; and 4 Myl. & Cr. 289).

Mr. Jacob, Mr. Wigram and Mr. Williams, for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case must be governed by the general rule.

There is a total absence in the will of anything like a declaration of intention that the property shall be enjoyed in the specific state in which it was at the time of the testator's death.

In the case of *Pickering v. Pickering* the testator gave to his wife the interest, rents, dividends, annual produce and profits, and use and enjoyment of all his estate and effects whatsoever.

In every will you must look at the words of the whole will. Now, in this case, the testator, after the death of his wife, gives the whole of his property to his brothers and sister. What property ? "The whole of my property, both real and personal." There it is plain they were to take what his wife was to enjoy during her life. Is that consistent with the idea of her enjoying the property as it existed at the time of the testator's death ? [639] It is the duty of the executors to deal with the property in such a manner as that it may continue to produce the same interest after the death of the tenant for life. Suppose that the testator had given a flock of sheep : could it be held that they were to be kept in the same state and not sold ? They might all die, and then the subject of the gift could not possibly pass to the persons in remainder ; for nothing would be left.

As the will stands, there is nothing on the face of it to prevent the application of the rule of law that perishable property must be sold and converted into money, and invested in the funds, in order to produce the same interest to the remainder-man as was enjoyed by the tenant for life.

[639] VAUGHAN v. THE MARQUIS OF HEADFORT. May 8, 1840.

[S. C. 9 L. J. Ch. (N. S.) 271 ; 4 Jur. 649.]

Will. Construction.

Testator bequeathed £40,000 to Lord H. and his children, to be secured for their benefit. Held, that Lord H. took for life, with remainder to his children.

Margaret Vaughan made her will, dated the 7th of November 1836, and containing the following bequests :—

“I leave two houses in Foley Place and £2000 to the Honourable Lady Cockburn : £40,000 in the three per cent. Reduced annuities *to the Marquis of Headfort and his children, to be secured for their use.*”

The testatrix died eleven days after the date of her will. At her death Lord Headfort had six children, all of whom were still infants.

[640] The questions raised on behalf of the Marquis of Headfort and his children were, first, whether the legacy to the marquis and his children was specific or general : 2d, whether the marquis and his children took the £40,000 as joint-tenants, or whether the marquis was entitled to it for his life, with remainder to his children.

Mr. Knight Bruce and Mr. Evans, for the Plaintiff, the residuary legatee, submitted whether the bequest was general or specific.

THE VICE-CHANCELLOR was clearly of opinion that the legacy was general.

Mr. Jacob and Mr. Lovat, for Lord Headfort, relied on the words “to be secured,” as shewing that the children were not intended to have any portion of the fund transferred to them immediately, but that there was to be a trusteeship created during the life of the marquis, that is, that the father was to take for life with remainder to his children, which construction would let in the future children of the marquis. *Crawford v. Trotter* (4 Madd. 361), *Jeffery v. Honywood* (*Ibid.* 398), *Newman v. Nightingale* (1 Cox, 341). They also contended that the words “for their use” meant for the use of *the children*.

Mr. Wakefield, Mr. Wigram and Mr. Ellison, for the children, said that the gift to the marquis and his children made them joint-tenants, and that the words “to be secured,” &c., did not destroy the effect of the preceding gift, but meant that a security was to be found [641] for the fund, that is, that it was to go into the hands of a trustee for the benefit of the legatees. *Cooper v. Thornton* (3 Bro. C. C. 96 and 186).

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case shews, as I have often observed before, that no light is thrown on questions like the present by quoting other cases. By the laws of this country, every testator, in disposing of his property, is at liberty to adopt his own nonsense ; and a decision on the expressions used by one testator seldom affords any clue to the meaning of another.

On looking through the whole of the will, I do not see anything that throws any light on the question now before me ; and therefore I must deal with the individual expression as well as I can.

If possible, every word in a will ought to have that meaning given to it which, in common fairness of construction, it is capable of receiving. Now the words in this case are : “£40,000 in the three per cent. Reduced annuities to the Marquis of Headfort and his children.” If it stood there, the marquis and his children would be joint-tenants ; but then it goes on : “to be secured for their use.” Now it would be absurd to hold that those words apply to the marquis ; as he might have taken his own share, and either secured it for himself or spent it. Those words therefore do not comprehend the marquis ; but the plain meaning of them is that the fund is to be secured for the children from the dominion of their father ; and, in my opinion, there is quite enough in this will to justify the Court in holding that [642] the father is to take for his life, and his children after his decease ; and that construction will let in any children of the marquis that may be born hereafter.

Mr. Wray, Mr. Keene and Mr. Humphry appeared for other parties interested in other questions that arose on the will.

[642] GODDEN v. CROWHURST. Jan. 28, 1842.

[S. C. 11 L. J. Ch. 145. See *In re Coleman*, 1888, 39 Ch. D. 446.]

Will. Construction. Trust to Take Effect on Alienation or Bankruptcy. Bankrupt.

Testator bequeathed his residuary estate to trustees ; and, after making a provision out of it for the benefit of his son for his life, and, after the son's death, for his

wife and children, directed that, if his son should assign or charge the interest to which he was entitled for life, or attempt or agree to do or commit any act whereby the same, or any part thereof, might, if the absolute property thereof were vested in him, be forfeited to or become vested in any person or persons, then the trustees should pay and apply the said interest for the maintenance and support of his son, and any wife and child or children he might have, and for the education of such issue as the trustees should, in their discretion, think fit. Some years after the testator's death the son became bankrupt. Held, that the trust for the benefit of the son, his wife and children was valid, and that the assignees were not entitled to any part of the provision.

George Staffell, by his will, dated the 25th of April 1829, devised his real estates unto and to the use of William Manser, deceased, and the Defendants Thomas Crowhurst and Justinian Allen and their heirs, upon trust to sell the same at such time or times as they should think it would be most to the advantage of his estate; and he declared it to be his will that the monies which should arise from such sale should be considered to be part of his personal estate; and that the clear yearly rents and profits of his real estates, until the same should be sold, or so much thereof as should be remaining unsold, should be deemed to be part of the [643] annual income of his personal estate; and that the same monies and rents and profits should be subject to the dispositions thereafter made concerning his personal estate and the annual income thereof respectively; and he gave to the same trustees all his ready monies and securities for money, and monies in the British and foreign funds, debts, stock-in-trade and other personal estate, upon trust to get in and sell and dispose of the same; and he declared it to be his will, and that he was particularly desirous that his trustees should not sell any part of his real estate until they should, in their discretion, think it desirable so to do; and he authorized and empowered them to demise the whole or any part thereof for any term of years they might think proper, not exceeding seven years, in possession; and he directed his trustees to stand possessed of the monies to be by them raised, received, collected and got in by the ways and means aforesaid, upon trust, after paying his debts and certain other charges, to place out and invest the residue of such monies in their names, upon the usual securities, at interest; and, subject as thereafter mentioned, he gave the interest, dividends and annual produce of one moiety of the residue of his estate unto his son Henry Staffell and his assigns for his life; and, subject also as thereafter mentioned, he gave the interest, dividends and annual produce of the other moiety of the residue of his estate unto his daughter Grace Allen, the wife of Justinian Allen, and her assigns during her life; provided always, and he declared it to be his will that, as the interest, dividends and proceeds of the residue of his estate, and the rents of his real estate until sold, should be received by his trustees, the same should, after paying thereout the costs of keeping the messuages, buildings and premises then remaining unsold in good repair and insured from [644] loss by fire or other incidental expenses, be laid out and invested again as his trustees, in their discretion, should think most advantageous, and be accumulated for the space of five years from the day of his decease; and, at the expiration of that period, he directed his trustees to make out an account of all such interest and dividends and the accumulations thereof, and pay one moiety of such interest, dividends and accumulations to his son Henry for his own use and benefit, and to pay the other moiety of such interest, dividends and accumulations to his daughter Grace Allen for her own use and benefit; and he directed that, after such division of such interest and produce, the interest, dividends and annual produce of the residue of his estate should, subject to the deductions aforesaid, be again accumulated for five years, when a like division should be made thereof between his said son and daughter as before mentioned; and that such accumulations and divisions should continue to be made at the expiration of every five years; it being his wish and desire that the interest and produce of the residue of his estate should only be divided once every five years until the respective moieties thereof should become divisible amongst his grandchildren as thereafter mentioned; and, in case his son Henry should die in the lifetime of his then present or any future wife, he directed that the interest, dividends and annual produce of the moiety of the residue of his estate, to which

his son Henry was entitled, should be paid to such wife during her life, but, nevertheless, at the same periods and in the same manner only as such interest or produce was payable to his son during his life; and, in case his daughter Grace should die in the lifetime of her then husband or any future husband she might have, he directed that the interest, dividends and produce of [645] the moiety of the residue of his estate, to which she was entitled for life, should be paid to such husband surviving her during his life, but, nevertheless, at the same periods and in the same manner only as such interest or produce was payable to his daughter during her life; and he directed that, in case his son should, at any time or times, make any assignment, mortgage or charge of or upon, or in any manner dispose of, by way of anticipation, the said interest, dividends or accumulations, or any part thereof, to which he was entitled for life as aforesaid, or attempt or agree so to do, or commit any act whereby the same or any part thereof could or might, if the absolute property thereof were vested in him, his said son, be forfeited unto or become vested in any person or persons, then, and in any of the said cases, his trustees should thenceforth pay and apply the said interest, dividends and accumulations for the maintenance and support of his said son and any wife and child or children he might have, and for the education of such issue or any of them as his trustees for the time being should, in their discretion, think fit; and that, after the decease of his son and of his then present or any future wife, and after the decease of his daughter and her then present or any future husband, his trustees should pay, share and divide the moiety of the clear residue of his estate to which each such son or daughter was entitled for life, unto and equally between and amongst all and every his and her children, if more than one, who, whether sons or daughters, should attain the age of 21 years, share and share alike; and in case there should be only one child who should attain 21, then the whole of such moiety of his estate unto such child; and in case either his son or his daughter should die without leaving any child that should live to attain the age of 21 years, he directed his trustees to [646] stand possessed of such moiety upon the same trusts, for the benefit of the other of his son or daughter and his or her children, as were thereby mentioned and declared with respect to the moiety thereby given to or in trust for him or her and his or her children; and in case both his son and his daughter should die without leaving any child who should attain the age of 21 years, then he declared that the whole of the residue of his estate, and the stocks, funds or securities on which the same should be invested, should be payable to his own next of kin living at the time of such event happening, and be divisible according to the statute made for the distribution of intestates' estates; such bequests over, however, to be without prejudice and subject to the interest thereinbefore given to any wife of his son Henry, or any husband of his daughter Grace, who might respectively survive them.

The testator died on the 1st of January 1830, leaving Henry Staffell, his only son and heir at law, and Grace Allen, his daughter and only other child, surviving him; and, upon the death of the testator, the trustees entered into the possession of his real estates; and, after paying the testator's debts and the other charges payable out of his personal estate, they invested the clear surplus thereof in the usual securities; and, in exercise of the discretion intrusted to them by the will, they retained the real estates unsold, and received the rents and profits thereof, and the dividends and interest arising from the investment of the surplus of the personal estate; and, during the period of five years from the death of the testator, they accumulated the same pursuant to the directions of the will; and, at the end of such period, they divided such accumulations between Henry Staffell and Grace Allen; and they received and accumulated the [647] rents of the real estates, and the dividends and interest of the personal estate which accrued from the time of the aforesaid division.

On the 31st of May 1837 a fiat in bankruptcy was issued against Henry Staffell, under which he was declared a bankrupt, and the Plaintiffs, Henry Godden and James Foster Groom, were appointed the creditors' and official assignee respectively under the fiat.

The bill was filed against Henry Staffell, his wife and children and the surviving trustees of the will; and, after stating as above, it alleged that, although the testator had, by his will, directed that, in the event of Henry Staffell committing any act whereby the interest, dividends or accumulations to which he should be entitled for

life under the will could or might, if the absolute property thereof were vested in him, be forfeited unto or become vested in any person or persons, the trustees should thenceforth pay and apply the interest, dividends and accumulations for the maintenance and support of Henry Staffell, and any wife or child he might have, and for the education of such issue or any of them, as they, in their discretion, should think fit; the Plaintiffs were advised that such direction was in itself ineffectual for the purpose of defeating or divesting the right of Henry Staffell and his assigns for his life, under the previous dispositions of the will, to a moiety of the rents, interest and dividends arising from the real and personal estate of the testator, or, if it was in any event effectual, that it was not applicable to the claim of the Plaintiffs as arising under the bankruptcy of Henry Staffell; and that the Plaintiffs, as his assignees, were entitled, notwithstanding such direction, to so much of the said moiety of the interest, dividends and accumulations [648] aforesaid as had not been paid to Henry Staffell previously to his bankruptcy, and to a moiety of the rents, interest and dividends subsequently accruing; or, if such division should, for any reason, be considered to be, to any extent, effectual as against the Plaintiffs as such assignees, then they were advised that they were entitled to the whole of Henry Staffell's moiety of the rents, interest, dividends and accumulations which had accrued up to the time of his bankruptcy, and were entitled to some part of his moiety of the rents, interest, dividends and accumulations which had accrued subsequently to his bankruptcy, and which should thereafter accrue, not being less than an equal portion thereof, with the wife and children of Henry Staffell; and that the Plaintiffs were also advised that the direction to accumulate, from time to time, the rents, interest and dividends for periods of five years was not binding upon Henry Staffell previously to his bankruptcy, and was not then binding upon the Plaintiffs as his assignees; and that the whole, or such proportion as the Plaintiffs might be entitled to of Henry Staffell's moiety of the rents, interest, dividends and accumulations which had already accrued, ought to be paid to the Plaintiffs forthwith; and such moiety, or proportion of a moiety of the future rents, interest and dividends, ought to be paid to them as the same should from time to time accrue and be received by the trustees; but that the trustees refused to pay to the Plaintiffs any part of the rents, interest, dividends and accumulations which had accrued since the aforesaid division; and that Henry Staffell and his wife and children insisted that, under the trusts declared by the will of Henry Staffell's moiety of the rents, interest, dividends and accumulations, in the event of his committing any such act as before mentioned, they, or some of them, were entitled [649] to have the whole of such moiety of the rents, interest, dividends and accumulations from the time of the aforesaid division thereof applied for their maintenance, support and education.

The bill prayed that the will might be established; and that it might be declared that the Plaintiffs, as the assignees of Henry Staffell, were entitled to the moiety of the rents, interest, dividends and accumulations arising from the real and personal estates of the testator, which Henry Staffell would have been entitled to if he had not become a bankrupt; and that it might be declared that the direction contained in the will for the accumulation of the said rents, interest and dividends was not binding upon Henry Staffell previously to his bankruptcy, and was not then binding upon the Plaintiffs as his assignees; and, if it should happen that the Plaintiffs were not entitled to the whole of Henry Staffell's moiety of the rents, interest, dividends and accumulations accrued since his bankruptcy, then that the Plaintiffs might be declared to be entitled to the whole of such rents, interest, dividends and accumulations as accrued previously to such bankruptcy, and to some part, not being less than an equal portion with H. Staffell's wife and children, of his moiety of the rents, interest, dividends and accumulations which had accrued since such bankruptcy, and of the rents, interest and dividends that should thereafter accrue during the life of Henry Staffell; and that the trustees might account for the rents, interest, dividends and accumulations which had accrued since the division made by them as before mentioned: and might pay to the Plaintiffs one moiety or such other proportion of the rents, interest, dividends and accumulations, as they might appear to be entitled to during the whole or any part or parts of the [650] period elapsed since such division, and also a moiety or such other proportion as they might happen to be

entitled to, of the future rents, interest and dividends of the testator's real and personal estate.

Mr. G. Richards and Mr. Bacon, for the Plaintiffs. In this case the provision made in the event of the son's assigning his moiety of the interest, dividends and accumulations of the trust property, or doing any act whereby the same might become vested in any other person is, substantially, for the son's benefit; and that being so, the assignees under his bankruptcy are entitled to his share of the interest, dividends and accumulations which have arisen since the last division of the accumulations took place. *Phipps v. Lord Ennismore* (4 Russ. 131). In that case a settlement was made in consideration of the marriage of the settlor; and, by a separate but contemporaneous deed made between the same parties, it was agreed that, if the settlor should sell, mortgage or in any manner incumber the lands comprised in the settlement, or do or attempt to do any act whereby those lands should be vested in any other person, the trustees should receive the rents and apply them in such manner as they should think proper for the maintenance and support of the settlor or his wife or children; and notwithstanding the marriage consideration extended to that deed, the Court held it to be void against subsequent incumbrancers.

If, however, the Court should be of opinion that the assignees are not entitled to the full extent which we have contended for, it is impossible to hold that they [651] are not entitled to anything; as the son is one of the objects of the provision, and no discretion is given to the trustees to apply his moiety of the interest, &c., for the maintenance and support of him, or of his wife, or of his children. Therefore, if the assignees are not entitled to the whole of the son's moiety, they are entitled to one-half of it at the least; for the testator places the son in one class, and his wife and children in another class.

We also submit that the trust for accumulation cannot be supported, as it is repugnant to or inconsistent with the prior trusts of the will.

Mr. Lovat and Mr. Torriano, for Henry Staffell and his wife and children. We submit that the assignees are not entitled to anything. The testator's son has committed an act whereby his share of the interest and accumulations, if the absolute property thereof had been vested in him, would have become vested in some other persons; and the consequence is that the trustees are to apply his share of the interest, &c., for the maintenance and support of him, his wife and children, as the trustees may in their discretion think fit. It would be singular to construe this clause so as to vest the son's moiety in his assignees, when it was clearly intended to prevent that result. There is this important distinction between this case and those in which the property of a bankrupt has been held to be ineffectually protected from the effects of his bankruptcy, namely, that in those cases the property was given for the *general* benefit of the party; but here the provision in the event of bankruptcy is not for the general benefit of the testator's son, but the trustees are directed to apply his share of [652] the interest, &c., of the trust fund for the *maintenance and support* of him and any wife or children he may have, and for the education of such issue, or any of them, as the trustees may, in their discretion, think fit. How is the Court to limit the discretion given to the trustees? There is no difference between this case and *Twopeny v. Peyton* (*ante*, p. 487), except that that case is stronger in favour of the assignees than the present case is; for there the bankrupt was the sole object of the provision.

Mr. Whitmarsh, jun., appeared for the trustees of the will.

Mr. Richards, in reply, said that *Twopeny v. Peyton* was plainly distinguishable from the present case; as there the party, for whom the provision was made by the will, had become bankrupt at the date of the codicil; and that that circumstance was the ground of the decision.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is a case quite *sui generis*. It has nothing to do with those cases in which it has been held that, where a trader settles his own estate with such a proviso as has been introduced into this will with respect to bankruptcy, the proviso is void as against the creditors; and, therefore, this case must be decided upon the view of the will itself.

Now observe how the will is framed. The testator has given, first of all, his real estate to trustees in trust to sell; and the proceeds are to be considered as part of

his personal estate; and then he gives the following directions with regard to the disposition of his personal [653] estate, namely, that the trustees are to pay his debts, and invest the residue in the Parliamentary stocks or funds of Great Britain, or on real securities at interest. Then he gives "the interest, dividends and annual produce of one moiety of the residue of my estate unto my said son Henry and his assigns for his life; and, subject also as hereinafter mentioned, I give and bequeath the interest, dividends or annual produce of the remaining moiety of the residue of my estate unto my daughter, Grace Allen, and her assigns during her life." Then he introduces this proviso: "Provided always, and my express will and desire is that, as the interest, dividends and proceeds of the residue of my estate, and the rents of my real estate until sold shall be received by my said executors and trustees, the same shall, after deducting and paying thereout the costs of keeping the messuages, buildings and premises then remaining unsold in good repair and insured from loss by fire or other incidental expenses, to be laid out and invested again as they, my said trustees, in their discretion shall think most advantageous, and be accumulated for the space of five years from the day of my decease; and at the expiration of that period I direct my executors and trustees, for the time being, to make out an account of all such interest and dividends and the accumulations thereof, and pay one moiety of such interest, dividends and accumulations unto my said son Henry, to and for his own use and benefit; and pay the remaining or other moiety of such interest, dividends and accumulations unto my daughter, Grace Allen, to and for her own use and benefit; and I further direct that, after such division of the said interest and produce, the interest, dividends and annual produce of the said residue of my estate shall, subject to the deductions [654] aforesaid, be again accumulated for five years; when a like division shall be made thereof between my said son Henry and daughter Grace, as before mentioned; and such accumulations and divisions shall continue to be made at the expiration of every five years; it being my wish and desire that the interest and produce of the residue of my estate should only be divided once every five years, until the respective moieties thereof shall become divisible amongst my grandchildren as hereinafter mentioned." I have looked to that part of the will with regard to the gift to the children of Henry and Grace, and there all intention of accumulation disappears; there is no such provision with respect to them at least. Now it was competent to the testator to give this direction; and, as both the son and the daughter were affected by it, I do not conceive that, unless they had both concurred in an application to the trustees to discontinue the accumulation, that it could properly be discontinued. It is not a direction which is void. Whether in case a bill had been filed, by the son and the daughter against the trustees, for the purpose of having the question determined, the Court would or would not have interfered is a different consideration. That is a matter which I cannot determine now, because I have not the daughter here; but, in my opinion, the trust is unquestionably good, at any rate, until it is put an end to. There was nothing to put an end to it. The accumulations were paid at the end of five years, and were then allowed to continue; and it is too much to say that, in the interval between the first accumulation and the second, it is competent for one only of the parties interested to interfere with the accumulations; and my opinion therefore is that the trust for accumulation is perfectly good.

[655] The principal question, however, is: What is the effect of the proviso? [Mr. Richards. With great deference, sir, supposing that the clause for accumulation is good, then the question would arise whether the accumulations were not vested in the son.] Yes; I am coming to that: that is the point. Now it seems to me that the accumulations would, by the nature of the trust, go on, that is to say that, nothing having occurred to put an end to the trust after the end of the first five years, it continued in force.

Then the question is, what is the effect of the provision with respect to the son doing any act "whereby the same" (that is the accumulations) "or any part thereof could or might, if the absolute property thereof were vested in him, my said son, be forfeited unto or become vested in any person or persons?" It is clear that the testator there considered that his son was not to be considered under his will as taking the absolute interest. I mean that, independent of the words which follow, which attempt to give the son's interest over, the testator there expresses his opinion

that the property was by the will so given as that the son did not take an absolute interest for life. Then the will proceeds thus: "Then, and in any of the said cases, upon trust that they, my said trustees or trustee for the time being, do and shall thenceforth pay and apply the said interest, dividends and accumulations for the maintenance and support of my said son, and any wife and child or children he may have, and for the education of such issue or any of them as they, my said trustees for the time being, shall in their discretion think fit." Now I take it that those words "or any of them" merely apply to the words "such issue:" such issue meaning "child or children." I point that [656] out in order that I may give an express opinion upon the point that this fund, if it be given at all, is given collectively and not distributively, for the maintenance and support of the son, and any wife and child or children he may have. The word *or* there is merely addressed to children collectively as the substitutes for a single child. It is not a word of distribution which separates the son from the wife, or the wife from the child. I so express myself because, according to my apprehension, this is a clause in which, whatever benefit is intended, is given collectively to the son and the wife and the children; and it appears to me that that is the grammatical construction for the reason I have stated. Then the property is given "for the maintenance and support of my said son, and any wife and child or children" (which is the event that has happened) "he may have, and for the education of such issue or any of them as they, my said trustees for the time being, shall in their discretion think fit." Now there is nothing, in point of law, to invalidate such a gift that I am aware of. It does not follow that anything was of necessity to be *paid*; but the property was to be applied; and there might have been a maintenance of the son, and of the wife and of the children, without their receiving any money at all. For instance, the trustees might take a house for their lodging, and they might give directions to tradesmen to supply the son and the wife and the children with all that was necessary for maintenance; and, therefore, my opinion is that I am not at liberty to take this as a mere gift for the benefit of the son simply; but it is a gift for his benefit in the shape of maintenance and support of himself jointly with his wife and children. And if that is the true construction of the gift in question, the result is that the assignees are not entitled to anything; but the [657] consequence is that, if the trust was a perfect trust for accumulation for the second period, the whole of the accumulated fund will, at the end of that period, be applicable for the maintenance and support of the son, the wife and children collectively, and the assignees have no interest at all.(1)

Bill dismissed without costs.

[657] WILSON v. APPLGARTH. Jan. 31, 1842.

New Orders. Preliminary Accounts and Inquiries.

A bill was filed for payment of a legacy; but it appeared from the answer that the Plaintiff had not correctly answer the description of the legatee contained in the will.

The Court refused to direct a preliminary inquiry under the 5th Order of the 9th of May 1839.

Mary Eliza Steel, by her will, dated in October 1834, bequeathed her residuary estate in trust for her son William Steel, provided he should return to England within five years from her death; but if he should not return within that time, then she gave to her cousins, Joseph Wilson and Hannah Wilson, a son and daughter of John Wilson, late of High Leaven, in the North Riding of the county of York, deceased, a legacy of £50 each.

The testatrix died in October 1834.

In August 1840 the bill was filed for payment of the legacies by two persons named Joseph Wilson and Hannah Wilson, alleging that they were the son and daughter of

(1) See *Rippon v. Norton*, 2 Beav. 63; and *Page v. Way*, 3 Beav. 20.

Joseph Wilson in the bill, by mistake called John Wilson ; and that the said Joseph Wilson was late of High Leaven in the North Riding of Yorkshire ; and that the Plaintiffs were the testatrix's [658] cousins ; and that William Steel, the testatrix's son, was not in England at the date of the will or at the testatrix's death, and had never since returned to England, but had, in fact, died abroad in the testatrix's lifetime.

The answer of the Defendant, who was the executor of the will, stated that the Defendant had been informed and believed that John Wilson and Joseph Wilson, who were brothers, formerly resided at High Leaven : that John Wilson married Elizabeth Thirkill, a first cousin of the testatrix, and left High Leaven many years ago, and afterwards emigrated to America, and that upon the death of his wife he married again and had a numerous family ; and that Joseph Wilson married Mary Steel, the sister of William Steel, the testatrix's late husband ; but otherwise Joseph Wilson and his wife were neither of them related to the testatrix ; and that the Defendant believed that the Plaintiffs were the children of the said Joseph Wilson.

Mr. Cole, for the Plaintiffs, now moved under the Third Order of the 9th of May 1839, that it might be referred to the Master to inquire and state whether William Steel, the testatrix's son named in her will, returned to England within five years from the testatrix's death.

Mr. G. Richards, for the Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell] refused the motion, on the ground that the Plaintiff's title to the legacies was not sufficiently admitted by the answer.

Reports of CASES DECIDED in the HIGH COURT
OF CHANCERY by the Right Honorable Sir
LANCELOT SHADWELL, Vice-Chancellor of
England, containing cases in 1840 and 1841,
with a few in 1842 and 1843. By NICHOLAS
SIMONS, of Lincoln's Inn, Esqr., Barrister-at-Law.
Vol. XI. 1843.

[1] TURNER v. HILL. May 2, 1840.

Pleading. Parties. Mine.

The owner of nearly one-half of the shares in a valuable mine in Cornwall (which was divided into 1624 shares) having become bankrupt, his assignee and the other shareholders agreed, without the consent of the creditors, to dispose of his shares amongst themselves and their friends; and in order to effect that object, they arranged that the mine should be sold under a decree of the Vice-Warden of the Stannaries, in an amicable suit to be instituted by a creditor of the mine against the then shareholders; that the mine should be repurchased by the assignee at a certain sum, and that a new company should be formed, consisting of the old and new shareholders. The bankrupt's shares were disposed of accordingly, the assignee and the old shareholders having agreed to take some of them, H. and T. to take another jointly; and certain other persons the remainder. Afterwards it was agreed that the shares in the mine should be altered to 54th shares. The decree was then obtained, and the mine sold and repurchased as had been arranged. H. and T. then agreed to sever their share. The creditors having discovered the circumstances under which the bankrupt's shares had been disposed of, the assignee was removed and the Plaintiff appointed in his place. The Plaintiff filed a bill against H. alone, alleging that H. and all the other shareholders had notice of the circumstances before mentioned, and praying that H. might transfer her share to him, and account for and pay to him the profits thereof, and that a receiver might be appointed of the *profits of the mine*. Held, that "the profits of the mine" must be taken to mean the profits of the share sought to be recovered; and that none of the other shareholders were necessary parties to the bill.

The Plaintiff was the surviving assignee of Thomas and John Gundry, bankrupts. The object of the bill was to recover a share in certain mines in Cornwall, [2] formerly belonging to the bankrupts, which had been purchased by Jane Penneck Hill, and bequeathed by her to the Defendants; one of whom was her executrix.

At and before the bankruptcy of the Messrs. Gundry, the mines in question were divided into 1624 shares; and those gentlemen were entitled between them to nearly one-half of the shares. John Gundry was also the purser of the mines: and he having become greatly embarrassed in his circumstances, and the other shareholders having discovered that he had falsely charged them in his accounts with sums to a

large amount as paid by him for materials for the mines, they, a few months before his bankruptcy, dismissed him from his office, and appointed Richard Tyacke purser of the mines in his place. In January 1820 the commission issued, under which the Messrs. Gundry, who were co-partners as bankers, were declared bankrupts. At the time of their bankruptcy the mines were very valuable.

H. M. Grylls, a gentleman of great influence in the neighbourhood of the mines, became desirous of purchasing some of the bankrupt's shares; and the other shareholders were desirous that he should become a co-adventurer with them in the mines, and should purchase as many of the bankrupt's shares as he should think proper, and that the remainder should be disposed of amongst themselves and such other persons as they should approve of as co-adventurers with them. On the 5th of February 1820 a meeting of the adventurers in the mines, at which Grylls and Tyacke were present, was held for the purpose of considering how to effect the before-mentioned object; and it was then proposed, [3] as the best mode of effecting it, that a new company of adventures should be formed, and that the bankrupts' shares should be disposed of; and that, for the purpose of securing from liability such persons as should take shares as new adventurers, the mines should be sold through the medium of a decree of the Vice-Warden of the Stannaries, and be repurchased by the old adventurers in conjunction with the new adventurers, and that the monies to arise from the sale of John Gundry's shares should be applied in discharge of the debt due from him to his late co-adventurers; and thereupon, and in the presence of Grylls and Tyacke, the following resolutions were drawn up and signed by the adventurers present: "It is proposed, as the only measure which can prevent the mines from stopping, to offer at least one-half for sale at the price of £500 for each share; it is proposed, for the security of the new adventurers, that the mines, materials, halvans, &c., shall be sold by the decree of the Vice-Warden, and entered upon as on the 1st of this instant February, clear of debts and demands which may have been contracted before that day; that the sum which may be raised from John Gundry's late shares be wholly appropriated to pay the amount due from the mines to the end of October last; that the present adventurers who shall continue their shares do give an undertaking to the Vice-Warden to pay their proportions of the deficiency which may remain due from John Gundry as late purser, after the proceeds of the said John Gundry's shares shall have been appropriated as above; that communications be made, respecting the purchase of the one-half of the mines agreed to be offered for sale, to Mr. Grylls, and that he be requested to correspond with such persons as are willing to become purchasers thereof; and the adventurers now present will endeavour to dispose of some part thereof amongst their friends, and write to Mr. Grylls with the result." In consequence of these resolutions, Grylls and the then adventurers, together with Tyacke, immediately took active steps to form the new company, and to get persons whom they approved of to purchase the shares which were to be disposed of as before mentioned; and some of the old adventurers and Grylls and his friends agreed to take some of those shares; and Jane P. Hill and Tyacke agreed to take another share jointly. The bill alleged that Jane P. Hill, at the time when she so agreed to become interested in the mines, was well acquainted with the several circumstances before mentioned under which the proposed new company was intended to be formed] and the said shares therein disposed of; and well knew that the mines were very valuable, and that the proposed undertaking would be very profitable.

On the 16th of February 1820, at which time all the shares in the new adventure had been disposed of, a meeting of the old and new adventurers was held, at which it was resolved that the principal creditors of the mines should immediately petition the Vice-Warden for a decree to procure the payment of the sums due to them; that they should represent to him, at the same time, that there was a great number of other creditors, and request him to appoint a day for the proof of their respective claims before his secretary, with a view to a decree for the sale of the mines, materials and halvans, for the purpose of defraying the whole sum which might be due; and that, when that should be accomplished, the Vice-Warden should be petitioned for a decree to sell the mines with everything which might be thereon, in one lot. On the 23d of the same month Grylls and Charles Read were chosen assignees of the bankrupts' [5] estates, and the usual assignment thereof was made to them; but Read

interfered very little in the affairs of the bankrupts, and acted entirely under the influence and direction of Grylls.

Grylls, in order to effect his intention of becoming possessed of part of the bankrupts' shares and to facilitate the formation of the new company, determined, as soon as he was appointed assignee, absolutely to relinquish the bankrupts' shares: in order that they might be more readily disposed of in the manner and for the purpose mentioned in the resolutions. Accordingly, he and Read, with the privity of and in concert with the old and new adventurers, but without the consent or concurrence of the creditors of the bankrupts, relinquished all the bankrupts' shares to the old adventurers, under the pretence that the debts due in respect of them exceeded their value.

On the day on which Grylls and Read were appointed assignees, another meeting of the old and new adventurers was held; and they then agreed to take such shares in the new company as were set opposite to their names respectively; and it was further agreed that immediate measures should be taken to induce the Vice-Warden of the Stannaries to grant a decree for the sale of the mines, in order to pay the debts due at the end of January then last; and other arrangements were made with a view to the formation of the new company.

On the 23d of March 1820 a petition was presented to the Vice-Warden, in pursuance of the before-mentioned resolutions by Charles Scott and others, against several of the old adventurers, and also against Grylls and [6] Read, as assignees of the bankrupts' estates, for the pretended purpose of recovering a debt due to the Petitioners for goods sold and delivered for the use of the mines, by the orders of John Gundry, whilst he was purser of the mines, and of Tyacke, his successor: but that petition was, in fact, an amicable suit, concerted between the Petitioners and the old and new adventurers, in order to obtain a sale of the mines for the purposes before mentioned. On the 9th of May 1820 the petition was heard, and it was then ordered, with the consent of the adventurers, that the mines and the tin, engines and materials belonging thereto, should be sold by public auction, under the direction of the Secretary of the Court, for payment of the debt due to the Petitioners. At the time when this decree was made, the engines, materials, tin, &c., belonging to the mines were of the value of £28,000 and upwards; and the bill alleged that a decree for the sale of an entire mine to liquidate one debt, and that of comparatively small amount, was without precedent in the Vice-Warden's Court, contrary to the law of the Stannaries, and unnecessary, inasmuch as all the then adventurers, with one or two exceptions, were solvent, and the greater part of them would have been able, if called upon individually to discharge immediately the debt due to the Petitioners. On the 2d of June 1820 a meeting of the adventurers was held, at which it was resolved that Gryll should attend at the sale, which was advertised to take place at the Red Lion in Truro, on the 5th of June, and should purchase the mines, materials, &c., for £18,000. But previously to that meeting, it had been agreed that the shares in the mines should be altered, and that they should be divided into 54 shares only, 30 of which the new adventurers agreed to take.

[7] The sale was commenced on the day appointed; but, in consequence of some disagreement or pretended disagreement between Grylls and one of the old adventurers, the Vice-Warden's Secretary declined to proceed with the sale; and some of the persons who had attended it went home. On the evening of the same day, the Secretary, Grylls and some of the old adventurers dined together; and it was then arranged that the sale should take place at the Prince's Court (where the Vice-Warden's Court was usually held), and before the sitting of the Court on the following morning. The sale took place accordingly, but without any further notice or advertisement: and Grylls, who was the only bidder, purchased the mines, engines, materials, &c., for £18,000. On the same morning an order confirming the sale was made by the Vice-Warden, with consent.

The bill, after stating as above, alleged that the shares taken by the new adventurers in the mines were the shares or part of the shares of the bankrupts so relinquished by Grylls and Read as before mentioned: that the relinquishment, and sale and purchase of the shares of the bankrupts were void in equity: and that the persons who became purchasers of and interested in such shares were trustees thereof for the creditors of the bankrupts: that, in October 1821, John Rogers, one of the new

adventurers who had taken four 54th shares in the mines, relinquished his shares, and thereby the shares into which the mines were divided were increased from 54th to 50th shares; and Tyacke and Jane P. Hill became possessed, jointly of one 50th share, which was part of the shares and interests of the bankrupts in the mines: that Tyacke and Jane P. Hill afterwards divided their share, and the same was, subsequently, held by them in severance; and one-half [8] thereof, being a 100th share, was transferred into Jane P. Hill's name, in the cost-book of the mines, and she thereby became the absolute legal owner thereof: that Jane P. Hill died in 1836, having, by her will, bequeathed her share in the mines to two of the Defendants, their executors and administrators, in trust for her daughters, the other Defendants, their executors and administrators; and, shortly after her decease, such share was transferred into the names of the Defendants, in the cost-book of the mines; and that the Defendants were trustees thereof for the creditors of the bankrupts: that the circumstances under which the shares of the bankrupts had been disposed of did not come to the knowledge of the creditors until March 1825; that some of the creditors then presented a petition to the Lord Chancellor, stating several of the facts before mentioned, and praying (amongst other things) that Grylls and Read might be removed from being assignees; that new assignees might be chosen in their place, and that they might be made liable to the estate of the bankrupts for the loss occasioned by the relinquishment of the shares: that the petition was heard in July 1829, when it was ordered, amongst other things, that Grylls and Read should be removed and that new assignees should be chosen in their place; and Grylls was declared to be a trustee of the shares held by him for the creditors of the bankrupts: (1) that, accordingly, the Plaintiff and two other persons, since deceased, were chosen assignees of the bankrupts' estates, and the usual assignment thereof was made to them; and that Grylls had assigned his shares to them, and accounted to them for the profits [9] thereof. The bill charged that Grylls became the purchaser of the mines under the circumstances, for the purposes and in the manner aforesaid, at the time he was assignee as aforesaid; and that Jane P. Hill and the several other persons who became interested in the mines as aforesaid, purchased through the means of Grylls, with full knowledge and notice of all the circumstances and purposes before mentioned; and that Grylls purchased the mines as the agent and on the behalf and for the benefit of those persons, he having been authorized so to do as before mentioned; that Jane P. Hill and the Defendants, when they became possessed of the 100th share in the mines, had notice, respectively, that Grylls was assignee of the bankrupts' estates when he purchased the mines, and that such purchase was made in the manner, for the purposes, and under the circumstances before mentioned: and it prayed that the Defendants might be declared trustees for the Plaintiff, of the 100th share, or of such part thereof as the Court should think the Plaintiff entitled to, and might be decreed to transfer the same to the Plaintiff, and to account for and pay to him the profits made by them therefrom: and that a receiver might be appointed of the profits arising from the said mines; and that all proper declarations, inquiries and accounts might be made and directed for effectuating the purposes aforesaid.

The Defendants demurred for want of equity and for want of parties.

Mr. Knight Bruce and Mr. Sandys, in support of the demurrer. The Messrs. Gundry, whom the Plaintiff represents, were entitled to certain shares in the mines under the old division: but he seeks by his bill to recover, not one of those specific shares, but one of the new shares [10] into which the mines have been since divided. Suppose a tenant in common of land to be disseised of his share, and a new division of the land to be afterwards made by the parties wrongfully in possession, the disseisee could not recover his share, except in an action against all the parties in possession. Here the Plaintiff omits not only all the old shareholders, but also all the new shareholders except the Defendants. (2)

Admitting, however, that a title is so stated, in the Plaintiff, as that he can come against the Defendants alone, to recover a specific share; still he must confine his

(1) See *Ex parte Badcock, In re Gundry*, Mont. & Macarthur's B. C. 231; and *Ex parte Grylls*, in the same matter, 2 Deac. & Chitty's B. C. 290.

(2) The names both of the old and new shareholders, and the shares held by each of them, were mentioned in the bill.

prayer to that share: but he prays for a receiver of the profits of the mines. That part of the prayer is, alone, fatal to the bill. *Brookes v. Burt* (1 Beav. 106).

It is difficult to make out what was the nature and extent of the interest which the bankrupts and their co-adventurers had in the mines; whether they had the fee or only a term; whether they had the legal as well as the equitable, or only the equitable interest in the mines. If they had only the equitable interest then the bill would be defective for want of the party having the legal estate: but, if they had the legal title, it could not be effected either by the relinquishment of the shares, the sale in the Vice-Warden's Court, or any of the other transactions stated in the bill. If that be so, whatever may have been the case with respect to Grylls, there is no pretence for coming into equity, as against the demurring parties, before the establishment of the [11] title at law. The shares which Grylls held have been extracted from him; because he, being assignee of the bankrupts' estates, ought not to have purchased them: but Grylls never had any interest in the share in question; and neither Tyacke nor Mrs. Hill ever stood in a fiduciary character to the bankrupts' estate; nor is any fraud charged against either of them. Nothing but what belonged to the peculiar character of Grylls would make the transaction bad. Tyacke and Mrs. Hill, being strangers to the bankrupts' estate, had a right to purchase the shares which Grylls had relinquished. No case, therefore, is stated, on which this Court ought to interfere as against the Defendants who claim under Mrs. Hill.

Supposing, however, this to be a case in which a Court of Equity ought to relieve the question is whether you can administer equity between the present parties alone. The arrangement under which the title to the shares was acquired was one entire transaction: is it competent, then, to the Plaintiff, to come against one only of the parties who acquired a title under that arrangement? You cannot give relief except upon the ground that the transaction was a breach of trust, and, therefore, void altogether. It cannot be relieved against piecemeal. The Defendants, who represent Mrs. Hill, have a right to have all the persons who were parties to the transaction of 1820 brought before the Court in one suit.

What the Plaintiff now seeks to recover is a 100th share, that is, a moiety of the share which was purchased by Tyacke for himself and Mrs. Hill. At all events, that purchase was a single transaction; and [12] Tyacke, at least, ought to have been made a Co-defendant.

The case of *Mare v. Malachy* (1 Myl. & Cr. 559) will be, perhaps, cited in support of the bill; but it is, in fact, a direct authority in support of this demurrer. The bill in this case is not filed against Grylls, the party who did the wrongful act; but against persons claiming under one of the parties who, by means of that wrongful act, acquired an interest in the mines. In *Mare v. Malachy* the Defendant, Joseph Malachy, was a trustee for the Plaintiff, and had retained sufficient to satisfy the Plaintiff's demand. If the bill had been filed against one of the parties to whom he had sold the mines, could it have been sustained?

At the time when the Messrs. Gundry, whom the Plaintiff represents, became bankrupts, the shares into which the mines were divided were 1624th shares. They were afterwards divided into 54th shares; and they are now divided into 50th shares. How can the Plaintiff take a 1624th share out of a share on the new division? He must get his share out of the entire *corpus*; and, for that purpose, all the parties interested in the mines must be brought before the Court.

Besides, it appears from the statements in the bill that the bankrupts held less than half the shares in the mines, and that the new adventurers took amongst them thirty 54th shares; and, in consequence of Rogers having relinquished his four shares, the shares of the continuing shareholders have been increased; consequently the new shareholders now hold amongst them a larger proportion of the mines than the bankrupts were entitled to; and, therefore, there must be something which each of the new shareholders is entitled to retain.

Lastly, it is now twenty years since the transaction complained of in the bill took place. (1) Will the Court interfere after so great a lapse of time?

(1) The brief with which the reporter was furnished did not mention the time when the bill was filed.

THE VICE-CHANCELLOR. If new shares accrue, they must be considered the same as the original shares in respect of which the accruer took place, the increase being to the unlawful owner. If a trustee of a beneficial lease takes a renewal of it, this Court will not allow him to hold the renewed lease for his own benefit.

Mr. Jacob, Mr. Richards and Mr. Follett appeared in support of the bill ; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said : I agree with Mr. Knight Bruce that it is not very distinctly stated in the bill what sort of interest the adventurers had in the mines in question : but, as I understand it, the interest was of this kind, namely, that so long as any parties joined together in working the mines, they were at liberty to work them ; and, therefore, it was nothing more than a partnership between the persons engaged, for the time being, in the adventure. It is true that they were at liberty to continue the working of the mines, with either more or fewer co-adventurers ; but, so long as they worked [14] them, the adventure was in the nature of a partnership. It appears, too, that Mrs. Hill's interest in the mines was disposed of by her will as a chattel interest ; for it was given to the trustees, *their executors and administrators*, in trust for her daughters for their lives, with a power of appointment, and, in default of appointment, in trust for *their executors and administrators* : and that seems to be the view which is taken of the interest of the shareholders, from the beginning to the end of the bill. And what the Plaintiff seeks to recover in this case is not a bodily possession of a portion of the mines, in the sense in which a bodily possession might be required by a tenant in common of land ; but, throughout the bill, the matter is treated as a matter of commercial adventure in the working of the mines.

Then it appears that there was a most improper manœuvre put in practice, the effect of which was to give to the assignees, Grylls and Read, the property of the bankrupts. That object was accomplished by means of a complicated scheme, the result of which was that the concern was apparently put an end to, although it has been virtually carried on from that time to the present.

Taking then the case to be as it is represented by the bill, my opinion is that this Court will give relief, notwithstanding the lapse of time : for there is an allegation that Mrs. Hill, at the time when she agreed to become interested in the mines, was well acquainted with the circumstances stated in the bill, under which the new company or adventure was intended to be formed, and the shares therein disposed of : and there is an express charge that she and also the Defendants well knew and had full and sufficient notice, [15] when they respectively became possessed of and interested in the said 100th share in the said mines, that the said H. M. Grylls was such assignee as aforesaid, when he made such purchase of shares in the said mines in manner aforesaid ; and that the said purchase was, in fact, made in manner and for the purposes and under the circumstances before in that behalf stated : and then there is another charge that Mrs. Hill and the Defendants likewise always well knew and had full and sufficient notice, when and ever since they became respectively possessed of the said share in the said mines in manner aforesaid, that the creditors of the said bankrupts, and also the Plaintiff, as such assignee as aforesaid, disputed such sale and purchase of the bankrupts' shares, and that such proceedings were being taken to set aside the same in manner aforesaid. It seems to me, therefore, that this is a mere pursuit, by means of a bill in equity, of a portion of the property of the bankrupts, which, by a fraudulent transaction of the assignees, became vested in the testatrix : and, that being so, it is reasonably plain that this is a case in which the Court will relieve, provided no sufficient answer is given to it.

That passage in the prayer of the bill which asks for a receiver of the profits of the whole mines is clearly a mistake ; for the Plaintiff is seeking, by his bill, to recover no more than a 100th share of the mines ; and, therefore, in common fairness of construction, that passage ought to be referred to the profits of that share, and not to the profits of the whole mines.

With respect to the objection that all the other shareholders in the mines ought to have been made parties to the bill, it is to be observed that what is [16] wanted in this case is to ascertain what profits have been received by the parties who hold that 100th share ; and, for that purpose, it is not necessary to have an account taken of all the profits of the mines.

The bill also prays that the Defendants may transfer that 100th share to the Plaintiff; and it seems to me that there is no difficulty in granting that part of the relief; for, as the matter is represented, it comes to this, namely, that by the means and under the circumstances stated, the Defendants have in them, under the denomination of the 100th share, a portion of that share which originally belonged to the bankrupts.

Therefore the demurrer must be overruled.(1)

[16] TURNER v. TYACKE. May 2, 1840.

The object of the bill in this case was to recover from the personal representatives of Richard Tyacke (who was dead) the 100th share in the mines, which the deceased had become possessed of, in the manner and under the circumstances stated in the preceding case; and the Defendants having demurred on the same grounds as in that case, the demurrer was overruled without argument.(2)

[17] TURNER v. BORLASE. May 2, 1840.

The Plaintiff in this case was the same as in the two preceding cases. The Defendants were the members of a company or co-partnership called the Gweek Company. The object of the bill was to recover four shares in the mines, which Richard Tyacke (who had been a member of the company) had purchased on behalf of the company. In other respects, the circumstances of the case were precisely the same as those of the two preceding cases; and the Defendants having demurred on the same grounds, the demurrer was overruled after a short discussion.

The Defendants appealed to Lord Cottenham, C. The appeal was argued in May 1840; and, at the conclusion of the argument, his Lordship said that the bill having been filed within twenty years from the time when the transaction complained of took place, and there being no allegations of acquiescence, the general demurrer, which was founded on the length of time, could not be supported.

On the 17th of November 1840 his Lordship delivered the following judgment:—

The only question in this case is whether the bill is defective for want of parties, there being no ground whatever for the objection for want of equity. As to parties, the case being complicated, some difficulty arises in rightly comprehending the facts, so far as they are applicable to the point; but when understood, I do [18] not think there is much difficulty, due regard being had to the allegations in the bill.

Four objections were made for want of parties; on account, first, of the absence of all the new adventurers in the mines; secondly, of the representatives of Richard Tyacke; thirdly, of the representatives of Charles Trelawney,(3) and fourthly, of the trustees of the deed of the 4th November 1819.(4)

The facts as stated in the bill, so far as they apply to these several points, are as follows:—That Thomas and John Gundry were entitled to a half or nearly a half of the shares in the original adventure; and John, having become indebted to the other adventurers as purser of the mines, assigned some of his shares to trustees in trust, by sale or otherwise, to raise money to pay the debt; that the Gundrys having afterwards become bankrupts, an arrangement was agreed upon between the then assignees and the other adventurers, that the whole of the mines should be sold, the shares of the remaining shareholders being repurchased by them; and that the shares of the Gundrys should be sold, and the proceeds applied in payment of the debt due to the company; and that the purchasers and the old shareholders should constitute a new company; that this arrangement was carried into effect by means of a decree for the sale of the mines and of the property belonging to them, in the Vice-Warden's Court,

(1) See the two next cases.

(2) See the next case.

(3) One of the new adventurers.

(4) The contents of this deed are stated in the subsequent part of the judgment.

at the suit of certain creditors of the mines, who lent their names for that purpose ; and that, for the purpose of facilitating that object, the then assignees of Messrs. Gundry nominally relinquished the shares of the bankrupts ; that it was previously agreed that certain other persons should become the purchasers of such shares, and, amongst others, that Richard Tyacke should have four 54ths for himself and his co-partners in the Gweek Company ; that the trustees of Charles Trelawney were to have other of such shares ; that the sale under the decree was nominal and fictitious, the sums and future shareholders having been previously agreed upon ; that the Gweek Company so became possessed of four 54th shares, and were so entered in the cost-book of the mines ; and that such four shares were part of the shares of the Gundrys which had been so relinquished ; and that the Gweek Company were the legal owners of such shares, but that they had notice of all the circumstances stated with respect to the manner in which the shares of the Gundrys had been dealt with ; and that such company was not therefore entitled to hold such shares against the creditors of the Gundrys, represented by the Plaintiff, their present assignee. The Defendants are the existing partners in the Gweek Company, Richard Tyacke being dead ; and the bill prays that such shares may be restored to the estate of the Gundrys, upon such terms as the Court may think fit, and for an account of the profits of such shares received by the Defendants ; and that a receiver may be appointed to receive the profits arising from the said mines ; and that all proper accounts may be ordered for effectuating the purposes aforesaid.

This, therefore, is a very distinct statement that the shares sought to be recovered from the Gweek Company were part of the shares that belonged to the Gundrys, and were possessed by the Gweek Company under a sale impeached as fraudulent.

[20] Upon the case so stated I think that the other adventurers and the purchasers of the other shares are not only not necessary parties to this suit, but that they would not have been properly made parties to the bill containing such allegations.

I see no reason for departing from the opinion I expressed upon this subject in the case of *Mare v. Malachy* (1 Myl. & Cr. 577).

It was, however, observed that the bill prayed a receiver of the profits arising from the said mines ; and, if that must necessarily be intended to mean the general profits from the mines, it would be asking for that which could not be granted in the absence of all the other adventurers ; but I do not understand the expression to have that meaning. All the case made and all the relief asked relate to the particular shares bought by the Gweek Company and the profits which they have received therefrom ; and I must understand the profits, as to which the receiver is asked, to be the profits before spoken of : which makes the whole consistent, and for which purpose the other adventurers would not be necessary parties.

As to the representatives of Richard Tyacke and Charles Trelawney, those persons are alleged to have been purchasers of other of the shares belonging to the Gundrys, under the same sale, it is true, but by distinct purchases ; and, as such, they are not necessary and would not be proper parties to the suit ; and Richard Tyacke being dead, all his interest as a partner in the Gweek Company has merged in that of his surviving partners.

[21] It only remains to consider the objection that the trustees of the deed of the 4th of November 1819 are not parties. The other adventurers in the mines were the *cestuis que trust* of that deed ; and the bill alleges subsequent transactions between the assignees of John Gundry, the author of that deed, and such *cestuis que trust*, by which the objects of that deed were accomplished, namely, the sale of the shares and payment, out of the proceeds, of the debts due from John Gundry ; and thus the bill alleges that all the legal estate and interest of and in the said several last-mentioned shares is now legally vested in the Defendants.(1) According to these allegations the trustees of the deed of 1819 have no estate or interest in these shares.

(1) The bill in *Turner v. Hill* also alleged, with respect to this deed, that it was always treated as, and was a complete nullity, and was never acted upon.

I am, for these reasons, of opinion that the demurrer for want of parties cannot be supported, and that the order of the Vice-Chancellor must be affirmed with costs.

I have thus minutely stated the grounds on which I have come to this conclusion; because, if the allegations in the bill, upon which my judgment on the demurrer necessarily depends, be not according to the facts before me at the hearing, there may appear to be ground for supporting an objection for want of parties; and the opinion which I now express cannot have any bearing upon such a case.

[22] BEAVAN v. CARPENTER. March 7, 12, 1842.

Practice. Dismissal. Bill to Perpetuate Testimony.

The Court will not, even before replication, dismiss a bill to perpetuate testimony for want of prosecution; but will order the Plaintiff to reply and examine his witnesses, and procure the examination to be completed by a certain time; and, in default thereof, to pay to the Defendant his costs of the suit.

The bill was filed to perpetuate the testimony of witnesses.

More than two months since the answer of one of the Defendants was to be deemed sufficient, having elapsed, and the Plaintiff *not having replied*,

Mr. Wetherell, for that Defendant, moved to dismiss the bill for want of prosecution. He cited 1 Smith's Pract. 365, and *Anon.* (2 Vez. 497, 498).

Mr. Birkbeck appeared for the Plaintiff.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he never remembered an order being made to dismiss a bill to perpetuate testimony for want of prosecution; and that he would have the practice inquired into.

The order made by His Honor, after he had ascertained the practice, was that the Plaintiff should file a replication forthwith, and proceed to the examination of his witnesses as prayed by his bill, and procure such examination to be completed on or before a certain day; and that, in default thereof, he should pay to the Defendant his costs of the suit, to be taxed by the Master in rotation. (See *Wright v. Tatham*, ante, vol. ii. p. 459, where the motion to dismiss was made after replication.)

[23] BIGNOLD v. AUDLAND. May 4, 1840.

Interpleader. Affidavit. Pleading. Multifariousness.

Where a bill of interpleader is filed by the officer of a company on behalf of the company, the affidavit annexed ought to state, not that the Plaintiff does not collude, but that, to the best of his knowledge and belief, the company do not collude with the Defendants.

Where a bill of interpleader is filed respecting a sum of money on which interest is recoverable at law, under 3 & 4 Will. 4, c. 42, s. 28, the Plaintiff ought to offer, by his bill, to pay the interest.

A. having in his hands a sum of money, which B. and C. claimed adversely to each other, filed a bill against them, praying that they might interplead respecting the sum. The bill also sought the decision of the Court as to a claim made by B. to interest on the sum, and raised a question as to the costs of an action which B. had brought to recover the sum. Held, that the bill was not sustainable as a bill of interpleader, and that it was multifarious.

The Norwich Union Life Insurance Society being authorized by Act of Parliament to sue in the name of their secretary, the bill in this case was filed by them in the name of their secretary, praying that the Defendants might interplead respecting a sum of money for which the life of W. Whitelock, who died in June 1836, had been insured by the society.

The Defendants Audland and Moser, who were the executors of Whitelock, demurred to the bill on the following amongst other grounds: first, because the affidavit annexed to the bill stated that *the Plaintiff* did not collude with any of the Defendants; whereas it ought to have stated that, to the best of the Plaintiff's knowledge and belief, *the society* did not collude with any of the Defendants: and, secondly, because interest on the sum insured being recoverable at law,⁽¹⁾ the bill [24] ought to have contained an offer on the part of the society to pay interest on that sum as well as the principal of it.

Mr. Jacob and Mr. Walker appeared in support of the demurrer; and Mr. Anderdon, in support of the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the affidavit ought to have stated, not that the secretary, who was the mere nominal Plaintiff, did not collude, but that, to the best of his knowledge and belief, the society, who were the real Plaintiffs, did not collude with the Defendants: and that he thought that where a party from whom a sum of money was due sought the protection of a Court of Equity by filing a bill of interpleader, the Court ought to be placed, with respect to its power of giving relief, in the same situation as a Court of law; and, therefore, that the bill in this case ought to have contained an offer on the part of the society to pay the interest recoverable on the sum insured.

Dec. 5. The bill was afterwards amended, leave having been given by the Court for that purpose.

To the facts above stated, it is necessary to add that, prior to the filing of the original bill, Audland and [25] Moser commenced an action, for the sum insured, against one Noverre, who was the survivor of the three directors who had signed the policy; and that, pending the action, Noverre died intestate and insolvent, and letters of administration had not been taken out to his estate.

The amended bill to which, as well as to the original bill, Audland and Moser, and J. Ward (to whom Whitelock had assigned the policy in his lifetime)⁽²⁾ were made Defendants, alleged that, though the policy had been signed by Noverre and two other directors, yet the insurance society were liable to pay the sum insured: and that, inasmuch as the society were also bound to indemnify Noverre's estate in respect of all costs and charges incurred in respect of the policy, they were entitled to stand in his place, and to require the Defendants to interplead, in like manner as he, if living, would have been entitled to: that the society were not liable to pay, nor were Audland and Moser entitled, as they alleged, to recover interest on the sum insured, because the policy was effected before the 3d & 4th W. 4, c. 42, was passed, and the society had made no default in payment of that sum, but had been always ready and willing to pay the same. The amended bill prayed that the Defendants might interplead respecting the sum insured, and that the Plaintiff might be at liberty to pay it into Court; the Plaintiff submitting, on behalf of the society, to pay such further sum on account of interest as the Court should direct, and to be answerable for the costs which Audland and Moser would have [26] been entitled to, against Noverre or his estate, if the bill had been filed by him.⁽³⁾

(1) By the 3 & 4 Will. 4, c. 42, s. 28, it is enacted that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of an issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or, if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law.

(2) See *Ward v. Audland*, C. P. Cooper's Rep. 146, and *ante*, vol. viii. p. 571.

(3) One of the objections made in arguing the demurrer to the original bill was that it did not offer to pay the costs incurred by Audland and Moser in the action brought by them against Noverre.

Audland and Moser demurred to the amended bill for want of equity and for multifariousness, and also because Noverre was not represented on the record.

Mr. Jacob and Mr. Walker, in support of the demurrer. Three different questions are raised by this bill. The first is a question of interpleader, that is, to which of the Defendants the principal sum due on the policy belongs. The second is whether the insurance company ought to pay interest on that sum. The third relates to the costs of the action brought by our clients against Noverre. We say that we are entitled to be indemnified in respect of those costs: but the other side say that those costs are lost by the abatement of the action. The Plaintiff, therefore, seeks to have adverse questions between him and the Defendants decided in an interpleading suit.

But whatever the nature of the bill may be, it is clearly multifarious; for it raises questions between the Plaintiff and the Defendants Audland and Moser, with which the other Defendant Ward has nothing to do.

Lastly, letters of administration ought to have been taken out to Noverre, and the administrator made a party to the bill. As the bill now stands, it con-[27]-tains a prayer of interpleader; but the party to be protected by the interpleader is not before the Court. The bill, it is true, alleges that Noverre died insolvent; but it is not a sufficient excuse for the absence of his personal representative: the bill ought to have alleged that he did not leave any assets. He may have died insolvent, and yet have left assets sufficient to pay 19s. in the pound to all the parties having claims on his estate.

Mr. Knight Bruce and Mr. Anderdon, in support of the bill. Although this bill may not be strictly a bill of interpleader, yet it is one which is conformable to the principles of this Court. Notwithstanding three of the directors, of whom Noverre was the survivor, subscribed the policy, yet, by the express terms of it, the funds of the society were to be answerable to Whitelock's executors for the sum insured. The society were not the parties to be sued, but their funds were to be made liable through the medium of an action against Noverre. In order to make this strictly a bill of interpleader, Noverre's representative ought to have filed it; it is, however, strictly within the equitable doctrine of interpleader. The society is left incumbered with a some of money in its hands, belonging to other persons, from which it is desirous to discharge itself. Is not the owner of a fund charged with the payment of a sum of money entitled to come to this Court (the time of payment having arrived) in order to disencumber himself of the money; particularly where interest is claimed? That he is entitled to do so, there cannot be the slightest doubt: and, that being so, there is an equity in this case, although it may not be strictly a case of interpleader.

[28] Next, with respect to the objection that Noverre is not represented on this record. The bill alleges that he died insolvent; and that is a sufficient reason for not bringing his representative before the Court. *Seddon v. Connell* (*ante*, vol. x. p. 85). And, moreover, the Defendants cannot be prejudiced by the absence of his personal representative.

Lastly, with respect to the question relating to the costs of the action. It is perfectly clear that where the sole Defendant in an action dies before judgment, the action is gone, and no costs can ever be recovered in it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question in this case seems to be, first of all, is this a bill of interpleader or not? Lord Redesdale, in the second edition of his *Treatise on Pleading*, says:—"Where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought of right to render a debt of duty or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them. In this bill he must state his own rights and their several claims, and pray that they may interplead, so that the Court may judge to whom the thing belongs, and he may be indemnified." And I observe that the language of the fourth edition of the same work is identically the same. Sir J. Leach takes the same view of the subject in *Mitchell v. Hayne* (2 Sim. & Stu. 63). In that case an auctioneer had sold an estate for one of the Defendants; and the other Defendant, who was the purchaser, had [29] commenced an action against him for the deposit. The auctioneer then filed a bill of interpleader against the vendor and the purchaser, and prayed for an injunction to restrain the action. Sir J. Leach made this observation on that case:

"Interpleader is where the Plaintiff is the holder of a stake, which is equally contested by the Defendants, as to which the Plaintiff is wholly indifferent between the parties, and the right to which will be fully settled by interpleader between the Defendants. That is not this case. The Plaintiff receives a deposit of £87, 18s. 9d., and claims against both the Defendants, to retain £27, 16s. 10d., for his commission and the auction duty. And, by this motion, the Plaintiff calls upon the Defendants to interplead for the sum of £60, 1s. 11d., which he desires to pay into Court. But the bill itself states that the action which is threatened by the Defendant, the purchaser, is for the whole deposit of £87, 18s. 9d., and not for the sum of £60, 1s. 11d. only, which is all that the Defendant, the vendor, could claim. The Plaintiff is not, therefore, an indifferent stakeholder, but has a personal question to maintain with the Defendant, the purchaser; and, if he seeks an injunction, must obtain it, not upon the principle of interpleader, but on an order for time, or upon the answer." So that it is quite clear that in the opinion of Sir J. Leach, where a Plaintiff represents not merely that he has a sum with respect to which two other persons have adverse rights, but that there is a further question to be litigated adversely, between himself and one of them, that is not a case of interpleader.

Now the present Plaintiff represents the Norwich Union Insurance Society; and he has filed a bill which, after setting forth the granting by that society of a [30] policy of insurance for the life of a particular person, and the conflicting claims to the sum insured made by the executors of the assured and by the other Defendant to whom he had assigned the policy in his lifetime, goes on to represent that there is a dispute as to whether interest is due upon the policy, from three months after the death of the assured; which question the Plaintiff, by his bill, offers to have decided as between himself and one claimant. So that it is obvious that the Plaintiff has an adverse claim in respect of the subject-matter of his bill. Therefore, according to Lord Redesdale's definition and the judgment of Sir John Leach, he has plainly shewn that this is not a case of interpleader: and, if this is not a case of interpleader, the Plaintiff has no right to ask, in such a bill, that any question may be decided with respect to any claim that Ward may have: for with that the executors of Whitelock having nothing to do.

The bill is also oddly constituted in another respect. It raises a question between the society and the executors in respect of a certain indemnity to which the latter may be entitled with regard to the costs of the action brought against Noverre. But that is a question between the society and the executors; and Ward is in no manner interested in it. Yet the bill has mixed up the claim of Ward with the claim of the executors, and the dispute of the society as to the interest on the policy and the indemnity as to the costs of the action; and, therefore, as the bill is not a bill of interpleader, as I take it not to be, it is clearly multifarious, and the demurrer must be allowed.

[31] CAMPBELL v. SCOTT. Feb. 8, 1842.

[S. C. 11 L. J. Ch. 166; 6 Jur. 186. See *Walter v. Steinkopff* [1892], 3 Ch. 497.]

Copyright. Injunction.

The Defendants published a work containing an original essay on modern English poetry, biographical sketches of 43 modern poets, and selections from their poems, amongst which were six short poems and parts of longer poems, the copyright whereof belonged to the Plaintiff. The selections constituted altogether the bulk of the Defendants' work; but were alleged to have been introduced into it for the purpose of illustrating the essay. The Court restrained the publication of the Defendants' work as being an infringement of the Plaintiff's copyright.

The bill complained that the Defendants, Messrs. Scott & Geary, who were booksellers and publishers in London, had published and sold, without the Plaintiff's leave, certain poems which the Plaintiff had composed, and the copyright of which

was vested in him : and it prayed for an account and payment of the profits of the sale, and for an injunction to restrain the further sale of those poems.

The bill and the Plaintiff's affidavit in support of it stated that the Plaintiff had at various times composed divers poems and caused them to be printed, published and sold for his own benefit, and that the entire copyright therein was, previous to the year 1840, and still remained, vested in him : that in the year 1840 he agreed with Edward Moxon of Dover Street, Piccadilly, bookseller and publisher, that he should print and publish a new edition of the Plaintiff's works, consisting of such original poems as aforesaid for the Plaintiff's benefit, upon certain terms agreed upon between him and Moxon ; but the Plaintiff did not, by such terms, sell or assign, or in any way part with his copyright in the poems intended to be comprised in such new edition : that, accordingly, in the year 1840, Moxon printed and published a new edition of the Plaintiff's works under the title of "The Poetical Works of Thomas Campbell," and copies of such edition had been constantly on sale to the public ever since : that Moxon had also by agreement with the Plaintiff, from time to time, printed, published and sold other editions of the Plaintiff's [32] works ; and that, previously thereto, other editions of such works, or of some parts or part of them, had been, from time to time, printed, published and sold by divers and other persons ; that in January 1842 the Defendants printed and published a work intituled "Book of the Poets"—"The Modern Poets of the Nineteenth Century," and in such work they had, without the leave or licence of the Plaintiff, printed and published, amongst other things, divers of the said original poems, entire, composed by the Plaintiff, and called "Ye Mariners of England," "Lord Ullin's Daughter," "Glenara," "Song of the Greeks," "The Turkish Lady," and "The Last Man ;" and also copious selections from others of such poems : that several of the Plaintiff's poems so printed and published by the Defendants were amongst the most popular and characteristic of his works ; and the Plaintiff's right and interest to and in the copyright of his said original compositions, and his profits by the sale of the same, were likely to be greatly injured and endangered by the Defendants' unauthorized publication.

The Defendant, Scott, by his affidavit, admitted that he and his partner published the work called "Book of the Poets"—"The Modern Poets of the Nineteenth Century ;" and said that it was the second or companion-volume to a work published by the Defendants intituled "Book of the Poets"—"Chaucer to Beattie : " that the "Book of the Poets"—"Chaucer to Beattie," consisted of an essay on English poetry from its commencement until the end of the 18th century, with biographical notices of various poets and selections of pieces and extracts from their works to illustrate the progress of English poetry, the genius, the language and the characteristics of each of the series of 117 [33] celebrated poets of that period ; and that it was embellished with 45 engravings to render it more attractive, in accordance with the taste of the day : that "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," contained a similar essay, biographical notices, selections of pieces and extracts from 43 of the most distinguished and popular of the poets of the nineteenth century, and embellished to a like extent and precisely in the same manner as the first series of the poets from Chaucer to Beattie : that it had always been the custom of the trade to publish works of a similar nature to the before-mentioned works of the Defendant and his partner, consisting of a collection of pieces and extracts from various authors under various well-known titles, amongst others, "Elegant Extracts in Poetry, selected by Vicesimus Knox, D.D.," "Poems for Young Ladies, selected by Dr. Goldsmith," &c., &c. : that, since the bill was filed, the deponent had made inquiry as to the custom of the trade in such cases as that complained of, and had been assured by one of the oldest and most experienced members that it had always been considered an admitted right to publish *bonâ fide* selections from the writings of living authors whose works were copyright, and that it had been constantly practised by various publishers of the greatest respectability ; and the deponent therefore insisted that he was legally entitled to make the selections and extracts from the works of the Plaintiff which were contained in "The Book of the Poets"—"The Modern Poets of the Nineteenth Century : " that the Defendants, wishing to make their work on the poets worthy of the attention of the public, employed a competent person to write the essay and biographical notices and make the selections from the various authors ; and, that the

intended work might possess novelty and attraction, the editor was instructed [34] to produce, as far as possible, an entirely original selection to illustrate their genius, the progressive change in the language and versification, and the characteristic thoughts and expressions of the individual authors as well as the progress of English poetry during the respective periods: that the deponent believed that the editor for that purpose did not confine himself to any particular edition of the various authors, but used considerable labour in ascertaining all their works, and exercised considerable skill in making his selections; in proof whereof "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," contained three pieces written by the Plaintiff which were not contained in the edition of the Plaintiff's works especially mentioned in his affidavit or any of the modern editions of his works, and which pieces were very characteristic, and illustrated the biographical notice relating to the Plaintiff, one of them being especially referred to in the biographical notice: that the deponent most positively denied that he or his partner had any intention whatever, in publishing "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," to infringe or injure the Plaintiff's copyright in his works; on the contrary, the deponent said he should have considered he had done great injustice to the Plaintiff had he omitted to notice him as one of the most celebrated poets of the nineteenth century, and given specimens of his works: that the deponent positively denied that the Plaintiff's right and interest to and in the copyright of his original compositions and his profits by the sale of the same were likely to be greatly injured and endangered by the work of the Defendants; for that it was well known that works of a similar nature to that of the Defendants were calculated by the notice taken of the various authors in the biographical notices and the selections made from their [35] works, to draw the attention of the public to their works, and induce persons to obtain copies of such works which they would otherwise not have done; in addition to which the edition of the Plaintiff's works published in 1840, particularly mentioned in the Plaintiff's affidavit, contained three long poems and eighty shorter pieces and songs, containing altogether 6667 lines, and was sold for 9s.; and that there were other editions of the Plaintiff's works sold for a less price, and, in particular, an edition published by Moxon, which contained the same works of the Plaintiff as the edition particularly referred to in the Plaintiff's affidavit, which was sold for 2s. 6d., whereas "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," was published at one guinea, and contained, besides 24 pages of the original essay, 23 biographical notices of one page each, in very small type, and 20 shorter notices of the authors, 425 pieces and extracts containing altogether about 10,000 lines, out of which there were taken from the Plaintiff's works only the six pieces particularly named in the Plaintiff's affidavit, containing 298 lines, three pieces not contained in the edition of the Plaintiff's works particularly mentioned in his affidavit or in the other editions thereinbefore mentioned, containing 71 lines, and six extracts taken from the "Pleasures of Hope," "Gertrude of Wyoming," and "O'Connor's Child," which the deponent said he verily believed and insisted were fair and legitimate extracts and that he was entitled to make them.

The Plaintiff now moved for an injunction to restrain the Defendants from selling or exposing for sale any further copies of the work or volume called "The Book of the Poets"—"The Modern Poets of the Nineteenth Century," or such part or parts thereof as consisted of the Plaintiff's original compositions, comprized [36] between pages 233 and 251, both inclusive of the said volume, and from printing or publishing the same or any other of the Plaintiff's compositions, in any other volume or work, without the Plaintiff's leave.

Mr. Cooper and Mr. Coleridge, in support of the motion. The Defendants have taken from the Plaintiff's work 733 lines, embracing six entire poems and copious extracts from "The Pleasures of Hope" and other poems composed by the Plaintiff. The taking is not denied; but the defence set up is that the case comes within the exception in favour of criticism and fair quotation; or, if not, that no injury has been done to the Plaintiff. In order to bring a case within the exception in favour of criticism, the critique must not be colourable. Here criticism was not the paramount or principal object of the work complained of: the principal object was to publish the poems of the Plaintiff and of other authors, without paying for them.

The work is, in fact, a book of selections, with a short essay at the beginning and a biographical sketch of each of the authors of the selected poems. The song "Ye Mariners of England," has been published separately; and therefore it is a book by itself. Can it then be said that an author is not injured by selections being made wholesale from his works? If one publisher may take two or three poems, another publisher may take as many, and so on, until the whole work has been pirated. Although the 733 lines which have been taken may be but a small portion of the Plaintiff's work, they may comprise the most striking and attractive parts of it. In *Bramwell v. Halcomb* Lord Cottenham, C., says, "When it comes to a question of quantity it must be very vague. One writer might take all the vital part [37] of another's book, though it might be but a small proportion of the book in quantity. It is not only quantity but value that is always looked to." (3 Myl. & Cr. 738.) Besides, if the Plaintiff had acquiesced in the Defendants' taking a portion of his poems, he would have lost his right to call on this Court to interfere against other persons infringing his copyright. (*Saunders v. Smith*, *Ibid.* 711.)

Mr. K. Parker and Mr. Glassey, for the Defendants. The complaint made by the Plaintiff has reference to only one edition of his poems, namely, that published by Moxon in 1840. Three of his poems, that is, "The Dirge of Wallace," "Lines on James the Fourth," and "A Song," which are contained in the Defendants' publication, are not contained in the edition of 1840. The Defendants' work consists of 790 pages, and only 18 are taken from the Plaintiff's work. The selections were not made *animus furandi*, but for the legitimate purpose of illustrating the essay at the beginning of the volume and the biographical notice of the author. The Plaintiff can sustain no injury by the publication of the Defendants' work; for it is not a substitute for that work, and it is sold at a much higher price. Indeed, the sale of the Plaintiff's work, as appears by the Defendants' affidavit, will be promoted by the Defendants' publication. *Dodsley v. Kinnersley* (Amb. 403), *Rundell v. Murray* (Jac. 311), *Roworth v. Wilkes* (1 Camp. N. P. C. 94).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the legal right is, *prima facie*, quite clear with the Plaintiff; because it is not denied that the [38] extracts complained of are taken literally as they stand from the Plaintiff's work.

Then is the work complained of anything like an abridgement of the Plaintiff's work, or a critique upon it? Some of the poems are given entire; and large extracts are given from other poems: and I cannot think that it can be considered as a book of criticism, when you observe the way in which it is composed. It contains 790 pages, 34 of which are taken up by a general disquisition upon the nature of the poetry of the nineteenth century: then, without any particular observation being appended to the particular poems and extracts from poems which follow, there are 758 pages of selections from the works of other authors; and therefore I cannot think that the work complained of can, in any sense, be said to be a book of criticism. If there were critical notes appended to each separate passage, or to several of the passages in succession, which might illustrate them and shew from whence Mr. Campbell had borrowed an idea, or what idea he had communicated to others, I could understand that to be a fair criticism. But there is, first of all, a general essay, then there follows a mass of pirated matter, which, in fact, constitutes the value of the volume.

Then it is said that there is no *animus furandi*: but if A. takes the property of B., the *animus furandi* is inferred from the act. Here there is a very distinct taking, and, in my opinion, it has been done in a manner which the law will not permit.

Roworth v. Wilkes was a case in which 75 pages of a treatise consisting of 118 pages were taken and inserted in a very voluminous work, *The Encyclopædia* [39] *Londinensis*; and, although the matter taken formed but a very small proportion of the work into which it was introduced, the jury found for the Plaintiff, who was the author of the treatise.

I do not think that it is necessary for me to consider whether the selections in this case are the very cream and essence of all that Mr. Campbell ever wrote; but it is pretty plain that they would not have been inserted in the Defendants' work, unless the party who selected them thought that they were very attractive in themselves. However, it so happens that, in turning over the pages of the Defendants' publication

I find an extract from "The Pleasures of Hope," which is the only part of that poem of which I have a distinct recollection: and I have reason to suppose that is a very striking passage, because it has remained impressed upon my memory for so many years.

Then it is said that, with respect to three of the selected poems, the Court ought not to interfere in the present case. I admit that they are not contained in Moxon's edition of the Plaintiff's works, published in 1840; but nevertheless there is a general statement in the bill that the Plaintiff composed them all. And I observe that Mr. Campbell is the sole Plaintiff: the bill is not filed by him and Mr. Moxon, or by Mr. Moxon alone, but by Mr. Campbell solely: and I consider that his copyright in those three poems is entitled to protection equally with his copyright in the rest of the matters which unquestionably have been pirated from Moxon's edition and copied into the work complained of.

Then the only question is whether there has been such a *damnum* as will justify the party in applying to [40] the Court; because *injuria* there clearly has been. What has been done is against the right of the Plaintiff. Now, in my opinion, he is the person best able to judge of that himself; and, if the Court does clearly see that there has been anything done which tends to an injury, I cannot but think that the safest rule is to follow the legal right and grant the injunction.

It strikes me upon the whole, therefore, that I ought to grant the injunction in this case; and I will put Mr. Campbell, if the other side desire it, to bring such action as he may be advised.

Mr. K. Parker. Your Honor will limit the time for bringing the action.

THE VICE-CHANCELLOR. I shall do here as I have done in other cases: I shall grant the injunction giving the Plaintiff liberty to bring such action as he may be advised, to establish his legal title, and reserve the further consideration of the motion, and give both parties liberty to apply: then, if the action is not brought within due time, you can apply.

[41] DE WITTE v. DE WITTE. May 8, 1840.

[S. C. 9 L. J. Ch. (N. S.) 270; 4 Jur. 625. Followed, *Bustard v. Saunders*, 1843, 7 Beav. 93; 49 E. R. 998. See *Newill v. Newill*, 1871-72, L. R. 12 Eq. 435; L. R. 7 Ch. 256; *In re Seyton*, 1887, 34 Ch. D. 515.]

Will. Construction.

Testator bequeathed his residue in trust for his daughter Sarah and her children, independently of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge. Held, that the daughter and her children living at the testator's death were entitled to the residue jointly.

J. Crutchley, by his will, after making several specific and pecuniary bequests, and, amongst them, a bequest to his daughter Sarah de Witte, for her life, with remainder to her children, gave the residue of his personal estate to trustees, in trust to sell and dispose thereof and to stand possessed of the proceeds in trust for the sole, exclusive and peculiar use and benefit of his said daughter Sarah de Witte and her children, independent of her husband, and her receipts alone, notwithstanding her coverture, to be from time to time a sufficient discharge.

The question was whether Mrs. De Witte took the residue for her life with remainder to her children, or whether she and her children took it jointly.

Mr. Goodeve, for the children, said that there were several instances in the preceding part of the will in which the testator had given *express* estates for life to Mrs. De Witte and his other daughters, with remainders to their respective children.

Mr. Bethell and Mr. Abraham, for Mrs. De Witte, relied on *Morse v. Morse* (*ante*, vol. ii. p. 485), as governing the present case, and said that the interpretation contended for on behalf of the children was not a reasonable one, as it would exclude children born after the testator's death.

Mr. F. Bayley appeared for the executors.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have looked through the whole of the will, in order [42] to ascertain what the testator meant by the words which he has used in disposing of his residuary estate; but there is no reason, apparent on the face of the instrument, why those words should not be taken in their plain and ordinary sense, and have their natural effect given to them.

Declare that Mrs. De Witte and her children living at the testator's death are entitled to the testator's residuary estate as joint-tenants (the interest of Mrs. De Witte being for her separate use), and that her receipts will be sufficient discharges for all monies that shall be paid to her during the continuance of the joint-tenancy between her and any of her children.

[42] THE NORTHAM BRIDGE AND ROAD COMPANY v. THE LONDON AND SOUTHAMPTON RAILWAY COMPANY. May 11, 12, 1840.

Case sent to Law. Issue. New Trial.

Although a Court of Equity would have been satisfied if the opinion on a case or the verdict on an issue directed by it had been the reverse of what it is; yet it is not the duty of the Court to direct another case or another issue, unless it sees that the opinion or verdict is clearly wrong.

On the hearing of a motion for an injunction in this case, one question was whether a road called the Northam Bridge Road, which was crossed by the line of the London and Southampton Railway, was a turnpike road within the meaning of the Act for making the railway. The Vice-Chancellor directed a case to be made for the opinion of the Barons of the Exchequer upon the question.

[43] The case having been argued, the learned Barons certified in the affirmative. (See 6 Mees. & Wels. 428.)

The motion for the injunction was now renewed. At the same time the Defendants, who were dissatisfied with the certificate, applied that a case might be made for the opinion of another Court of law upon the question.

Mr. Knight Bruce and Mr. Taylor, for the Plaintiffs.

Mr. Serjeant Wilde, Mr. M. D. Hill, Mr. Jacob and Mr. Jemmett, for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. A case was sent to the Court of Exchequer, in which the question was whether the Northam Bridge Road was to be considered as coming within the words "any turnpike road" in the Southampton Railway Act. Now a road may be considered as a turnpike road, either by reason of its being within the intent and meaning of the Acts which regulate turnpike roads in general, or by reason of its being a road upon which there is a turnpike, that is to say, some species of obstruction to the public, in passing along the road unless they pay toll, which may be applicable, to some extent at least, to the sustentation of the road. It is quite clear, and, indeed, it was not contended that mere private roads, however obstructed, are within the meaning of the Act.

The Barons of the Exchequer have certified to me their deliberate opinion that the road in question is a turnpike road within the meaning of the Act, and I am now asked not to accede to that certificate.

[44] Where this Court has either sent a case for the opinion of a Court of law, or directed an issue to be tried by a jury, and a certificate has been returned or a verdict found, it may easily happen that this Court would have been satisfied, if the reverse had been certified in the one case, or found in the other. But I apprehend that it is not a reason for quarrelling with either a certificate or a verdict merely because the reverse might have been equally right. And I do not think that I can judicially dissent from the certificate in this case, unless I see something in it that is clearly wrong, some plain violation of an acknowledged principle or something which satisfies me that it cannot be right.

On looking at the Southampton Railway Act, it strikes me that very good reasons

may be assigned in support of the conclusion which the Barons of the Exchequer have come to. [His Honor here stated the reasons.] On these grounds I cannot say that I think that the certificate is so wrong that I am judicially bound to dissent from it and send a case to another Court of law. On the contrary, my opinion is that, having now obtained the deliberate opinions of the Barons of the Exchequer upon the question submitted to them, I have the law laid down before me with sufficient clearness to enable me to proceed with the motion; that is, having now ascertained the law, I shall be able to enter into the question of equity: and, according to the best opinion that I can form, I think that I shall not be doing that which will be either wise or useful, or, I may say, consistent with my view of judicial duty, if I were to send this case to another Court of law.

[45] WILLIAMS v. NEWTON. May 12, 1840.

Contempt. Practice. 11 Geo. 4 and 1 Will. 4, c. 36.

Plaintiff did not then proceed, within the time limited by 11 Geo. 4 and 1 Will. 4, c. 36, rule 13, to take the bill *pro confesso* against a Defendant who was in prison for want of answer. After that time had expired, the Defendant filed his answer, and then moved, under the rule, to be discharged without costs. Held, that as the Defendant had not applied to be discharged until after he had disabled the Plaintiff, by filing his answer, from proceeding to take the bill *pro confesso*, the case was not within the rule, and, therefore, the Defendant could not be discharged without paying the costs of his contempt.

The Defendant being in prison, and in contempt for not answering the bill in this cause, an attachment was lodged against him on the 3d of December 1839; and as he did not put in his answer within two calendar months from that day, the Plaintiff might have proceeded, under 11 Geo. 4 and 1 Will. 4, c. 36, rule 13, to take the bill *pro confesso*. He did not, however, take any step for that purpose; and, consequently, at the end of six weeks after the expiration of the two months, the Defendant was entitled, under the same rule, to be discharged out of custody without paying any of the costs of the contempt. Some time after the six weeks had expired the Defendant put in his answer; and

Mr. Blunt, on his behalf, now moved that he might be discharged out of custody, without payment of costs.

He said that, under the 13th rule, the Defendant was entitled, before he put in his answer, to be discharged, without costs; for the Plaintiff, having omitted to proceed to take the bill *pro confesso* within the six weeks, had forfeited his right to costs.

Mr. Koe appeared for the Plaintiff; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing him, said that the Defendant would have been entitled to be discharged without costs if he had applied after the ex-[46]-piration of the six weeks, and before he put in his answer; but as he had, by putting in his answer, disabled the Plaintiff from proceeding to take the bill *pro confesso*, the case was not provided for by the Act, and, therefore, the Defendant could not be discharged without paying the costs of his contempt.

[46] TEAGUE v. RICHARDS. May 12, 1840.

New Orders. Preliminary Accounts and Inquiries. Injunction. Creditor.

Although an order for preliminary accounts and inquiries has been obtained in a suit for administering a testator's estate, yet the Court will not, on that account, restrain a creditor from suing the executors at law. The order, however, does not prevent the parties from having the cause heard before the Master has made his report.

This was a suit for the administration and distribution of a testator's estate.

Under the Fifth General Order of May 1839, the Plaintiff had obtained an order, dated the 31st of January 1840, referring it to the Master to take an account of the testator's personal estate, and of his funeral and testamentary expenses, debts and legacies, and to advertise for creditors; and the Master had advertised accordingly. In December 1839 a creditor of the testator brought an action for his debt against the Defendants, the executors, and was about to proceed to trial, notwithstanding he had been served with notice of the order of January 1840. Whereupon,

Mr. Lovat, for the executors, moved that all further proceedings in the action might be stayed, and that the creditor might be directed to go in and prove his debt before the Master under the order.

Mr. Girdlestone appeared for the creditor.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The interlocutory order which has been obtained in this cause is not so extensive as the decree which [47] would have been made at the hearing; for it contains no direction for payment of the testator's debts; and I am not at liberty to give to it any force or value except what is derived from the terms of the order itself.

In my opinion, however, the cause may be heard and a decree made notwithstanding the existence of the order, without waiting for the Master's report.

Motion refused with costs.

[47] HOOPER v. BRODRICK. May 27, 1840.

[S. C. 9 L. J. Ch. (N. S.) 321. See *Nuneaton Local Board v. General Sewage Company*, 1875, L. R. 20 Eq. 132.]

Injunction. Covenant. Jurisdiction.

The lessee of an inn covenanted to use and keep it open as an inn during the term, and not to do any act whereby the licences might become forfeited. The lessee having threatened to do certain acts inconsistent with the first branch of the covenant, the lessor obtained an *ex parte* injunction, restraining him from discontinuing to use and keep open the premises as an inn, and from doing any act whereby the licences might become forfeited or be refused. But the injunction was afterwards dissolved, the Court having no jurisdiction to restrain a person from discontinuing to use premises as an inn, which was the same in effect as ordering him to keep an inn; and no intention having been shewn on the part of the Defendant to violate the negative part of the covenant.

The Defendant was the assignee of a lease of the Cross Keys Inn in St. John Street, Clerkenwell, which the Plaintiff had granted, and which contained a covenant on the part of the lessee, his executors, administrators and assigns, to use and keep open the demised premises during the term as an inn, provided the proper licences for that purpose could be obtained, and to use his best endeavours to procure the licences to be renewed from time to time, and not to do or cause or permit to be done any act whereby they might become forfeited or be refused. The inn proved to be a losing concern, and the Defendant having threatened to do certain acts inconsis-[48]-tent with the first branch of the covenant, the Plaintiff filed the bill in this cause for, and obtained, *ex parte*, an injunction restraining the Defendant from discontinuing, during the term, to use and keep open the premises as an inn, or to renew the licences from time to time, provided they could be obtained, and from doing or causing or permitting to be done any act whereby the licences might become forfeited or be refused.

Mr. G. Richards and Mr. Palmer, for the Defendant, now moved to dissolve the injunction. They said that the Court could not order the Defendant to perform the positive part of the covenant which was to carry on the business of an innkeeper, and, therefore, the injunction could not be sustained. *Blakemore v. The Glamorgan-*

shire Canal Navigation (1 Myl. & Keen, 154), *Earl of Ripon v. Hobart* (3 Myl. & Keen, 169), *Kemble v. Kean* (*ante*, vol. vi. p. 333), *Kimberley v. Jennings* (*Ibid.* 340).

Mr. Knight Bruce and Mr. Bazalgette, for the Plaintiff. The covenant is not that the Defendant or any other particular individual shall carry on the business of an innkeeper; but that the business shall be carried on on the demised premises. An injunction may be granted to prevent the using of a house as a shop, where it would be a breach of covenant; and if the covenant be that the house shall be used in no other manner than as an inn, the covenantee has a right to have the covenant performed. The Defendant, in this case, may get rid of his liability under the covenant by assigning the lease. Although the Court cannot compel the tenant of a house to carry on any particular trade or business in it, it may [49] prevent him from using the house for any other purpose. In many cases the injunction of this Court must be mandatory in effect, although it is prohibitory in form. *Morris v. Colman* (18 Ves. 437).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Court ought not to have restrained the Defendant from discontinuing to use and keep open the demised premises as an inn, which is the same in effect as ordering him to carry on the business of an innkeeper; but it might have restrained him from doing or causing or permitting to be done any act which would have put it out of his power, or the power of any other person, to carry on that business on the premises. It is not, however, shewn that the Defendant has threatened or intends to do or to cause or permit to be done any act whereby the licences may become forfeited or be refused; and, therefore, the injunction must be dissolved.

[50] SHARP v. TAYLOR. May 28, 1840.

[Observed upon, *Barnet v. Laing*, 1842, 13 Sim. 255.]

Ne Exeat. Practice.

A *ne exeat* will not be granted unless it is prayed for by the bill.

Motion for a *ne exeat*.

The bill neither prayed for the writ, nor stated that the Defendant intended to go abroad.

Mr. Sharpe, in support of the motion, cited *Moore v. Hudson* (Madd. & Geld. 218), in which a *ne exeat* was granted, although the bill did not pray for it. He admitted, however, that in that case the Plaintiff did not know that the Defendant intended to leave the kingdom until after the bill was filed: whereas, in the present case, the affidavit shewed that the Plaintiff, when he filed his bill, knew that the Defendant intended to go abroad.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he could not grant the writ, unless it was prayed for by the bill; and that, as the affidavit in support of the motion stated acts done by the Defendant since the filing of the bill, as evidence of his intention to leave the kingdom, a supplemental bill must be filed for the purpose of stating those facts and praying for the *ne exeat*.

[51] POWELL v. CALLOWAY. June 5, 1840.

Practice. Advancing Cause.

A motion to advance a cause cannot be made without notice to the other party.

This cause had been advanced: and, on its being called on,

Mr. Harrison, for the Defendant, objected to its being heard, as he had had no notice of the application to advance it.

THE VICE-CHANCELLOR [Sir L. Shadwell] allowed the objection ; and gave the Defendant the costs of the day.

Mr. Faber appeared for the Plaintiff.

[51] SWEET v. MAUGHAM. June 8, 1840.

[S. C. 9 L. J. Ch. (N. S.) 323; 4 Jur. 479. See *Walter v. Lane* [1899], 2 Ch. 756 ; [1900] A. C. 539.]

Copyright. Pleading. Injunction.

Where a party seeks to restrain an infringement of his copyright, it is not necessary for him to specify, either in his bill or affidavit, the parts of his work which he considers to have been pirated ; although he does not claim copyright in all the passages which are the same in both works.

Where an injunction restraining an infringement of copyright is continued, subject to the Plaintiff bringing an action, the Court will not allow the Defendant to continue the sale of his work, he keeping an account, unless the Plaintiff will consent.

The Plaintiffs and the Defendants were the proprietors of two rival periodical publications, the one called *The Jurist* and the other *The Legal Observer*, each of which contained, amongst other matter, reports of cases at law and in equity, taken by gentlemen at the Bar, under verbal agreements with the proprietors. Some of the reports in *The Legal Observer* having been copied, [52] as was alleged, from *The Jurist*, the Plaintiffs filed the bill in this cause for, and afterwards obtained, *ex parte*, an injunction restraining the Defendants from printing, publishing or selling any copies of *The Legal Observer* containing reports which had been copied from *The Jurist*, the copyright of which was in the Plaintiffs.

Some of the reports, which were identically the same in both works, had been taken from a common source ; and in *them* the Plaintiffs did not claim any copyright.

Mr. Wigram and Mr. James Russell, on moving to dissolve the injunction, contended, first, that the injunction was, at the least, too extensive, and that it ought to be confined to those reports alleged to have been copied from *The Jurist*, in which the Plaintiffs claimed copyright ; and, secondly, that the Plaintiffs ought (especially as they claimed copyright in some only of the reports which were the same in both publications) to have specified in their bill and also in their affidavit, on which the injunction was obtained, the particular reports which they alleged to have been pirated : whereas, in their bill, they had stated merely that many of the reports in *The Legal Observer* had been copied from *The Jurist* ; and, in their affidavit, that a book marked B, which contained eighteen numbers of *The Legal Observer*, contained copies of reports in a book marked A, which contained several numbers of *The Jurist*.

Mr. Knight Bruce and Mr. Sharpe, for the Plaintiffs, said that in *Lewis v. Fullarton* (2 Beav. 6) the pirated work did not wholly consist of original matter, but partly of selections from other authors ; and yet the Master of the Rolls refused to [53] confine the injunction to the original matter, and granted it generally ; and that, in cases of infringement of copyright, the Plaintiff was not required to point out the particular parts of the rival work which he alleged to have been pirated from his work.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As long as I remember the Court, it never has been thought necessary for a party who complains that his copyright has been infringed to specify, either in his bill or his affidavit, the parts of the Defendant's work which he thinks have been pirated from his work ; but it has been always considered sufficient to allege, generally, that the Defendant's work contains several passages which have been pirated from the Plaintiff's work ; and to verify the rival works by affidavit. Then, when the injunction has been moved for, the two works have been brought into Court, and the counsel have pointed out to the Court the passages which they rely upon as shewing the piracy.

The injunction, as it is now expressed, does not extend to the reports which have been taken from a common source, but to those only which have been copied from *The Jurist*, and which are the Plaintiffs' copyright. As it is quite plain that an injury

has been done by the Defendants, I shall continue the injunction as it now stands, and let the Plaintiffs bring such action as they may be advised. I shall not fix any time for bringing the action; but, in order to guard against delay in commencing or proceeding with it, I shall give each party liberty to apply. The Defendants must admit that the gentlemen who furnished the reports to *The Jurist* have assigned their copyrights therein to the Plaintiffs.

[54] Mr. Wigram asked that the Defendants might be allowed to sell those numbers of *The Legal Observer* which were already printed, they keeping an account.

THE VICE-CHANCELLOR said that he could not grant that permission without the Plaintiffs' consent.

Mr. Knight Bruce said that they could not consent.

[54] In the Matter of 11TH GEO. 4 AND 1ST W. 4, c. 60. *Ex parte WILLIAMS.*
June 10, 1840.

Infant. Trustee. 11 Geo. 4 and 1 Will. 4, c. 60.

Four co-partners purchased an estate out of the partnership assets, and took a conveyance to themselves as tenants in common in fee. One of them died intestate as to his real estates, leaving an infant heir. The survivors settled with his executors for the value of one-fourth of the estate, and then petitioned under the 11 Geo. 4 and 1 Will. 4, c. 60, that the infant might be declared a trustee of one-fourth of the estate, and might join in conveying the estate to a purchaser. The Court refused to make the order, and said that a bill must be filed.

Four persons, who were co-partners as bankers, purchased a freehold estate out of the assets of the partnership, and had it conveyed to them and their heirs as tenants in common. Afterwards one of the partners died intestate as to his freehold estates, leaving an infant heir. The surviving co-partners settled accounts with the executors of the deceased, and allowed them, in account, one-fourth of the value of the estate. They then contracted to sell the estate, and presented a petition under the 11th Geo. 4 and 1st Will. 4, c. 60, alleging that the infant was a trustee for them of one-fourth of the estate, and praying that he might be ordered to join with them in the conveyance to the purchaser.

Mr. Cockerell, for the Petitioners, suggested that it was doubtful whether the Court could direct the usual [55] reference in this case, as the effect of it might be to take away the infant's estate in his absence.

THE VICE-CHANCELLOR [Sir L. Shadwell] declined to make any order under the Act; and said that a suit must be instituted for the purpose of having the infant declared to be a trustee. (See the 18th sect. of the Act.)

[55] *FRYER v. RANKEN.* June 12, 1840.

[S. C. 9 L. J. Ch. (N. S.) 337.]

Will. Construction. Legacy.

"I give, to my wife, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current expenses at the time of my decease." Held, that cash balances in the hands of the testator's bankers and of his agent, and dividends of stock due at the testator's death, passed by the bequest; but that the rent of a house and the interest of a sum due on mortgage did not pass.

The will of Cornelius Fryer contained the following bequest:—

"I give and bequeath unto my dear wife, Susannah Fryer, all my ready money at my bankers, in my dwelling-house, or elsewhere; by which I mean money not invested in security or otherwise bearing interest, but what I may have in hand for current

income and expenses at the time of my decease, subject to the payment thereof of the legacy of £50 hereinafter given to Miss M. Wilson, now residing in my house. I also give and bequeath unto my said dear wife, absolutely, all my plate, jewels, trinkets, seals, watches, porcelain and other china, books, pictures, prints, paintings, household furniture, linen, wearing apparel, stores, wines and other liquors, horses, harness and carriages, [56] together with my estate and interest in the house I now occupy, or such other house I may occupy as my usual residence at the time of my decease, and all the effects in and about the same, excepting only securities for money. I give and bequeath to the said M. Wilson a legacy of £50, to be paid out of *my ready money before mentioned*, free of legacy duty or other deductions, as soon as conveniently may be after my decease." And, after giving some other pecuniary legacies, the testator bequeathed the residue of his estate to the Defendants, and appointed them and his wife, who was the Plaintiff in the cause, the executors and executrix of his will.

The testator at his decease had a cash balance in the hands of his bankers; another cash balance in the hands of C. Ranken, his agent and receiver, on whom he was in the habit of drawing on as a banker, and who kept a running account with him; interest due on a mortgage; dividends due on stock; and rent due for a house. Ranken was agent for the mortgagor as well as the testator; and as the interest on the mortgage became due, he had been in the habit of transferring the amount from time to time from the mortgagor's account to the credit of the testator's account; but, by some accident or oversight, the amount of the half year's interest due at the testator's death had not been so transferred.

The question was whether any and which of the sums above mentioned passed by the above bequest.

Mr. Knight Bruce and Mr. Pole appeared for the Plaintiff.

Mr. Jacob, Mr. Collins and Mr. Sawyer appeared for the residuary legatees.

[57] THE VICE-CHANCELLOR [Sir L. Shadwell] held that the balances in the hands of the testator's bankers and of his agent, and the dividends due on the stock, which he might have received on applying for them, passed by the bequest: but that the rent of the house, and the interest on the mortgage, which, at the testator's death, had not been transferred to the credit of his account with Ranken, who, therefore, then held it as agent for the mortgagor, did not pass. (See *Vaisey v. Reynolds*, 5 Russ. 12.)

[57] THE MIDLAND COUNTIES RAILWAY COMPANY v. WESTCOMB. June 19, 1840.

[S. C. 2 Rail. Cas. 211; 9 L. J. Ch. (N. S.) 324.]

Vendor and Purchaser. Specific Performance. Infant. Costs.

A. agreed to sell land to a railway company; but died before he had executed the conveyance, leaving an infant heir. The company then instituted a suit, in order to obtain a conveyance from the infant.

Held, that although the company were bound, by their Act, to pay the expenses of the conveyance of land taken by them, yet, as A. had occasioned the suit by suffering the land to descend to an infant, the costs of the suit and of having the conveyance settled by the Master must be paid out of the purchase-money.

The Defendant's father had agreed to sell a piece of land to the Plaintiffs for the purposes of the Act for making the railway; but, before he had executed the conveyance, he died intestate, leaving the Defendant his heir.

The Defendant, being an infant, the Plaintiffs were under the necessity of instituting this suit, in order to obtain a decree directing the infant to convey the piece of land to the Plaintiffs: and the Court having decreed accordingly, the question was whether the costs of the suit were to be paid by the Plaintiffs or by the Defendant.

Mr. Hallett, for the Defendant, said that, by the Act, the expenses of the conveyance of lands taken by the [58] Plaintiffs for making the railway were to be

borne by them; and that, in this case, the costs of the suit were part of the necessary expences of the conveyance, and, therefore, ought to be paid by the Plaintiffs. *Ex parte Cant* (10 Ves. 554).

Mr. James Parker, for the Plaintiffs, cited *Prytharch v. Havard* (*ante*, vol. vi. p. 9).

THE VICE-CHANCELLOR [Sir L. Shadwell]. If the Defendant's father, instead of allowing the piece of land to descend to an infant, had taken only the ordinary precaution of devising it either to his executors or to a trustee in trust to convey it to the Plaintiffs, there would have been no occasion for instituting this suit: and as he has created the necessity for the suit, by his own *laches*, the costs of it must come out of the purchase-money. The expences of the actual conveyance must be borne by the company; but, if it is necessary that it should be settled by the Master, the extra expence occasioned thereby, as well as the costs of the suit, must be paid out of the purchase-money. (See *Prytharch v. Havard*, *ante*, vol. vi. p. 9.)

[59] SETON v. SMITH. June 19, 1840.

Election.

An unmarried lady being entitled to £5000 charged upon a real estate of which she was tenant for life, with remainder to her children in tail, and being entitled also to a sum of stock, for her life, with remainder to her children absolutely, by the settlement on her marriage released the real estate from the £5000; and, supposing that the stock was her absolute property, settled it on her husband for life, with remainder to her children. After the marriage the parties to the settlement, having discovered the mistake as to the stock, made an indorsement on the settlement, by which, after reciting that they had so discovered, they declared that thenceforth the stock should be held by the original trustees thereof (in whose name it was still standing), upon the trusts to which it was subject before and at the date of the settlement.

Held that the children of the marriage could not claim the benefit of the release of the £5000 and also the sum of stock, to the prejudice of their father's interest therein under the settlement; but that, before the indorsement was made, he was entitled to put them to their election, and that he had not lost that right by being a party to the indorsement.

Josias Cocke, by his will, dated the 28th of March 1812, directed the sum of £5000 to be raised, by mortgage of his real estates, and paid to his wife, in case she should survive him: and he gave his real estates, subject to the raising and payment of the £5000, and his personal estate, to trustees, in trust for his daughter, Ann Maria Cocke, for her life, and, after her decease, in trust for her children, equally as tenants in common in tail.

The testator died in 1821, leaving his widow and daughter surviving him. His residuary personal estate consisted of £1000 consols and 3500 francs rentes in the French five per cent. stock.

The widow died in 1831, having, by her will, bequeathed the £5000 to her daughter, Ann Maria Cocke.

[60] By the settlement on the marriage of Ann Maria Cocke with Miles Charles Seton, dated the 14th of August 1832, and made between Ann Maria Cocke of the first part, William Slater of the second part, Miles Charles Seton of the third part, John Mark and Frederick Smith, William Henry M'Alpine and Henry Smith of the fourth part, after reciting that the £5000 had not been raised, and that it had been agreed that Ann Maria Cocke should release her right to that sum, and that the £1000 consols and certain other sums of the same stock then standing in the name of Ann Maria Cocke, making altogether £4247, 4s. 6d. consols, and the 3500 francs French stock should be transferred to certain persons therein named, upon the trusts thereafter mentioned, and that Ann Maria Cocke had executed powers of attorney for transferring the same accordingly: Ann Maria Cocke released her late father's real estates from the £5000, and assigned the consols and French stock to the trustees

in trust, in case she should die in the lifetime of Miles C. Seton and any issue of the marriage should be then living, to pay two-third parts of the dividends of those funds to M. C. Seton during his life, if any issue of the marriage should so long live, and, after the decease of Ann Maria Cocke, in trust to stand possessed of the same funds (subject to the life interest of M. C. Seton in two-third parts thereof) in trust for the children of the marriage who, being sons, should attain 21, or, being daughters, should attain that age or marry.

Soon after the solemnization of the marriage it was discovered that the £1000 consols and the £3500 francs French stock were not, as had been supposed, the property of Ann Maria Cocke at the time of the execution of the settlement, but that the same had [61] passed, by the will of Josias Cocke, to the trustees thereof, upon the trusts thereby declared. In consequence of that discovery an indorsement was made on the settlement, in the following words:—

“Whereas the within-mentioned marriage hath been duly had and solemnized; and whereas, at the time of making and executing the within-written indenture, it was erroneously supposed that the sum of £1000 £3 per cent. consolidated Bank annuities, one of the sums within mentioned as forming part of the aggregate sum of £4247, 4s. 6d. £3 per cent. consolidated Bank annuities within mentioned, and also the sum of 3500 francs rentes, were the property of the within-named Ann Maria Cocke; and it is within stated that the said sum of £1000 £3 per cent. consolidated Bank annuities, and the said sum of 3500 francs rentes, had been transferred into the name of the said Ann Maria Cocke, and were, at the time of the execution of the within-written indenture, standing in her name accordingly; and whereas, soon after the execution of the within-written indenture, it was discovered that the said sums of £1000 £3 per cent. consolidated Bank annuities and 3500 francs rentes were the property of the said Josias Cocke, having been purchased by him in his lifetime, and he having died possessed thereof, and the same, at the time of his decease, were standing in his name in the respective books of the said stocks or funds: and whereas the said two sums of stock were given and bequeathed by the said Josias Cocke, in and by his will within recited, amongst the general description of his personal estate, property and effects unto his executors, the within-named J. M. F. Smith and Henshaw Latham of Dover aforesaid, banker, upon certain trusts therein set forth: and whereas, in [62] consequence of the said sums of stock having been so discovered to have been the property of the said Josias Cocke, the same were not, as within stated, transferred to the said Ann Maria Cocke, but the same remained in the name of the said Josias Cocke until lately, when the same have been transferred into the names of the said J. M. F. Smith and H. Latham, as such executors as aforesaid: Now it is hereby declared and agreed, by and between the parties to the within-written indenture, that the said two sums of £1000 £3 per cent. consolidated Bank annuities and 3500 francs rentes shall from henceforth continue and be in the names of the said J. M. F. Smith and Henshaw Latham, as executors as aforesaid, and in the name of the survivor of them and his executors and administrators; and that they and the survivors of them, and the executors and administrators of such survivor shall, from henceforth and at all times hereafter, stand and be possessed thereof and of the interest, dividends and annual proceeds from time to time to accrue and grow due thereon, upon such trusts and to and for such ends, intents and purposes as, in and by the said will of the said Josias Cocke, are mentioned, expressed and declared of and concerning his personal estate and effects, or upon such of the same trusts as are now subsisting and capable of taking effect.”

Ann Maria Seton died in November 1838, leaving her husband Miles C. Seton (who became her personal representative) and three infant children by him her surviving.

The bill was filed by two of those children against the third, and also against J. M. F. Smith, Henshaw Latham, Miles Charles Seton, W. H. M'Alpine and [63] Henry West, alleging that, under the will of Josias Cocke, the Plaintiffs and the Defendant, their brother, who was Josias Cocke's heir, were entitled to J. Cocke's real estates as tenants in common in tail, with cross-remainders between them in tail, freed and discharged from the £5000; and that, by virtue of the same will, the same parties were then entitled, absolutely, as tenants in common, to the £1000 consols

and 3500 francs French stock. The bill prayed that Josias Cocke's will might be established, and that the rights of all parties under the same and under the settlement might be declared, and that the trusts thereof might be carried into execution.

As the trusts of the £1000 consols and of the French stock expressed in the settlement were inoperative, those sums being subject to the trusts of Josias Cocke's will, and as the release of the £5000 was contained in the same instrument as those inoperative trusts, the question was whether the Plaintiffs and the Defendant, their brother, could claim the benefit of the release without giving effect to the trusts of the stock expressed in the settlement, or, in other words, whether, if they claimed the benefit of the release, they were not bound to give effect to the trusts of the stock expressed in the settlement.

Mr. Jacob and Mr. Kenyon, for the Plaintiffs, contended that the indorsement on the settlement was a relinquishment of the right, if it ever existed, to make the Plaintiffs and their brother elect whether they would take under the will or under the settlement.

Mr. Knight Bruce and Mr. Coleridge, for the Defendant Miles C. Seton. This is a clear case of election. At the time when the settlement was made the two sums of stock were sup-[64]-posed to belong to the wife; and, by one and the same deed, the sum of £5000, which was the wife's absolute property, was given up in favour of the children, and the two sums of stock was settled on the husband and the children.

The children, therefore, cannot claim the benefit of the release, without making good the rest of the settlement: for it is an invariable rule of this Court not to allow a party to claim both under and against the same instrument.

It being then clear that Mr. Seton, before the indorsement was made on the settlement, had a remedy by way of election, the only question is whether he is barred of that remedy by the memorandum? Now that memorandum was made without any contract and without any consideration for it; and it does not contain any trace of an intention, on the part of Mr. Seton, to relinquish any remedy or right which he then had. The object of it was nothing more than to remove a cloud that otherwise would have rested on the title to the sums of stock; and, consequently, it would be gross injustice to hold that it prejudiced his rights.

Mr. Neate appeared for other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. At the time when the settlement was executed the £1000 consols and the 3500 francs of French stock were subject to certain trusts declared by the will of Josias Cocke, under which Mrs. Seton was entitled to the income of those sums for her life, and, after her death, the capital was to belong to her children. It was, however, then supposed that those two sums were [65] the absolute property of Mrs. Seton; and, under that impression, the settlement was made by which it was intended that Mr. Seton should take a certain interest in a portion of the income of the stock. By the same settlement Mrs. Seton released her late father's real estates, of which she was then tenant for life, with remainder to her children in tail, from the sum of £5000 with which they stood charged under her father's will, and to which she had become absolutely entitled under the will of her mother. That being the state of the case, it is perfectly plain that Mr. Seton has a right to say to his children, "If you will have the benefit of the release, you must give me what I claim under the settlement."

It was said, however, that Mr. Seton, after he was apprised of the mistake in the settlement, signed the indorsement on it, and that he thereby waived his right to compensation by way of election. But no one, I think, can look at the indorsement without seeing that it is nothing more than an admission that there was a mistake in the settlement with respect to the two sums of stock: and that the sole object of it was to remove the doubts, which otherwise would have existed, as to the trusts to which those sums of stock were subjected. It is in as naked a form as can be; and contains no representation of intention on the part of Mr. Seton to waive any right which he might have under the settlement.

The consequence is that Mr. Seton now has the same rights under the settlement as he had on the execution of it; and, therefore, his children must be put to their election.

[66] Declare that the children are bound to elect whether they will take against

or under the settlement, and refer it to the Master to inquire and state which will be most for the benefit.

[66] GRAND v. REEVE. June 26, 1840.

Will. Construction. Republication.

Testator, by his will, gave £500 to A. and £1000 to B., to be paid *within* 12 calendar months after his wife's death. By a codicil of the same date he reduced those legacies to £300 and £500 respectively. Afterwards he formally republished his will. By a second codicil, after reciting the bequest in his will of £500 to A., he revoked that bequest, and, in lieu of it, gave A. £300, to be paid at the same time as the revoked bequest was directed by his will. By a third codicil, after reciting that, by his will, he had given to R. £3000, he reduced that legacy to £2000; and then directed that the £300 given to A., as well as the £1000 given to B., should not be paid till twelve months *after* the death of his wife. Held, taking all the instruments together, that B. was entitled to a legacy of £1000.

James Reeve, by his will, dated the 21st of December 1821, gave, amongst other legacies and annuities, the sum of £500 to Robert Bass; and, to his wife's nephew, Frederick Charles Ganning, the sum of £1000; and he directed that those legacies should be payable *within* 12 calendar months next after the decease of his wife, Frances; and he gave all his real and personal estate, subject to the payment of the legacies and annuities, to the Defendant absolutely.

The testator made a codicil, bearing the same date as his will, but written on a separate sheet of paper, which was attached to his will. It was partly as follows:—"In consequence of the depression of all landed property, I give my said wife an annuity of £600 per annum, only for life, instead of the £700 by my said will bequeathed to her. I also give to Mr. Robert Bass [67] £300, and to Frederick Charles Ganning, £500 only, instead of the legacies of £500 and £1000 by my said will respectively bequeathed to them."

On the 28th of October 1824 the testator resigned, resealed and republished his will in the presence of three attesting witnesses.

The testator made another codicil, which was dated the 30th of November 1825, and was partly as follows:—"This is a codicil to the last will and testament of me, James Reeve of Halesworth, in the county of Suffolk, Esq., which will bears date the 21st day of December 1821. . . . And whereas I have also, in and by my said will, given and bequeathed unto Robert Bass the sum of £500, to be paid him within 12 calendar months next after the decease of the said Frances, my wife: now I do hereby revoke the said last-mentioned bequest, and, in lieu and stead thereof, I do hereby give and bequeath the sum of £300 only, to be payable and paid at the same time, and in such and the like manner as the said bequest hereby revoked was directed in and by my said will; and, in all other respects, I do ratify and confirm my said will."

The testator made another codicil, which was dated the 17th of February 1826, and therein expressed himself as follows:—"Whereas, by my will, dated the 21st day of December 1821, I have given my brother, Benjamin Reeve, the sum of £3000; now, by this my codicil to my will, I do hereby revoke the said bequest, and, in lieu and stead thereof, I do hereby give and bequeath to the said Benjamin Reeve the sum of £2000 only, to be paid within 12 calendar months after the decease of the said Frances, my wife; and I do [68] further direct that the legacy of £300 given to Robert Bass, as well as the £1000 given to Frederick Ganning, shall not be paid, likewise, till 12 months after the decease of the said Frances Reeve, my wife."

The testator died on the 10th of December 1826. Frederick Charles Ganning died in May 1829. The Plaintiff was his personal representative. Frances Reeve died in July 1838.

The question was whether the Plaintiff, as Ganning's representative, was entitled to be paid £1000 or £500.

Mr. Knight Bruce and Mr. E. Montagu, for the Plaintiff. It is not necessary, in this case, to decide whether the republication of the will in 1824 republished the

antecedent codicil; for it appears from the subsequent codicil that the testator considered that the republication had annihilated the intermediate codicil. By that subsequent codicil the testator recites that he had, *by his will*, given to Bass £500, to be paid within 12 calendar months from the decease of his wife; and then he revokes that bequest, and, in lieu thereof, gives him £300 only, to be paid at the same time and in such and the like manner as the bequest thereby revoked was directed by his will; and, in all other respects, he ratifies and confirms his said will. Then, in the codicil of 1826, he directs that the legacy of £300 given to Bass, as well as the £1000 given to Ganning, shall not be paid till twelve months after the death of his wife. So that he there refers to the existing legacy to Bass; and, therefore, he must be taken to refer to what he considered to be the existing legacy to Ganning. Taking then the whole of the instruments together, the [69] fair conclusion is that he considered the first codicil to be inoperative; and that his intention was that Bass should take £300, and that Ganning should take £1000.

Mr. Jacob and Mr. Blunt, for the Defendant. The will and the first codicil were written on separate sheets of paper; but they were attached to each other: therefore the republication in 1824 was a republication of the codicil as well as of the will. We are not to say that a codicil is revoked, because in other testamentary papers there is an indication that the testator did not correctly recollect the contents of that codicil. As far as respects Bass, the codicil of 1825 was surplusage: but are we to say that, on that account, the prior codicil was revoked? Then comes the last codicil; with respect to which it may be observed that it contains no words of gift, but only a mistaken reference to the will with regard to Ganning. Now a mistaken reference does not amount to a gift, unless there are either words of gift, or something shewing an intention to give. The testator's sole object in making that codicil was to postpone the payment of the legacies (which object, indeed, he had before accomplished), until the end of 12 months after the death of his wife. That codicil is merely negative: it says that the legacies shall not be paid, &c. That does not make a new gift; it must be looked at as an inaccurate reference to the will. *Gordon v. Hoffman* (ante, vol. vii. p. 29); *Gordon v. Lord Reay* (ante, vol. v. p. 274); *Crosbie v. Macdowal* (4 Ves. 610).

[70] THE VICE-CHANCELLOR [Sir L. Shadwell]. There is a degree of ambiguity in this case, which is occasioned by the republication of the will and by the subsequent codicil; but then the second codicil does clearly express the testator's intention.

I do not observe that, in that codicil, any notice is taken of the prior one: it seems to proceed as if that prior codicil had not been in existence. For the testator says: "Whereas I have also, in and by my said will, given and bequeathed unto Robert Bass the sum of £500, to be paid him within 12 calendar months next after the decease of the said Frances, my wife: now I do hereby revoke the said last-mentioned bequest; and, in lieu and stead thereof, I do hereby give and bequeath the sum of £300 only." Now the first codicil had revoked the bequest in the will to Bass, and had reduced his legacy to £300.

Then the testator makes the codicil of 1826, by which, after reciting that he had given by his will £3000 to his brother, Benjamin Reeve, he revokes that bequest and reduces it to £2000, and directs that the reduced legacy shall be paid within 12 calendar months next after the death of his wife. He then proceeds thus: "And I do further direct that the legacy of £300 given to Robert Bass, as well as the £1000 given to Frederick Ganning, shall not be paid likewise till 12 months after the decease of the said Frances Reeve, my wife." Now a direction that a legacy shall not be paid until the expiration of a certain time is, in effect, a direction that it shall be paid at the expiration of that time. And it is plain that the testator considered that, by his will, he had given Ganning a legacy of £1000, and appointed [71] a time for payment of it. Then, by this third codicil, he makes an alteration in the time of payment appointed by his will, and directs that the legacy shall not be paid until 12 months after the death of his wife; whereas, by his will, he had directed that it should be paid *within* 12 months after that event. And although it is true, in the abstract, that the republication of the will was a republication of the codicil, yet, taking all these instruments together, my opinion is that there is a gift of a legacy of £1000 to Ganning.

[71] LAUTOUR v. HOLCOMBE. March 17, 1842.

Practice. Parties. Supplemental Bill. Dismissal.

Where a bill has been dismissed for want of prosecution against a Defendant who at the hearing is held to be a necessary party; the Court will not allow the Plaintiff to bring him before the Court again by supplemental bill, but will dismiss the bill with costs.

The bill was filed by an uncertificated bankrupt against his assignees and certain other parties. (See *ante*, vol. viii. p. 76.) The assignees put in their answer, and afterwards obtained an order dismissing the bill, as against themselves, for want of prosecution, with costs.

The cause now came on to be heard as against the other Defendants.

Mr. Bethell and Mr. Beavan, for those Defendants, contended that the assignees were necessary parties, and that the suit could not be heard in their absence.

Mr. Wakefield, Mr. Koe and Mr. Lovat, for the Plaintiff, contended that the assignees were not necessary parties.

[72] THE VICE-CHANCELLOR, however, ruled the contrary.

The Plaintiff's counsel then asked that the cause might stand over, and that the Plaintiff might be at liberty to file a supplemental bill for the purpose of bringing the assignees again before the Court.

The Defendant's counsel opposed the application, and cited *Bierdermann v. Seymour* (1 Beav. 594) and *Tyler v. Bell* (1 Keen, 826, and 2 Myl. & Cr. 89).

THE VICE-CHANCELLOR [Sir L. Shadwell]. (1) The only thing asked is for leave to file a supplemental bill against the assignees. I am of opinion I ought not to grant it; and for this very plain reason: it is admitted that the bill was properly dismissed as against the assignees for want of prosecution. But that did not prevent the institution of a new suit against them: and I have yet to learn that, when a dismissal for want of prosecution is ordered against one Defendant, the Plaintiff can escape from the effects of the order by filing a supplemental bill: and I am of opinion that what is asked cannot be allowed.

I am asked, expressly, to give leave, in the absence of those who have obtained the order to dismiss. I might be thereby doing a great act of injustice, and should be deciding in the absence of parties concerned.

The bill was dismissed against them in November 1836, and this application is made five years afterwards, [73] when, in all probability, they have abandoned all thoughts of this suit. They might have then had sufficient evidence of the fairness of the transaction, which may now have perished. It appears to me that, after what has taken place, it would be most unjust if I allowed them to be brought back again to this suit.

The bill must, therefore, be dismissed with costs.

[73] WATSON v. WATSON. June 26, 1840.

Will. Construction.

Testator gave annuities to three of his relations, and directed that, if the annuities were paid by the interest of money in the stocks, at the death of the different parties, the principal should be divided between the children of the deceased. One of the annuitants had five children living at the testator's death; but only one of them survived the annuitant. Held, that the capital of the stock which had been provided to answer the annuity did not vest in the surviving child, on the

(1) The judgment is given *ex relatione*.

annuitant's death; but vested, on the testator's death, in all the children then living, as tenants in common.

Thomas Stalker, by his will, dated the 29th of April 1811, made the following amongst other bequests: "I give and bequeath to my brother Daniel's children, Harriet and Maria, £500 each; Captain James Murray, £100; to his daughter, Mary, £50; to my nephew, John P. Stalker, £1000; to Edward Owen, of Wood Street, £50; to my cousin, Horace Watson, £300; to my brother, Joshua Stalker, £500; to each of the children of my sister, Dorothy Martin and John Martin, £100 each; to Dorothy Martin an annuity of £30 a year, and, after, to her husband, if he survives her; to Jane Tunstall, daughter of my sister, Jane Tunstall, £150; to my sister, Mary Tunstall, an annuity of £30; to William Bell, £100; to my brother [74] Joshua and Esther, his wife, an annuity of £60 a year, to go to the survivor; to Mary Stalker, eldest daughter of my brother Joshua, £200; to the next daughter, £200, to be paid when of age; to each of the younger children, £100 to be kept out at interest and paid when of age: and I appoint my brother, Daniel Stalker, and James Watt to be my executors, to see the preceding carried into execution; wishing them to act in such manner as they may think best in everything: the residue of my property, if any, to be equally divided between my nephews and nieces: if the annuities are paid by the interest of purchasing money in the stocks: *at the death of the different parties, the principal to be divided between the children of the deceased.*"

The testator died shortly after the date of his will. At his death John Martin and Dorothy, his wife, had six children living. Five of them died in the lifetime of John Martin; and the Plaintiff, Daniel Watson, was their personal representative. John Martin survived his wife and died in December 1839.

Daniel Stalker survived his co-executor, James Watt, and afterwards died. The Defendant, Horace Watson, was his executor.

The bill was filed against Horace Watson as the personal representative of the testator, and also against Mary Martin, who was the only surviving child of John and Dorothy Martin: and the question was whether the sum of stock which had been purchased out of the testator's assets, to answer the payments of the annuity of £30, bequeathed to Dorothy Martin and John Martin, vested in Mary Martin on her father's death; or whe-[75]-ther it vested in her and her deceased brothers and sisters on the testator's death.

Mr. Knight Bruce and Mr. Cooke, for the Plaintiff. The gift of the principal of the sum of stock is an immediate gift: the enjoyment of it only is postponed. The bequests of £100 each to the children of Dorothy and John Martin are bequests to children living at the testator's death; and the bequest of the residue is to the testator's nephews and nieces living at the same time.

Mr. Jacob and Mr. Chandless, for Horace Watson, the testator's personal representative.

Mr. Follett, for Mary Martin. There is no gift of the principal of the sum of stock until after the death of the surviving annuitant: in such a case the period of distribution and of the gift is the same. At the testator's death there was no fund that could vest in the children of the annuitants. Where the principal of a fund is given and a life interest is taken out of it, it vests immediately; but not so where there is no immediate gift. In *Pope v. Whitcombe* (3 Russ. 124) the Lord Chancellor says: "By the terms of this will, the interest of the residue was given by the testatrix to her brother, William Pope; and the executors were authorized to place out the fund as they should think proper, during his life; and, from and after the death of William Pope, the residue itself was given to the executors, in trust for the persons therein named, and the survivors and survivor of them, share and share alike, to be paid [76] or assigned to them respectively as they should attain the age of 21 years, with interest in the meantime until they should be entitled unto and should receive their shares respectively. By this will the testatrix bequeathed only the interest of the fund during the life of William Pope; the principal was not given until after his death. That also was the period assigned by the testatrix for the distribution of their proportions of the fund among such of the legatees as were then of the age of 21, and from which the division of the interest was to be made with reference to

those who had not attained that age. I think, therefore, that those only of the legatees who were living at the death of William Pope are entitled to share this property." In the present case there is no immediate gift except of the annuity; the principal is not given until after the death of the surviving annuitant: and, consequently, my client, who was the only child of the annuitants who was then living, is entitled to the whole fund.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not see much resemblance between this case and the case cited: as there, the question was who was to take under the description of survivors and survivor.

In this case the testator, besides his sisters Dorothy Martin and Mary Tunstall and his brother Joshua, to each of whom he gives an annuity, mentions another sister, Jane, and another brother, Daniel, and makes certain gifts to their children, whom he names. Then he gives the three annuities; and, in a subsequent part of his will, he says: "The residue of my property, if any, to be equally divided between my nephews and nieces." That, therefore, is a gift to all the persons answering the description of his nephews and nieces, [77] whether before mentioned or not. Then he says: "If the annuities are paid by the interest of purchasing money in the stocks; at the death of the different parties, the principal to be divided between the children of the deceased." Now, as the annuitants were only three out of five of his brothers and sisters, it is plain to me that he meant to make, by this last clause, a bequest different from the gift of the residue to his nephews and nieces: that is, to the children of all his brothers and sisters. And in my opinion the true construction of the last bequest in the will is that, as each annuitant dies, the principal of the stock purchased to answer the annuity is to be divided between the children of that annuitant; so that it is, in effect, an immediate gift in remainder to all the children of the annuitant; and, therefore, the children of the annuitant living at the death of the testator took a vested interest in the principal of the stock, as tenants in common.

[78] EMPRINGHAM v. SHORT. July 4, 6, 29, 1840.

Practice. Report. Confirmation.

On a motion to commit a Defendant for a contempt, the Defendant undertook to make reparation for the act complained of. Whereupon the Master was directed to inquire what reparation the Defendant ought to make; and he was ordered to make such reparation accordingly; and to pay to the Plaintiff the costs of the application and consequent thereon. Held, that the report made in obedience to the order did not require confirmation.

On the hearing of a motion to commit the Defendant for breach of an injunction, by which he was restrained from committing waste on part of the estates of the testator in the cause, the Defendant undertook, by his counsel, to make such reparation for the damage done by him as the Master should award; and, thereupon, an order dated the 25th of May 1839 was made, which, after referring to the undertaking, proceeded thus: "This Court doth order that it be referred to the Master of this Court in rotation, to inquire what reparation the Defendant, James Short, ought to make for the damage done to the testator's estate, in ploughing up the 12a. 1r. 4p. of pasture land in the pleadings mentioned, and sowing the same with mustard, flax and poppy seed; and it is ordered that the Defendant, James Short, do make such reparation accordingly, and pay unto the Plaintiff the costs of this application and of the said inquiry, and consequent thereon, to be taxed by the Master."

On the 9th of November 1839 the Master, in obedience to that order, reported as follows:—"I am of opinion that the reparation which the said Defendant, James Short, ought to make for the damage done to the said testator's estate, in ploughing up the 12a. 1r. 4p. of pasture land in the pleadings mentioned, and sowing the same with mustard, flax and poppy seed, is the sum of £150, to be paid by him into the bank to the credit of this cause: and that the said Defendant, James Short, shall

be permitted to use the [79] said land as arable land in future, treating the same in a good and husbandlike manner; and that he shall take therefrom no more than two crops of corn in succession, without fallowing, one of such crops only to be wheat: and shall not, in future, plant or sow on the said land any mustard, flax, hemp, poppy seed, woad or other injurious roots or seeds, or permit any cole or turnips to stand thereon for a crop of seed; and the said Defendant is to make such reparation accordingly as the said order directs: and the bill of costs of the said Plaintiff, of the application for the said order and of the said inquiry and consequent thereon, amounting to the sum of £51, 7s. 10d., I have taxed at the sum of £48, 0s. 2d.: and the same is to be paid by the said Defendant, James Short, to the said Plaintiff, as the said order also directs.”(1)

The Plaintiff did not move to confirm the report; but, on the 25th of November 1839, he obtained an order, on notice, for payment of the £150 into Court, pursuant to the report.

Mr. Knight Bruce and Mr. Sharpe, for the Defendant, now moved to discharge that order for irregularity, on the ground that it had been obtained without the report being confirmed; whereby the Defendant was prevented from excepting to the report as he had intended to do. They cited *Chennell v. Martin* (*ante*, vol. iv. p. 340), and *Scott v. Livesey* (2 Sim. & Stu. 300), and 2 Smith's Pract. 357.

[80] Mr. Jacob and Mr. W. M. James, for the Plaintiff, said that, as the report had been made in pursuance of an interlocutory order, it did not require confirmation; and that it appeared, from the order, that the report to be made in pursuance of it was to be final; for otherwise it would have concluded in the following words:—“And thereupon such further order shall be made as shall be just:” and, moreover, it directed the Defendant to make the reparation, and to pay to the Plaintiff the costs of the application and consequent thereon.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have had a conversation with the registrar upon the subject of the order sought to be discharged in this case; and I find that it is difficult to determine, by any general rule, what are the reports which this Court requires to be confirmed, and what are those reports which are taken to be sufficient for the Court to act upon though they be not confirmed. With respect to the latter class of reports, it seems to be rather singular that, notwithstanding they do not require confirmation, yet they may be excepted to.

But when I look at this particular report, coupled with the order which gave rise to it, and see the way in which the order was drawn up, I cannot but think that it is a report which ought to have been confirmed; and that it was quite a surprise upon the Defendant to move, in the way that was done, that the money should be paid into Court.

The order of reference in this case was of a very special kind; and, under it, the Master finds what sum ought to be paid by way of reparation for the damage done to that part of the testator's estate which was in [81] the Defendant's possession; and that that sum ought to be paid by the Defendant into Court to the credit of the cause. Then the Master goes on to state, as part of his finding, the particular mode of using the land in future.

Now the Court was not asked, by the notice of motion upon which the order of the 25th November was made, to confirm the report; but to carry only a portion of it into execution. The Defendant had carried in objections to the report; and it strikes me that, if the notice of motion had been to confirm the report, he would have seen what was the object of the party, and most probably would have matured his objections into exceptions. But the particular mode in which the notice was given appears to me to have thrown him off his guard.

I cannot but think that the report, upon the face of it, is one that required confirmation, and that the order that was drawn up was wrong: and the registrar informs me that, if his attention had been called to the report, he would not have drawn up the order without the report being confirmed.

(1) That part of the above report which relates to the mode of cultivating the land in future seems not to have been warranted by the order.

The consequence is that the order of the 25th of November 1839 must be discharged with costs.

On the 29th of July the Plaintiff moved Lord Cottenham, C., to discharge the Vice-Chancellor's order.

His Lordship said that the order of the 25th of May was final ; that it directed the Defendant to make the reparation when the amount should be ascertained by [82] the Master : and his Lordship granted the motion, and directed the Defendant to pay the costs of the application made to the Vice-Chancellor.

[82] STOPFORD v. LORD CANTERBURY. July 1, 2, 1840.

[S. C. 4 Jur. 842.]

Infant. Maintenance. Parties.

A., on his son's marriage, vested certain funds in trustees, in trust, after the deaths of himself and his son, for the daughters of the marriage at the usual periods, and, in the meantime, to apply the income of each daughter's share, or so much thereof as the trustees should think proper, for her maintenance and education. The son died, leaving an only daughter, an infant. Her mother married again. The infant, to whom no guardian was appointed, was maintained and educated by her mother and step-father ; and A. paid them, first, £200, and afterwards £300 a year, on the infant's account ; and, upon A.'s death, his widow continued to pay the £300 a year, and received the income of the trust funds for her own benefit, conceiving that she was entitled so to do under A.'s will. The infant being about to be married, the settlement was referred to ; and it was then discovered that the income of the trust funds amounted to £800 a year. Whereupon the mother and her second husband, who had expended much more than £300 a year in the infant's maintenance and education, filed a bill against A.'s widow and the trustees (but without making the infant or her husband parties), in order to recover their extra expenditure. The trustees admitted that the extra expenditure had been properly incurred, and that they should have increased the allowance for the infant had they been applied to. The Court directed the Master to inquire what was proper to be allowed to the Plaintiffs for the infant's maintenance and education from A.'s death until the infant's marriage.

By the settlement on the marriage of Richard John Tibbits, the son of Charles Tibbits, with Horatia Elizabeth Lockwood, dated in April 1817, certain estates in Warwickshire, the property of Charles Tibbits, were limited to Charles Tibbits for life, with remainder to R. J. Tibbits for life, with remainder to the first and other sons of the marriage, successively, in tail male, [83] with remainder to trustees, for the term of 600 years, upon trust to raise the sum of £10,000 for or towards the portion of the daughter or daughters of the marriage, and to be paid to and become vested in her or them on her or their attaining 21, or marrying under that age : and it was declared that the trustees should stand possessed of the sum of £13,793 consols therein mentioned, in trust for Charles Tibbits for his life, and, after his decease, in trust for Richard John Tibbits for his life, and, after the decease of the survivor of them, upon the trusts thereafter declared : and it was thereby declared that, when certain stocks, funds and securities constituting the portion of Horatia Charlotte Lockwood should be transferred to the trustees, pursuant to the trusts and directions thereinbefore contained, (1) the trustees should stand possessed thereof in trust for R. J. Tibbits during his life ; and that, subject thereto and to the trusts thereinbefore declared concerning the £13,793 consols, the trustees should stand possessed thereof and of the stocks, funds and securities so constituting the portion of Horatia C. Lockwood, in trust for the children of the marriage (except an eldest or only son)

(1) It did not appear that these funds were ever transferred.

who, being sons, should attain 21, or, being daughters, should attain that age or marry under it ; and if, at the death of the survivor of Charles Tibbits and Richard John Tibbits, there should be living any child who should not then have attained a vested interest under the last-mentioned trust, then upon trust to pay the dividends of such child's presumptive share of the trust fund, *or so much of such dividends as the trustees should think proper, in and towards the maintenance and education of such child*, until his or her share should become vested and payable ; and to lay out the residue of such [84] dividends to accumulate, and the accumulations to be held upon the same trusts as the share out of which they should have arisen should, for the time being, be subject to.

Richard John Tibbits died in 1821, leaving his wife surviving, and also a daughter, Mary Isabella Tibbits, then only two years and a half old, who was the only issue of the marriage.

From the death of Richard John Tibbits until the death of Charles Tibbits the latter paid to Horatio Charlotte Tibbits £200 a year for the maintenance and education of Mary Isabella Tibbits ; and, after she attained the age of seven years, he, in consequence of an application made to him by H. C. Tibbits, paid her yearly the further sum of £100 for the same purpose ; and the £300 a year continued to be paid during the lifetime of C. Tibbits, on the footing that the whole amount provided for the maintenance of the infant, by the settlement, was the sum of £200 a year, and that the further sum of £100 a year was paid by way of gift by Charles Tibbits.

Charles Tibbits, being seized in fee of the Warwickshire estates, subject to the limitations and trusts of the settlement, and also of estates in Northamptonshire and Buckinghamshire, made his will, dated the 18th of June 1828 ; and, thereby, after reciting that, in consequence of his son, Richard John Tibbits, having died without issue male, he was seized in fee of the Warwickshire estates, subject to the term of 600 years created by his son's settlement, for raising £10,000 for the portion of an only daughter of the marriage, to vest in her at 21 or on marriage, with power to the trustees of the term to raise such sum annually for the maintenance of such [85] daughter, until her portion should become payable, as they should think fit, not exceeding the interest of her portion at the rate of four per cent. per annum ; and that his estate in Northamptonshire was vested in him in fee, subject to a rent-charge of £1200 per annum payable, thereout, to his daughter-in-law, Horatio Charlotte Tibbits, for her jointure, and to a term of 500 years for better securing that jointure, and for raising, in the event which had happened of the death of his son in his lifetime leaving issue of his marriage, a yearly sum of £200, during the testator's life, for the maintenance of the child of that marriage ; and that his granddaughter, Mary Isabella Tibbits, would, in case of her surviving him and attaining the age of 21 years or being married, be entitled, under the trusts declared in the settlement of his Warwickshire estates, to the sum of £13,793 consols, and would, under the same settlement, be entitled, in case of her surviving her mother, to have the interest of her mother's portion applied for or towards her maintenance during her minority ; he devised his estates in the three counties before mentioned and elsewhere to trustees for 200 years, to commence from the day of his decease, upon the trusts thereafter declared, and, subject thereto, to the use of his wife, Mary Tibbits, for her life, with divers remainders over ; and he declared the trusts of the term of 200 years to be for raising the yearly sum of £600 to be applied in keeping his mansion-houses in Northamptonshire and Bryanstone Square in repair ; and, if the determination of the estate thereinbefore limited to his wife should happen during the minority of his granddaughter, Mary Isabella Tibbits, then that the trustees of the term should, during the minority of his granddaughter, receive the rents of the devised estates, and, after applying the annual sum of £600 in the manner before mentioned, should apply [86] the surplus thereof or so much thereof as they, in their discretion, should think fit, for the maintenance, education or benefit of his granddaughter, in such manner as to them, in their uncontrolled discretion, should seem meet, or, if Horatio Charlotte Tibbits should be living and remaining his son's widow, to pay such surplus or any part thereof, at their or his uncontrolled discretion, to Horatio Charlotte Tibbits, being a widow as aforesaid, for the better support and maintenance of herself and Mary Isabella Tibbits and the education of the latter ; and to accumulate the

residue of the rents of the devised estates, and to stand possessed of the accumulations in trust to transfer the same to Mary Isabella Tibbits on her attaining 21 or being married; and he appointed his wife the executrix of his will.

After the date of the will Horatio Charlotte Tibbits married Colonel Stopford, with the approbation of the testator; and the testator afterwards made a codicil to his will by which he bequeathed a leasehold house in Connaught Square, which he had purchased, to trustees in trust to permit Colonel and Mrs. Stopford and the survivor of them to have the use and enjoyment thereof during their lives and the life of the survivor rent free; and he directed his executors to pay the ground rent of the house out of his personal estate, and that, subject thereto, the house should be considered as part of his personal estate.

The testator died on the 19th of July 1830; and, on his death, Mary Tibbits entered into the possession or receipt of the rents of his real estates, and into the receipt of the dividends of the £13,793 consols, and she continued in such possession or receipt at the institution of the suit.

[87] The bill, which was filed in December 1837 by Colonel and Mrs. Stopford against the trustees of the settlement and Mary Tibbits, after stating as above, alleged that the infant resided with the Plaintiffs until her marriage, and that Mary Tibbits paid to the Plaintiffs the yearly sum of £300; and that the same was paid to them as the whole amount to which the infant was entitled for her maintenance and education under the trusts of the settlement; and that the Plaintiffs were given to understand, and did, in fact, understand and believe, until the time after mentioned, that that yearly sum was the full amount of the provision secured, under the trusts of the settlement, for the infant's maintenance and education; that the Plaintiffs maintained and educated the infant in a manner suitable to her station in society, and applied the £300 a year for that purpose; but the expense incurred by the Plaintiffs in respect of the infant's maintenance and education considerably exceeded that sum; that, early in the year 1836, the Plaintiffs applied to Mary Tibbits to increase the allowance; but she refused so to do; that, in 1837, upon the occasion of the treaty for the infant's marriage,⁽¹⁾ it was necessary to refer to the settlement; and the Plaintiffs then ascertained, for the first time, that the funds applicable for the infant's maintenance greatly exceeded £300 a year, and would have been sufficient to indemnify the Plaintiffs for the expenses incurred by them in the infant's maintenance and education; that, with the exception of the £300 a year, Mary Tibbits had received and applied for her own purposes the whole amount of the rents of the manors, messuages, &c., stocks and funds out of which the amount properly applicable for the infant's main-[88]-tenance and education ought, pursuant to the trusts of the settlement, to have been paid; that, upon discovering the amount of the funds provided for the infant's maintenance and education, the Plaintiffs applied to Mary Tibbits to pay them a sufficient sum to defray the expenses incurred by them as before mentioned; but she refused to make them any payment beyond the £300 a year.

The bill prayed that the Defendants might be decreed to pay to the Plaintiffs, under the trusts of the settlement, the full amount of the expenses incurred by the Plaintiffs in respect of the infant's maintenance and education beyond the £300 a year; and, if necessary, that it might be referred to the Master to take an account of the amount proper to be allowed to the Plaintiffs in respect of the infant's maintenance and education beyond the £300 a year; and that the Defendants might be decreed to pay to the Plaintiffs what the Master should find to be the proper amount to be paid to them for that purpose.

The Defendant, Mary Tibbits, in her answer, set forth a part of the testator's will, not contained in the bill, by which the testator devised all his real estates, after her decease, to the infant and her sons and daughters in strict settlement, and declared that such devise was made upon condition that the infant, either alone or together with any husband whom she might marry, should, within 12 calendar months next after she should have become competent in that behalf, upon being requested so to

(1) The infant married Lord Hood in June 1837.

do by the trustees of the testator's residuary personal estate, release his Warwickshire estates from the £10,000 and the interest thereof, and should, within the like period, assign the £13,793 consols, and also [89] her mother's portion, to the last-mentioned trustees, upon the trusts thereafter declared of such residue; and that, in case the infant or her husband should refuse or neglect to make such release or assignment, then all the limitations therein contained to or in favour of the infant or her issue should cease. The answer then stated that the residue of the testator's personal estate was by his will bequeathed to trustees in trust, to be invested in the purchase of real estates to be settled to the same uses as the devised estates, with directions that the interest, dividends and annual produce of such residue should, in the meantime, go and be paid to such person or persons as the rents of the estates to be purchased would have gone in case such purchases had been made. The answer also stated that from 1830 to 1835, both inclusive, the infant and her governess and maid-servant had resided for several months in each year with the Defendant; that from 1830 to 1837 the Defendant had paid for the salary of the governess and otherwise for the infant's use or benefit sums amounting in the whole to £1980; that she did not believe that the £300 a year was insufficient to meet such of the expenses of maintaining and educating the infant in a manner suitable to her station in society as were borne by the Plaintiffs, or that the expenses incurred by the Plaintiffs in respect of the infant's maintenance and education did considerably exceed £300 a year; that she considered that the amount of expenditure in respect of the maintenance and education of the infant, except the yearly sum of £200, was, by her late husband's will, left in her discretion; and she was led to suppose that the £200 a year continued payable for the infant's maintenance, under the settlement, from the circumstance of an abstract of the will having been delivered to her, in which it was omitted to be stated that the £200 a year [90] was payable during the testator's life only; and that she acted throughout under that impression. The Defendant, at the conclusion of her answer, claimed the same benefit from it as if she had demurred to the bill for want of equity.

The trustees in their answer said that they believed that the sums expended by the Plaintiffs in the infant's maintenance and education considerably exceeded £300 a year; that in 1837 they received from the Plaintiffs a statement of such expenses, and, having been advised that the same was just and reasonable, they wrote a letter to the Defendant, Mary Tibbits, in which they stated that they were bound to consider the claim which was made in January 1830 upon her for an increase of the infant's maintenance from that time, to stand in the same situation as if it had been made upon them personally; and that they were of opinion that if the claim had been made upon them, they should have awarded an allowance of £700 a year, from January 1836 to the then present time; and that they were of opinion that the payments made by Mary Tibbits to Mrs. Stopford, from 1831 inclusive to January 1836, ought to be made up to £550 per annum, which would not reach the actual expenditure incurred; and that from January 1836 down to the then present time the payment ought to have been made after the rate of £700 per annum. The trustees further said that if the Plaintiffs had applied to them at an early period for an increase of the allowance for the infant's maintenance, they should have been ready and willing to have made such an addition thereto, by virtue of the discretionary power vested in them, as to them should have appeared just and reasonable; and that they were satisfied that the expenses incurred by the Plaintiffs in the infant's [91] maintenance and education had been properly incurred, and that the Plaintiffs ought to be repaid the same.

Mr. Knight Bruce and Mr. James, for the Plaintiffs. The trustees, not being aware of the nature of their trust and no application having been made to them respecting the infant's maintenance, allowed Mrs. Tibbits to receive the whole of the rents of the estate and of the dividends of the stock out of which the maintenance was to come. They admit, however, in their answer, that the sum which was paid for the infant's maintenance was inadequate, and that if an application had been made to them, they should have exercised the discretion given to them by the settlement, and granted a considerable increase. Mrs. Tibbits must be taken to have had notice of the trust; and as the funds which were subject to the trust have come into her hands,

she has become a trustee of them. The real fact is that all parties have acted under a mistake; and on that ground the Court ought to interfere.

The case of *Maberly v. Turton* (14 Ves. 499) is a strong authority for allowing past maintenance in the present case.

Mr. Stuart and Mr. K. Parker, for the trustees, said that their clients considered the claim made by the Plaintiffs to be fair and reasonable, but that they left it to the decision of the Court.

Mr. Jacob and Mr. Stinton, for Mrs. Tibbits. The case of *Maberly v. Turton* is distinguishable from the present; for in that case, there being no [92] acting trustee, the father of the infants had received the income of the trust fund and applied it for the maintenance of his children, and the only question was whether he ought to be allowed the sums which he had so applied; and, therefore, it was referred to the Master to enquire whether it would have been reasonable and proper for the trustees to apply any and what part of the income of the fund for the children's maintenance.

The bill alleges that for seven years the infant resided with the Plaintiffs and was maintained by them, and that they expended much more than £300 a year on account of her maintenance; but Mrs. Tibbits, in her answer, expressly denies those allegations, and there is no evidence in support of them. She swears that, during the first five years, the infant, for several months in each year, resided with and was maintained by her, and that she paid the governess's salary and defrayed other expenses to a large amount on the infant's account; and that the £300 a year was sufficient to meet all the expenses which the Plaintiffs incurred on the infant's account. So that not only is there no evidence of any extra expenditure on the part of the Plaintiffs; but, if the Court were to enforce the claim made by the bill, Mrs. Tibbits would have to pay twice for the infant's maintenance.

It is difficult to discover the principle upon which the claim made by this bill is founded. If a person maintains another person's child, he may have a moral claim to be reimbursed what he has expended in maintaining the child; but he can have no claim which he can enforce either in a Court of law or in a Court of Equity. The infant naturally resided with her mother and step-father; and they received £300 a year from [93] Mrs. Tibbits: but neither Mrs. Tibbits nor the trustees entered into any contract with them for the maintenance of the infant. They were not appointed the guardians of the infant, nor indeed was any other person appointed her guardian, and if this bill is sustainable, any person whatever who had expended money for the infant, or the governess, on the ground that she had received an inadequate salary, might file a similar bill. The Plaintiffs, after having contributed to the maintenance of the infant for several years and received a certain yearly sum for that purpose, discovered that a larger provision had been made for her than they were before aware of; and, in consequence of that discovery, they come to this Court and allege that they have expended more than the £300 a year in the infant's maintenance, and ask to be reimbursed their extra expenses. Even where an infant is a ward of the Court, it is by no means of course to make an allowance for past maintenance. There is, however, a great difference between the case of this infant and that of a ward of Court; for in the latter case the Court has a certain control over the infant's property, and assumes to do what the infant is morally bound to do; but such a claim as is now made was never before heard of. If a person who had maintained an infant were to file a bill for the money which he had expended against the infant after it had attained majority, there can be no doubt that the bill would be dismissed, there being no contract or trust to support it. It is said in this case that all parties were under a mistake as to the amount of the provision made for the infant, and that the mistake was not discovered until the infant was about to be married. But if the discovery had been made at an earlier period, no increase of the allowance would have been made for the time past; [94] although, if the infant had been a ward of Court, an increase would have been made for the time to come. For the future maintenance might be upon a higher scale; but the bygone maintenance, which the Court would assume to have been commensurate to the allowance, could not be put upon a better footing.

It clearly appears from the testator's will that he intended his granddaughter to renounce all her right to the interest as well as the principal of the sums to which

she was entitled under the settlement, and that his widow should receive the interest of those sums during her life: and, although his granddaughter would be thereby deprived of all provision during her grandmother's lifetime, yet he doubtless thought that he could safely trust to the affection and liberality of the grandmother to make a proper provision for her grandchild.

Lastly, we submit that, at all events, the claim made by this bill cannot be dealt with, without having Lord and Lady Hood before the Court.

Mr. Knight Bruce, in reply. The objection for want of parties has been taken too late. The Defendants have elected to abide by the consequences that may result from any deficiency of parties; and the cause must now proceed in its present state; and be disposed of on its merits. Mrs. Tibbits has received that income which was applicable to the maintenance of Lady Hood: and the object of the suit is to recover from her the extra expenditure incurred by the Plaintiffs in maintaining and educating Lady Hood. Neither Lord nor Lady Hood can be prejudiced by anything that can take place in this suit.

[95] This Court encourages the maintenance and education of infants; and on that ground, and not on the ground of contract, it allows a person who has been maintaining an infant a reasonable compensation out of the property of the infant which is applicable to maintenance. If an infant has a large expectancy but no present provision, the Court, on the infant succeeding to its fortune, will allow past maintenance to the relative, or even to the father, who has maintained the infant. The infant is not interested in the past, but only in the future maintenance; and, therefore, the person who has incurred the expenditure, and not the infant on whose behalf it has been incurred, is the proper person to apply for the reimbursement.

It is admitted that the trusts of the settlement were forgotten by all parties; in consequence of which the trustees never exercised, nor were called upon to exercise, the discretion given to them by the settlement, respecting the provision for the infant's maintenance, nor acted in any other manner, in the execution of the trusts of the settlement: and that being so, the principle of the decision in *Maberly v. Turton* applies to the present case: for there Lord Eldon, C., says: "The fact that there were no trustees, or that the trustees never acted, which is in effect the same, imposes upon the Court the necessity of examining strictly what the trustees ought to have done." And his Lordship then directs a reference to the Master, with a view to the Court's exercising that discretion which, by the will, was vested in the trustees. That case corresponds in every respect with the present; and on the principle established by it, as well as on the long acknowledged ground of mistake, this Court is bound to interfere in the manner prayed by the bill; more especially [96] as the trustees admit that in addition to the board and lodging furnished by Mrs. Tibbits and the sums which she alleges she expended on the infant's account, an expenditure greatly exceeding the allowance of £300 a year was properly incurred by the Plaintiffs, and ought to be reimbursed to them; and as they admit also that if the Plaintiffs had applied to them at an earlier period for an increase of the allowance, they should have granted it by virtue of the discretionary power vested in them by the settlement, which they were not aware that they possessed, until it was called to their attention shortly before the infant's marriage.

Then it has been argued that the effect and intention of the will was to deprive the infant of the provision made by the settlement for her maintenance: but I deny that that is the effect of the will, or that any such effect could be given to it.

[THE VICE-CHANCELLOR. I will not trouble you to argue that point: for the words, "the interest thereof," are applied to the sum of £10,000 only; and it seems to me that, of necessity, those words cannot mean the interest to accrue during the infant's minority.] The will then being out of the question, I ask for a reference to the Master in such terms as will give Mrs. Tibbits the benefit of every shilling which can be brought by her into account and set off against the claim of Colonel Stopford.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the young lady in question was contingently entitled, under the settlement made on the marriage of her father and mother, to the sum of £10,000, which was secured by a term of 600 years, and also to [97] the sum of £13,793 consols: and the trustees of the settlement, if they

had thought proper, might have applied the whole of the interest of the £10,000 at four per cent., and of the dividends of the £13,793 consols, for her maintenance and education, during her minority or until she married. In point of fact, however, the trustees never exercised any discretion whatever as to the amount of the sum proper to be allowed for the purposes before mentioned.

The young lady lived with Colonel Stopford, who had married her mother after her father's death; and the trustees allowed her grandmother to receive the whole rents of the estates comprised in the term of years, of which she was tenant for life subject to the term; and also allowed her to receive the dividends of the consols. It is stated, however, that the trustees, if their attention had been called to the subject, would have allowed for the young lady's maintenance and education £550 a year at one time, and £700 at a subsequent time; so that, at anyrate, they would have allowed considerably beyond £300 a year, which was the amount of what Mrs. Tibbits herself paid for the maintenance of her grandchild. Although the discretion to which I have alluded was vested in the trustees, yet it seems that they did not exercise it, because Colonel and Mrs. Stopford were not aware of the provision made by the settlement for the maintenance and education of Miss Tibbits, and, therefore, never applied to the trustees to exercise any discretion on the subject. It seems to be very singular indeed that they were not aware of it, because Colonel Stopford and his wife took a benefit under the codicil to the will; and the will itself seems sufficiently to call the attention of parties who read it to the fact that there was this settlement, both of the £10,000 and also of the consols, for the benefit of the testator's granddaughter; and, indeed, the very provision that the will makes for the granddaughter releasing her right to those sums, as soon as she should be competent so to do, sufficiently indicates the fact that a portion was provided for her, and that she was entitled to be maintained and educated out of the income of it until the capital should become vested in her; although nothing very definite is said about the discretion of the trustees. But, as I said before, the trustees did not exercise any discretion; and matters were allowed to go on as before, until after the marriage of the young lady, and then this bill was filed, which demands payment of that sum which ought to have been allowed if the trustees had exercised the discretion given to them by the settlement.

Now I cannot but think that the letter which was written to Mrs. Tibbits by the trustees sufficiently shews what the opinion of the trustees was, and that, therefore, though there may be no admission in the answer of Mrs. Tibbits that enough was not paid, yet the mode in which the trustees have dealt with the question raises sufficient grounds for directing an inquiry on the subject. My opinion is that if, in point of fact, Colonel Stopford was at any expense for the maintenance and education of this young lady in a liberal manner, beyond what the sum of £300 a year allowed by the grandmother would satisfy, according to the doctrine of this Court, he would have been entitled to have called on the trustees to exercise the discretion given to them by the settlement, if he had been aware that they had any such discretion, and, if they had exercised a fair discretion, he would then have received from them what they thought proper to be allowed; [99] and, if the Court had thought that the discretion was fairly exercised, he could have obtained no more. But, if the trustees had not chosen to exercise any discretion on the matter, I take it to be perfectly clear that this Court would have interfered, and have exercised a discretion for them.

Inasmuch as what has occurred in this case appears to have happened by a sort of mistake by an accidental want of knowledge or consideration of what the real circumstances of the case were, I apprehend that this Court will interfere.

And as the sums of money which might have been applicable for the increased maintenance have been, in fact, received by Mrs. Tibbits, I do not feel my mind very much oppressed by the objection that there are not sufficient parties before the Court: because I apprehend that the money which ought to have satisfied the increased maintenance did, by mistake, come into the hands of Mrs. Tibbits. She, therefore, is the person who can, eventually, be made accountable for it; and I do not think it necessary at present that there should be any further parties to the record. My opinion, therefore, is that there ought to be such a reference as that which is asked.

Let it therefore be referred to the Master to inquire and state what, if anything, is proper to be allowed and paid to the Plaintiff, Colonel Stopford, in respect of the expenses of the maintenance and education of the infant, from the death of her grandfather to the time of her marriage, beyond the yearly sum of £300, with liberty to state all special circumstances; and reserve further directions, and give all parties liberty to apply as they shall be advised.

[100] FULCHER v. HOWELL. July 6, 1840.

Parties. Insolvent. Assignee.

Although, on the death of the assignee of an insolvent's estate, any creditor of the insolvent may get a new assignee appointed by the Insolvent Debtors Court, and all the insolvent's property which was vested in the deceased will immediately thereupon become vested in the new assignee, yet, where no new assignee has been appointed, a party having a demand against the insolvent, but not having proved under the insolvency, may sue the executors of the deceased assignee.

The Plaintiffs were interested in the personal estate of Nathaniel Fulcher, deceased, under the trusts of his will. Nathaniel Fulcher, a son of the testator, was a legatee under the will, and the sole acting trustee and executor thereof. In August 1824 the Plaintiffs filed a bill against Nathaniel Fulcher, the son, and the other executors and trustees, praying that the trusts of the will might be executed under the direction of the Court, and that an account might be taken of the testator's personal estate and effects which had been received by Nathaniel Fulcher, the son, and that the same might be applied in a due course of administration; and that Nathaniel Fulcher, the son, might be decreed to make good what should appear to be due from him on taking the account, and might be charged with interest on sums improperly retained, received or converted by him.

All the Defendants answered the bill, and a receiver of the testator's personal estate was appointed; but no further proceedings were had in the suit until May 1840, when the Plaintiffs filed a supplemental bill, alleging that it had been lately discovered, as the fact was, that on or about the 3d of March 1828 Nathaniel Fulcher, the son, took the benefit of the Act then in force for the relief of insolvent debtors, and that his estate and effects were assigned to George Howell, in trust for himself and the other creditors of Nathaniel Fulcher; and that the Plaintiffs were advised that the beneficial estate and interest of Nathaniel Fulcher under the [101] will of the testator thereby became vested in Howell, subject, nevertheless, to such equities as affected the same, as against Nathaniel Fulcher, in favour of the Plaintiffs and the other parties interested under the will; that in May 1832 Howell died, having made his will, and thereby appointed the Defendants, Ann Barbara Howell, Thomas Foster, Thomas Lovell Rogers and William White, executrix and executors thereof; that, by reason of the insolvency of Nathaniel Fulcher and of the assignment of his estate and effects, the original suit and the proceedings therein became defective; and that the Plaintiffs were advised that, inasmuch as no assignee of the estate and effects of Nathaniel Fulcher had been appointed in the place of Howell, Nathaniel Fulcher's beneficial estate and interest under the will became, upon Howell's death, and still were vested in the Defendants as his representatives; and that the Plaintiffs were entitled to prosecute the suit against them and to have the same or the like relief in respect of the defaults, misfeasances and liabilities of Nathaniel Fulcher, in the original bill mentioned, in respect of such beneficial estate and interest, as they would have been entitled to have against Nathaniel Fulcher if he had not become insolvent and made such assignment of his estate and effects as before mentioned; that the Defendants, as representing Nathaniel Fulcher, claimed to be entitled to such beneficial estate and interest as Nathaniel Fulcher was entitled to at the time of his discharge under his insolvency.

The supplemental bill prayed that the Plaintiffs might be declared to be entitled to the benefit of the original suit and the proceedings therein, and to prosecute the

same against the Defendants as Howell's legal personal representatives; and that they might have the [102] same or the like relief in respect of the matters contained in the original bill, and, in particular, as to the defaults, misfeasances and liabilities of Nathaniel Fulcher in the original bill mentioned, in respect of his said beneficial estate and interest, so far as the same would extend and could be made available, as they would have been entitled to against Nathaniel Fulcher if he had not become insolvent and not made the said assignment of his estate and effects.

The Defendants demurred to the supplemental bill, because no assignee of Nathaniel Fulcher, the insolvent, was made a party thereto.

Mr. Jacob and Mr. Chandless, in support of the demurrer. The bill seeks to charge the interest of the insolvent executor with all his defaults and misfeasances; but no person capable of protecting the interest of the creditors under the insolvency is a party to the suit. It is of the utmost importance to the creditors that there should be an assignee appointed; and, under the 65th sect. of 1 & 2 Vict. c. 110 (for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England) the Plaintiffs may get a new assignee appointed at any time. That section enacts that, in case of the death of an assignee of the estate and effects of an insolvent, it shall be lawful for any creditor of the insolvent to apply to the Insolvent Debtors Court to appoint a new assignee with like powers and authorities as are given by the Act to the original assignee; and that the Court shall have power to compel the heirs, executors or administrators [103]-trators of the deceased assignee to account for and deliver up to the Court, or as the Court shall order, all such estate and effects, books, papers, writings, deeds and other evidences relating thereto as shall remain in his or their hands, to be applied for the purposes of the Act; and that the decision of the Court in the matters aforesaid shall be final and conclusive; and that, from and immediately after such appointment of a new assignee and by virtue of the order of the Court in that behalf, all the estate, effects, rights and powers of the insolvent, vested in the former assignee, shall become vested in the new assignee, without any assignment or conveyance executed in that behalf. So that any creditor of the insolvent may get a new assignee appointed; and, as the Act vests all the insolvent's property in the new assignee, without a second assignment being made, it takes away from the representatives of the deceased assignee all power of interfering with the property. The reasoning of Sir John Leach, V.-C., in *Lloyd v. Lander* (5 Madd. 282; see 289) is very applicable to the present case. His Honor says: "It must be admitted that the real estate of the bankrupt is not formally taken out of him until a bargain and sale is executed; but the effect of the bankrupt laws is immediately to vest the real estate of the bankrupt potentially, though not formally, in the assignees. They can call for the formal transfer at their pleasure; and the real estate of the bankrupt is as much bound by the contracts of the assignees before the bargain and sale as it is afterwards. Before the bargain and sale, therefore, all beneficial interest is out of the bankrupt, and he differs from every other person who, in form, retains a legal estate; that he has no power of affecting that estate; and that it passes from [104] him, not by his own act, but by the act of others, and without his will. Having thus neither interest nor power in the subject of the suit, which requires to be bound by the decree of the Court, it is difficult to conceive any principle upon which he can be considered as a necessary party."

Mr. Knight Bruce and Mr. Anderdon, in support of the bill, said that the Plaintiffs had not gone in and proved under the insolvency, and, therefore, the section of the Act which had been referred to did not apply to them.

Mr. Chandless, in reply, said that any creditor of the insolvent might apply to the Insolvent Debtors Court to have a new assignee appointed, whether he had proved under the insolvency or not.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not accede to the objection that has been made to the supplemental bill in this case.

It seems to me that, as a matter of course, all the interest in the property of the insolvent which was vested in the deceased assignee does, by operation of law, vest in his executors until a new assignee is appointed; and that, when a new assignee is

appointed, all the interest of the executors vests, under the Act, in that new assignee ; and if in the intermediate time any money or other property belonging to the insolvent comes to the hands of the executors, the section of the Act which has been referred to enables the Insolvent Debtors Court to order the executors to deliver it up to the new assignee.

[105] In this case, however, no new assignee has been appointed ; and, as the Plaintiffs have not gone in and proved against the insolvent's estate, they are not in a situation to apply to the Insolvent Debtors Court for the appointment of a new assignee ; and, therefore, I think that it was justifiable in them to file the supplemental bill against the executors of the deceased assignee.

Demurrer overruled.

[105] YEWENS v. ROBINSON. July 8, 1840.

Insolvent Debtor. Jurisdiction.

An insolvent debtor and his wife conveyed estates belonging to the latter to trustees, to raise and pay £35,000 to the insolvent's assignees (who were parties to the deed), for the benefit of his creditors. The insolvent died before that sum was raised ; and, after his death, the assignees made a compromise with his widow, by which they agreed to accept from her a smaller sum. One of the creditors filed a bill against the assignees, the trustees and the widow, charging them with collusion, and praying that the trusts of the conveyance might be performed, and that the Defendants might be restrained from carrying the compromise into effect. A demurrer, by the assignees, for want of equity was allowed ; as the Plaintiff ought to have applied to the Insolvent Debtors Court to remove the assignees.

In August 1835 Sir Thomas Champneys took the benefit of the Act then in force for the relief of insolvent debtors. At that time he and Lady Champneys, his wife, were seized, in right of the latter, of estates in Cheshire and other counties, for the life of Lady Champneys. By an indenture, dated the 13th of August 1838, and made between the Defendants Robinson and Gillett, who were the assignees of the insolvent's estate, of the first part, the insolvent and his wife, of the second part, Lord Mostyn, of the third part, and the Defendants Bateman and Lawrence, of the fourth part, after reciting that Lord Mostyn, being desirous of making a contract for the purchase of the before-mentioned estates (which were comprised in the schedules to the indentures), had made two proposals for such contract (that is to say), [106] first, he had proposed to pay £35,000 for the purchase of the estate and interest of Sir Thomas Champneys and his assignees in the premises : and, secondly, as the consideration for the purchase of Lady Champneys' estate and interest, to grant to her a yearly rent-charge of £400 for her separate use, for her life, to be charged on a competent part of the hereditaments comprised in the first schedule to the indenture ; and, after further reciting that Lady Champneys was desirous that such contract should be entered into, and was willing to accept Lord Mostyn's second proposal ; and that Robinson and Gillett were of opinion that it would be very advantageous to Sir Thomas's creditors, named in the schedule filed by him on his insolvency, to accept Lord Mostyn's first proposal ; it was agreed and declared, by and between the parties, that Lord Mostyn contracted to purchase the hereditaments comprised in the first and second schedules to the indenture for Lady Champneys' life ; that Lord Mostyn should, as the consideration for the purchase of the estate and interest of Sir Thomas Champneys and his assignees in the premises, pay £35,000 to Robinson and Gillett ; and, as the consideration for the purchase of Lady Champneys's interest, should grant, to trustees to be named by her, a rent-charge of £400 a year, for her separate use during her life, to be charged on a competent part of the hereditaments comprised in the first schedule to the indenture ; and should also grant to trustees, for her separate use, a lease for 99 years, at a peppercorn rent, of the hereditaments comprised in the second schedule ; that Robinson and Gillett would immediately proceed to take the steps directed to be taken by the Act 7 G. 4, c. 57, previous to the sale

of the real estates of an insolvent debtor, and use their utmost endeavours to obtain the authority, required by that Act, [107] to sell their estate and interest in the hereditaments comprised in the first and second schedules to the indenture ; and, if they obtained such authority, would thereupon put up such estate and interest to sale by auction, and permit such sale to take place without any reserved price or bidding, except so far as the proposed bidding of £35,000 by Lord Mostyn might be so deemed ; and, if Lord Mostyn should, at any such sale, bid £35,000 or any higher sum for such estate and interest, and there should be no higher bidding, then such estate and interest should be knocked down to him ; but, if there should be a higher bidding, and Lord Mostyn should not think fit to bid more, then it was agreed that such estate and interest should not be knocked down to him, and he should not be the purchaser thereof, or in any manner bound by any of the covenants or agreements contained in the indenture ; and, by the same indenture, Sir Thomas and Lady Champneys conveyed the hereditaments comprised in the first and second schedules thereto to the Defendants, Bateman and Lawrence, and their heirs, for Lady Champneys' life, upon trust that they should, upon the performance, by Lord Mostyn, of the contract thereby entered into by him, convey the same to him and his heirs for Lady Champneys' life.(1)

By an indenture bearing even date with, but executed after the before-mentioned indenture, and made between Sir Thomas and Lady Champneys, of the one part, and Robinson and Gillett, of the other part, after reciting, amongst other things, that, in order to secure to Lady Champneys a conveyance to trustees for her separate [108] use, of the hereditaments comprised in the second schedule to the first-mentioned indenture, for all the estate and interest of Robinson and Gillett as such assignees as aforesaid therein, and also to prevent any prejudice or loss arising to the creditors of Sir Thomas, named in the schedule filed by him, if he should die in Lady Champneys' lifetime, the parties thereto had agreed to enter into the additional stipulations hereinafter contained ; it was agreed and declared, between and by such parties, that, in case the completion of Lord Mostyn's contract should be prevented by the premises intended to be put up to auction being knocked down to any other or higher bidder, Lady Champneys should not be bound to concur in or do any act to give effect to any conveyance to such other purchaser ; but, in that case, her right should remain in the same condition as if the first-mentioned indenture had not been made : but, in case the sale to Lord Mostyn, or any other sale of the premises intended to be put up to auction, should not take place or should not be completed, either by reason of Sir Thomas's death in Lady Champneys' lifetime, or from any other cause, then Robinson and Gillett, and all other necessary parties, should convey the hereditaments comprised in the second schedule to the first-mentioned indenture to two or more trustees, to be nominated by Lady Champneys, in trust for her separate use, during her life, and should convey the hereditaments mentioned in the first schedule to the same indenture, in such manner that the same might be vested in Robinson and Gillett, for Lady Champneys' life, upon trust that they should receive the rents of the same hereditaments until they should have received the sum of £35,000 therefrom, and should then convey the same hereditaments to other trustees, to be named by Lady Champneys, for the then remainder of her life ; and that Robinson and Gillett would use their [109] endeavours to procure Sir Thomas's creditors, whose debts were specified in his schedule and still remained unsatisfied, to ratify and confirm that indenture and also the one before mentioned.

The Plaintiff was one of the creditors above referred to ; and the contents of the two before-mentioned indentures (which were acknowledged by Lady Champneys, pursuant to the Act for abolishing fines and recoveries) were communicated by Robinson and Gillett to the Plaintiff as one of such creditors, and as a person interested under the provisions of those indentures ; and he assented to the terms thereof.

Shortly after the execution of those indentures, and upon the faith that the provisions thereof would be carried into effect, Lady Champneys was let into and

(1) The contents of the above deed, and of the one that follows, were correctly taken from the brief with which the reporter was furnished.

had ever since continued in the possession or receipt of the rents of the hereditaments comprised in the second schedule to the first indenture.

In November 1838 Robinson and Gillett put up to auction the estates and interest agreed to be sold as before mentioned; and the same were knocked down, not to Lord Mostyn, but to one Wall, for the sum of £50,000. Wall, as it was alleged, was a person without the means of completing, and had refused to complete the purchase, and such purchase had not been and never could be completed.

Sir Thomas Champneys died on the 21st of November 1839, and Lady Champneys was his sole legal personal representative.

The bill, after stating as above, alleged that the first indenture of the 13th of August 1838 had become [110] inoperative, save as to the conveyance thereby made to Bateman and Lawrence; but that the second indenture of the same date became operative, and that the hereditaments specified in the first schedule to the first indenture ought to have been conveyed by Bateman and Lawrence to Robinson and Gillett for Lady Champneys' life, upon the trusts of the second indenture, under which the Plaintiff was interested as a creditor of Sir Thomas Champneys: but that Robinson and Gillett, *acting in concert and collusion* with Bateman (who was Lady Champneys' solicitor and the trustee named in her behalf in the first indenture), and with Lawrence (who was the solicitor of Robinson and Gillett), and also with Lady Champneys, had (notwithstanding the Plaintiff had made to them several applications to have the arrangement contained in the second indenture, as to the estates mentioned in the first schedule to the first indenture and as to the rents thereof, carried into effect, and, in the meantime, to have such rents secured), not only refused so to do, but had permitted Lady Champneys to receive the rents of such estates accrued since Sir Thomas's death, or had permitted Bateman and Lawrence to receive and pay the same to Lady Champneys, instead of receiving and applying the same for the purpose of making up the £35,000; and that Robinson and Gillett, *acting in collusion and concert as aforesaid*, had omitted and refused to take any measures to prevent such misapplication of the said rents, or to have the same paid to them or secured; and that they had actually proposed to accept £21,500 from Lady Champneys in full of the £35,000: that the Plaintiff, as a creditor of Sir Thomas Champneys to a large amount, being greatly interested in having the £35,000 raised under the provisions of the second indenture, had requested Bateman and Lawrence not to reconvey to Lady [111] Champneys the estates mentioned in the first schedule to the first indenture, until Robinson and Gillett should have fully received the £35,000, and the Plaintiff had given the two last-mentioned parties, as well as Bateman and Lawrence notice to such effect; but, nevertheless, Robinson and Gillett, *acting in concert* with Lady Champneys, threatened to accept the £21,500 in full of the £35,000, and, thereupon, to discharge Lady Champneys and the estates comprised in the first schedule from the £35,000; and that Bateman and Lawrence, *acting in concert* with Robinson, Gillett and Lady Champneys, threatened to reconvey those estates to her. The bill then set forth a letter of the 16th of May 1840 from Robinson and Gillett's solicitor to the Plaintiff's solicitor, stating that the draft of the reconveyance of the estates in the first schedule to Lady Champneys was prepared and would probably be executed early in the ensuing week, and the contemplated arrangements with Lady Champneys carried into effect; and that nothing short of a rule or order of Court would stop them. The bill then alleged that the Defendants at times pretended that Robinson and Gillett were creditors of Sir Thomas Champneys, and that there were other creditors besides them and the Plaintiff (whose names, however, if any such there were, the Plaintiff did not know and the Defendants refused to disclose); and that Robinson and Gillett and such other alleged creditors being, as they pretended, the major part in value, were desirous and had come to some resolution, which had been sanctioned by the Insolvent Debtors' Court, that the proposal made to Lady Champneys should be adopted; but the Plaintiff charged the contrary, and that it was not competent for Robinson and Gillett and such other alleged creditors, if any, or for the Insolvent Debtors Court, to bind the Plaintiff's interest in respect of the [112] rents receivable under the second indenture, or to consent to, or sanction or direct that proposal to be carried into effect against the Plaintiff's wish; nor had the said Court any jurisdiction over or in respect of such rents, or to secure or apply or give any directions as

to the same ; and such Court had, in fact, disavowed and refused to exercise any such jurisdiction : that, under the circumstances aforesaid, the rents of the hereditaments comprised in the first schedule accrued since Sir Thomas Champneys' death were in great danger of being, and, in fact, would be, lost unless the Court of Chancery would immediately interfere and grant the relief thereinafter prayed.

The bill prayed that the trusts and agreements of the second indenture of the 13th of August 1838 might, so far as might be proper, be carried into execution under the direction of the Court ; and that Robinson and Gillett might be made answerable for the rents of the estates in the first schedule accrued since the death of Sir Thomas Champneys, which had been received by them, or by their order or for their use, or which they, without wilful default, might have received ; and that such rents might be duly applied ; and that Robinson and Gillett respectively might be restrained from carrying into effect the arrangement with Lady Champneys, and from releasing her or the last-mentioned estates from the £35,000 ; and that Bateman and Lawrence might be restrained from conveying the same estates to Lady Champneys, and from conveying or parting with their interest or estate therein otherwise than to Robinson and Gillett in pursuance of the second indenture, and from paying to Lady Champneys, or otherwise than into the Court to the credit of the cause, the rents of the same estates accrued since the death of Sir Thomas Champneys, which had been or should be received by [113] Bateman and Lawrence ; and that Lady Champneys might be restrained from receiving such rents, and that some person might be appointed to receive the same.

The Defendants, Robinson and Gillett, demurred to the bill on four grounds : first, for want of equity ; secondly, because all the creditors of Sir Thomas Champneys, whose names were inserted in the schedule filed by him on his insolvency, ought to have been made parties ; thirdly, because the bill ought to have been filed by the Plaintiff on behalf of himself and all other such creditors ; and, fourthly, because a personal representative of Sir Thomas was not made a party to the bill.

Mr. Jacob and Mr. Chandless, in support of the demurrer. This Court has no jurisdiction in the present case ; but the Plaintiff must seek his remedy for the acts which he complains of in the Insolvent Debtors Court. That Court has complete power over the assignees of insolvents' estates (see 7 Geo. 4, c. 57, ss. 35, 36, 37, 38 and 39), and, if an assignee will not do his duty, or is acting contrary to his duty, any creditor may apply to that Court and get him removed. If, therefore, the Plaintiff in this case thinks that the assignees have done wrong in making the compromise with Lady Champneys, he ought to go to the Insolvent Debtors Court and get them discharged. There may be special cases which cannot be investigated before the Insolvent Debtors Court ; but there is no peculiarity in this case. No deed has been executed which has given a right to a third party, who is not subject to the jurisdiction of that Court. The object of the bill is to prevent a compromise, alleged to have been made with Lady Champneys, from being carried into effect ; but, if [114] this were a proper case for the interference of a Court of Equity, it is not stated, nor is there anything in the bill to shew that the compromise will be injurious to the insolvent's estate ; and, therefore, the fair inference is that it will be beneficial. The Plaintiff does not say that anything will be lost to the estate, but only that the assignees had no right to enter into the compromise, and that the Insolvent Debtors Court has no power to sanction it without his consent. It is by no means of course to set aside a compromise made by assignees, though without the consent of the creditors or the sanction of the Court. An assignee, as well as an executor, may, by virtue of his office, make a beneficial compromise ; and, although the Act requires that the assignee shall have the consent of the major part in value of the creditors, and also the sanction of the Court (see 7 Geo. 4, c. 57, s. 24), yet that does not take away the power which he has by virtue of his office, but was intended for his protection. At all events, this Court will not entertain a bill to set aside a compromise, which the Plaintiff himself does not even allege to be injurious. The allegation of collusion is not specific ; and, if it were, it would only afford a ground for applying to the Insolvent Debtors Court to remove the assignees. The statement that it was not competent, for the assignees or for the Insolvent Debtors Court, to bind the Plaintiff's interest in respect of the rents receivable under the second

indenture, or to sanction or direct the proposal to be carried into effect, is the *gravamen* of the bill; but that is an allegation of matter of law; and, therefore, the demurrer does not admit it. *Hammond v. Attwood* (3 Mad. 158), *Kaye v. Fosbrooke* (*ante*, vol. viii. p. 28), *Blue v. Marshall* (3 P. W. 381), *Pennington* [115] *v. Healey* (1 Crom. & Mees. 402), *The Attorney-General v. The Mayor and Corporation of Norwich* (2 Myl. & Cr. 406; see 423), *Cawthorn v. Chaliè* (2 Sim. & Stu. 127).

Next, it appears on the face of the bill that there are unsatisfied creditors of the insolvent besides the Plaintiff; they are all interested under the trusts of the second deed of August 1838, which the bill prays may be carried into effect by the Court; the Plaintiff, therefore, ought either to have made all those creditors parties to the bill, or ought to have filed the bill on their behalf as well as his own.

Lastly, no personal representative of Sir Thomas Champneys is before the Court. He was a party to the deeds of August 1838; and the Plaintiff seems to admit that his personal representative is a necessary party; for he says, in his bill, that Sir T. Champneys died in November 1839, and that Lady Champneys is his sole legal personal representative. A demurrer admits only facts that are well pleaded; and it is not sufficient to aver that Lady Champneys is Sir Thomas's sole legal personal representative; the Plaintiff ought to have stated that she was either his executor or administrator. *Baker v. Harwood* (*ante*, vol. vii. p. 373).

Mr. Girdlestone and Mr. E. Montagu, in support of the bill. With respect to the last objection: the demurrer states, not that an executor or administrator, but that a personal representative of Sir Thomas Champneys is not made a party to the bill; the bill, however, alleges that Lady Champneys is his sole legal personal repre-[116]-sentative; and, consequently, that allegation is sufficient.

Next, as to the objection that the Insolvent Debtors Court, and not a Court of Equity, has jurisdiction in the case made by this bill. In the first place, the bill asks that the trusts of a certain deed may be carried into execution, so far as may be proper; then it asks that Robinson and Gillett may be restrained from carrying into effect the arrangement with Lady Champneys, and releasing her from the £35,000; that Bateman and Lawrence, in whom the legal estate is vested, may be restrained from conveying the estates to Lady Champneys or paying to her or permitting her to receive the rents of those estates; and that she may be restrained from receiving those rents; and that a receiver of them may be appointed. There can be no doubt that the Plaintiff, having an interest in the trusts of the deed, has a right to have those trusts carried into execution; and that he has that right as against the trustees and Lady Champneys. Is not then this Court the proper tribunal for the Plaintiff to resort to? Is the relief sought relief which, under any circumstances, could be obtained in the Insolvent Debtors Court? What jurisdiction has that Court over Lady Champneys, or over Bateman and Lawrence, in whom the legal estate is vested, under the first deed of August 1838, for the purpose of giving effect to a contract entered into by the assignees for the benefit of the creditors. How could this Court grant the relief asked by this bill, in the absence of the assignees? If it could not, they are properly made parties. Besides, the bill charges that they have permitted Lady Champneys to receive the rents; and, therefore, a specific act of collusion is charged. Suppose, for a moment, that the Insolvent [117] Debtors Court has jurisdiction in this case, is it not competent to the Plaintiff to come to this Court for an injunction until the question whether the trusts of the deed ought to be performed or not is decided? [THE VICE-CHANCELLOR. If the assignee of an insolvent is misconducting himself with respect to property vested in him for the benefit of the creditors; as, for instance, if he is about to sell the insolvent's estate to A. for a grossly inadequate price, the Insolvent Debtors Court will remove him. You say that because the legal estate is in trustees, and the trustees are going to sell the estate, with the concurrence of the assignees, for a grossly inadequate price, that it is a case for the interference of a Court of Equity.] Yes, and the case of *Barton v. Jayne* (*ante*, vol. vii. p. 24) is an authority for the proposition. [THE VICE-CHANCELLOR. There the assignee had actually assigned the insolvent's property; and the object of the bill was to set aside an act that had been actually done. Besides, in that case, the executor and not the assignee demurred; the assignee, therefore, did not object to the jurisdiction: but here the

assignees do object to the jurisdiction.] If, as we contend, the bill in this case is maintainable against Lady Champneys and the trustees, but would be demurrable if the assignees were not parties to it, the Plaintiff has a right to make them parties. *Kaye v. Fosbrooke* is an authority in support of our argument: for, though the demurrer was allowed in that case, yet the principle which we are contending for was, in a great measure, conceded by the Court. There the ground of the decision was that the facts charged in the bill did not amount to collusion: but, if the Court had been of opinion that in no case would such a bill be main-[118]-tained, it would not have adverted to the special charges in the bill, in order to shew that they did not amount to a case of collusion: the ground of the judgment, therefore, supports our proposition that the Court will entertain the suit, if the circumstances of the case are sufficient to make out a case of collusion. In *Benfield v. Solomons* (9 Ves. 77; see 86) the demurrer was allowed, because there was no allegation of a surplus; but why was that ground taken if the Court had jurisdiction? We cite that case, more particularly on the account of the remark which Lord Eldon makes in page 86 of the report; where his Lordship draws a distinction between the case of a bankrupt suing and the case of a creditor suing.

This bill charges not only that the Insolvent Debtors Court has no jurisdiction in this case, but that it has refused to exercise any such jurisdiction. [THE VICE-CHANCELLOR. The charge to which you allude cannot be taken as a charge that the Insolvent Debtors Court has refused to exercise its jurisdiction over the assignees. Are you aware of any case in which this Court has interfered, where it has been alleged that the assignee of an insolvent's estate was acting improperly, and the assignee has demurred to the jurisdiction?] It is not competent to the assignee to make that objection, if he is a necessary party to the suit. The ground of the Plaintiff's equity in this case is that he has an interest in the trusts of the second deed of August 1838, and that the assignees of the insolvent's estate not only refuse to concur in executing those trusts, but are acting in contravention of those trusts.

[119] Another objection that has been made to the bill is that it does not allege that the agreement which has been entered into with Lady Champneys is prejudicial to the interest of the Plaintiff; but the filing of the bill to have the original agreement carried into execution renders any express allegation to that effect superfluous. It is incumbent on the Defendants to shew that the trusts originally declared for the Plaintiff's benefit ought not to be carried into execution, and that the compromise with Lady Champneys ought to be carried into execution.

Next, with respect to the objection that the bill ought to have been filed by the Plaintiff on behalf of himself and the other unsatisfied creditors of the insolvent. We contend, first, that, if the Plaintiff might have so framed the bill, it was not obligatory upon him to do so: and secondly, that, according to the doctrine laid down in *Jones v. Garcia Del Rio* (Turn. & Russ. 297), this is not a case in which the Plaintiff could have so framed his bill; for here there is not such a community of interest as that all the creditors must take either that which the bill asks or nothing. Some of the creditors may think that the arrangement entered into with Lady Champneys is more beneficial to them than the original agreement; and may wish to have that arrangement carried into effect, in preference to having the trusts of the second deed of August 1838 performed.

Lastly, it was said that the other unsatisfied creditors of Sir Thomas Champneys ought to have been made Defendants; but the answer to that objection is that the bill charges that there are no such creditors except [120] the Plaintiff and the Defendants Robinson and Gillett, and that, if there are any such, the Plaintiff does not know, and the Defendants refuse to disclose their names. *Bowyer v. Covert* (1 Vern. 95), *Blain v. Agar* (ante, vol. ii. p. 289).

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is plainly distinguishable from the cases which have been cited; because this is a case in which the assignees of the insolvent are the parties who have demurred to the jurisdiction. In *Barton v. Jayne* and *Benfield v. Solomons*, the assignees did not demur; and as long as parties do not demur, they may be very fairly taken not to object to being made parties. I do not recollect any case in which the assignee of an insolvent or of a bankrupt has raised an objection to the jurisdiction of this Court, and this Court has upheld its jurisdiction against him.

On looking at this bill, I do not understand that, according to the view which the Plaintiff takes of the matter, he at all wishes that these assignees should be removed. The bill asks that Bateman and Lawrence may be restrained from conveying the estates, mentioned in the first schedule to the first indenture of August 1838, to Lady Champneys, and from parting with their interest in those estates otherwise than to Robinson and Gillett, the assignees; and therefore the objection raised by the bill is not to their having anything at all to do with the matter, but this part of the bill wishes that they should be the parties who should take the estates. The assignees, however, object to the jurisdiction of this Court.

[121] I observe that the prayer asks that the rents and profits which it seeks to recover may be duly applied. But that would be interfering with the jurisdiction of the Insolvent Debtors Court: for, though it may be true in some sense, that the specific sum of money to be paid out of Lady Champneys' estates is no part of the assets of Sir Thomas Champneys; yet it is impossible not to see that any right to receive the £35,000 or the £21,500 arises out of a dealing by these assignees with the interest which they had acquired, in right of Sir Thomas Champneys, in the estates of Lady Champneys. A particular arrangement was made, which was, in effect, giving up to a certain extent the particular right, whatever that might be, which was derived from Sir Thomas Champneys in consideration of a certain sum; so that that sum would be assets received by the assignees under the insolvency; and, *prima facie*, that sum would be to be applied and to be accounted for by the assignees under the jurisdiction of the Insolvent Debtors Court.

This bill, then, is filed for the purpose of changing the jurisdiction which, as I understand it, the Court of Insolvent Debtors is competent to exercise, and has not refused to exercise: for the general allegation in the bill, that the Insolvent Debtors Court has disavowed and refused to exercise any such jurisdiction cannot be taken as equivalent to an assertion that the Court has refused to exercise its jurisdiction, upon a proper application being made to it. If the bill had stated a particular case, and shewn that the Insolvent Debtors Court either had not jurisdiction or had refused to exercise it, after deliberation *that* might be another thing; but, as I understand this passage of the bill, that Court has not refused to exercise jurisdiction over the assignees.

[122] My opinion, then, is that the true method of proceeding in this case would have been to apply to the Insolvent Debtors Court to have the assignees removed, and others appointed; which ultimately would have given the Plaintiff all the relief sought by this bill.

It appears to me that, if I were not to allow this demurrer, I should be doing a very dangerous thing, and be opening an avenue by which all the business of the Insolvent Debtors Court might be removed into this Court. I think that this Court should be very careful how it assumes the jurisdiction of a Court of Common Law.

Demurrer allowed.

[122] VEITCH v. IRVING. July 17, 1840.

Practice. Costs.

New security ordered to be given for costs, the surety having become bankrupt.

The Plaintiff had given security for costs. The person who became surety for the costs afterwards became bankrupt: whereupon the Defendant moved that new security might be given.

Mr. Colvile, in support of the application, cited *Cliffe v. Wilkinson* (*ante*, vol. iv. p. 122).

Mr. James, *contrà*.

THE VICE-CHANCELLOR [Sir L. Shadwell] ordered new security to be given within a certain time, or the bill to be dismissed. (But see *ante*, vol. ii. p. 570.)

[123] HARRISON v. DIXON. July 16, 1840.

Practice. Injunction.

The Defendant being in contempt for want of appearance, the common injunction was extended to stay trial on a motion made without notice.

In this case, the Defendant being in contempt for want of appearance, THE VICE-CHANCELLOR [Sir L. Shadwell] granted an application made by Mr. Knight Bruce, *without notice*, to extend the common injunction to stay trial.

[123] DUNCAN v. CHAMBERLAYNE. July 8, 10, Dec. 14, 1840.

[S. C. 10 L. J. Ch. 307. Overruled, *Thompson v. Speirs*, 1845, 13 Sim. 469.]

Policy of Insurance. Order and Disposition. Notice.

All the assured in the Equitable Assurance Office are partners in the society; and, therefore, express notice of an assignment of a policy effected with that society need not be given in order to take the policy out of the order and disposition of the assignor.

The report of *Bozon v. Bolland*, in 1 Mont. & Bligh's Reports, corrected.

A life policy which had been effected with the Equitable Assurance Society was assigned to the Plaintiff as a security for a debt. The assignor afterwards took the benefit of the Insolvent Debtors Act.

The question was whether notice of the assignment ought not to have been given to the assurance society in order to take the policy out of the order and disposition of the insolvent.

Mr. Knight Bruce and Mr. Dixon appeared for the Plaintiff: and

Mr. Parker and Mr. Taylor, for the Defendants.

[124] July 10. In the course of the argument, *Williams v. Thorp* (*ante*, vol. ii. p. 257), *Ex parte Tennyson* (1 Mont. & Bligh, B. C. 67), and *Bozon v. Bolland* (*Ibid.* 74, cited), were cited.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have had an opportunity of looking at the case of *Bozon v. Bolland*, in Reg. Lib. A. 1831, fol. 3155: and I do not think that the short account that is given of that case, in Montagu & Bligh's Reports, is sufficient.

The report states that Mr. Joshua Rowe sold an annuity to Mr. Howden; and Rowe covenanted to effect an insurance on his life; which was accordingly effected; but, by mistake, the policy was effected in the name of Richard Creed, a solicitor. That statement, however, is incorrect; for the annuity was secured by bond and warrant of attorney; and there was no covenant by Rowe to effect an insurance on his life; but Howden wished to have an insurance on his life. Creed, as Howden's agent, by mistake, took the policy in his own name, without stating that he took it as agent to Howden, who had an interest in Rowe's life. At the end of a year Creed discovered the mistake, and that the policy was void, and requested Rowe to insure his own life at Creed's expense, and assign the policy. Rowe agreed, on condition that Creed should pay the premiums until Rowe should repurchase the annuity. The directors of the Equitable Assurance Society granted a new policy, dated the 23d February 1814, to Rowe, at Creed's expense, as a substitution for the first; and, by deed of the 11th of October 1815, between Rowe and Creed, Rowe assigned the policy to Creed in [125] trust for Rowe, if Rowe should repurchase the annuity in his life-time according to the condition of the annuity bond, but if he should not repurchase it, then in trust for the persons entitled by, from or under Howden: and Creed covenanted to keep up the policy during Rowe's life, or until the repurchase of the annuity. Rowe never repurchased the annuity, but became a bankrupt in 1824, and

died in 1828. Creed kept up the policy. The policy never was in Rowe's possession : and, as he did not repurchase the annuity, he was merely a trustee of the policy to secure the annuity to Howden.

In 1819, Howden being then dead, his executors sold and assigned the annuity and their interest in the policy to Marsh. Marsh afterwards assigned the arrears of the annuity due at the time of the assignment to Bozon. Marsh afterwards became bankrupt : and Bozon filed a bill against his assignees claiming the benefit of the policy to the extent of the arrears assigned to him.

At the hearing of the cause before Sir John Leach, Master of the Rolls, a question arose whether the policy was not in Rowe's order and disposition at the time of his bankruptcy ; and the cause was ordered to stand over, in order that his assignees might be brought before the Court by supplemental bill. (1 Russ. & Myl. 69.)

A supplemental bill was accordingly filed : and, on the cause again coming on to be heard, it was proved that the policy never had been in Rowe's possession, and that he never had any beneficial interest in it, but [126] was a trustee of it for securing the annuity to Howden : and, upon that, the Master of the Rolls held, and held most justly, that the policy was not in Rowe's order and disposition at the time of his bankruptcy.

Nothing turned, in that case, upon notice to the assurance society : but this fact came out in the course of the cause, namely, that, prior to 1824, the Equitable Office never took cognizance of assignments of policies, but paid the amount due on each policy to the person having the manual possession of it : and that, since that time, they had taken notice of assignments, and kept a book in which they made minutes of them.

It appears to me, therefore, that the case of *Bozon v. Bolland* has nothing to do with either *Williams v. Thorp* or *Ex parte Tennyson* : and, therefore, I continue of the same opinion as I expressed in *Williams v. Thorp*.

It was afterwards ascertained that, by the constitution of the Equitable Assurance Society, every person who effected an insurance with the society became thereby a partner in it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This fact was not brought to the attention of the Court in *Williams v. Thorp*, nor was it mentioned when this cause was first before the Court.

The rule is that notice to one partner is notice to the partnership ; and, as all the insurers in the Equitable Assurance Office are partners in the society, the fact of the assignment of a policy by one of the assured must [127] be taken to be a fact of which the society had notice ; and, therefore, I shall direct an account to be taken, in the terms of the prayer of this bill, of what is due on the security of the policy.

[127] BROWN v. BAMFORD. May 27, 1842.

[S. C. reversed, 1 Ph. 620 ; 41 E. R. 769.]

Separate Property. Restraint on Alienation. Feme Coverte.

The form commonly used for restraining married women from disposing of their separate property by anticipation is insufficient for that purpose. The receipt clause ought to declare that the receipts of the married woman to be given, from time to time, after the income of the property shall have become due, shall be, and that *no other receipts shall be*, sufficient discharges to the trustees.

John Beckett, by his will, dated the 21st of September 1832, gave certain leasehold houses and stock in the funds to trustees, upon trust, from time to time, during the natural life of his daughter Sophia Bamford, or until she should be duly declared a bankrupt or take the benefit of any Act passed or to be passed for the relief of insolvent debtors, to pay the clear rents, interest, dividends and proceeds of such leasehold hereditaments, stocks, funds and securities, unto such person or persons,

for such intents and purposes, and in such manner as Sophia Bamford, by any writing or writings under her hand, when and as the same should become due, but not by way of assignment, charge or other anticipation thereof, should, notwithstanding her then present or any future coverture, direct or appoint; and, in default of any such direction or appointment, or so far as the same, if incomplete, should not extend into her proper hands, for her sole and separate use, independent of the debts, control or interference of her then present or any future husband; for which purpose the testator thereby directed that the receipts in writing, under the hand of his daughter, Sophia Bamford, should, notwithstanding any such coverture as aforesaid, be good and sufficient discharges for the last-mentioned rents, [128] interest, dividends and proceeds, or so much thereof as should in such receipts respectively be expressed to have been received; and, from and after the decease of his daughter, Sophia Bamford, or such her bankruptcy or insolvency as aforesaid, which should first happen, then in trust for all and every or such one or more of her children as therein mentioned.

After the testator's death Sophia Bamford, in consideration of the Sunderland Joint Stock Banking Company withdrawing a writ under which certain goods of Benjamin Parker, her son-in-law, had been taken in execution for a debt due from him to the company, signed a paper writing by which she agreed to guarantee the payment of the debt to the company.

In December 1840 Parker became bankrupt; and no monies having been paid in reduction of the debt since the guarantee was given, the bill was filed by one of the public officers of the company against Sophia Bamford and John Bamford, her husband, and the assignee of Parker's estate and the trustees of the will; and after stating that Sophia Bamford had refused to pay the debt which she had so guaranteed, it alleged that John and Sophia Bamford and the trustees pretended that Sophia Bamford was, by the will, restrained from charging her shares and interests in the dividends, rents, issues and profits of the trust property or rendering the same liable for any claim on her by way of an anticipation. Whereas the Plaintiff charged that, according to the true construction of the will, Sophia Bamford had both a restricted power of appointment and the general uncontrolled dominion over the income so bequeathed to her for life as aforesaid; and that, by the [129] agreement signed by her as before mentioned, she rendered all the property which she was entitled to or interested in under the will liable to the payment of the debt.

The bill prayed that it might be declared that the income which Sophia Bamford was entitled to, under the will, for her separate use, was liable, to the extent of her right in or to the same, to make good and pay the debt to the company.(1)

Bamford and wife and the trustees demurred to the bill for want of equity.

Mr. Bethell and Mr. Baily, in support of the demurrer. The question in this case is whether the proviso, against anticipation, extends to the life-estate, as it unquestionably does to the power of appointment.

It will be contended, by the counsel in support of the bill, that a power to appoint the income of the property is expressly given to Mrs. Bamford, provided she does not anticipate it; and that, under the direction to pay the income into her proper hands for her separate use, she has, by implication, a general power to dispose of it; and *Barrymore v. Ellis* (2) will [130] be relied on. But that case is distinguishable from the present; for there the question arose on a deed: here it arises on a will. Here, too, the payment is to cease on Mrs. Bamford becoming either bankrupt or insolvent, and, therefore, it is manifest that the testator intended that the provision which he was making for her should be for her personal, inalienable enjoyment. It is clear that that intention will be defeated, if the construction contended for on the other side is to prevail. There is no break in the clause now under consideration; it is one entire sentence. In *Barrymore v. Ellis* your Honor says: "The deed does not say;

(1) See *Murray v. Barlee*, ante, vol. vii. p. 194; and 3 Myl. & Keen, 209. See also *Owens v. Dickenson*, 1 Craig. & Phil. 48.

(2) *Ante*, vol. viii. p. 1. It is settled that a person may have a power over, and also an interest in an estate; but it is not so well established that an express and an implied power can co-exist in the same person over the same property. Does not the maxim *expressum facit cessare tacitum* apply in such a case?

do and shall pay the same into her own hands, but, simply, to her for her own sole use." But in this case the trustees are expressly directed to pay the rents and dividends into the proper hands of Mrs. Bamford; and they are not to be paid except when and as they become due. Then there is a very marked distinction between the receipt clauses in the two cases. In this case the receipts of Mrs. Bamford are alone made sufficient discharges: but in any other case the receipts of Lady Barrymore or of any person or persons to be by her appointed to receive the annuity are made sufficient discharges. Therefore we have every requisite in this case, the want of which, in *Barrymore v. Ellis*, is assigned as the ground of the decision.

Lastly, the clause in question is in conformity to established forms and precedents, as will be seen on referring to the form given in 2 Roper on Husband and Wife, Jacob's edition, page 402.

Mr. Stuart and Mr. Simpson appeared in support of the bill, but the Vice-Chancellor gave judgment without hearing them.

[131] His Honor, after saying that the words on which the question arose in this case were the same, in substance, as the words in *Barrymore v. Ellis*, and that he adhered to his decision in that case, proceeded thus:—

I admit the common form to be in the terms stated: but it always appeared to me to be defective. When I was in the habit of drawing conveyances, and wished to settle, on a lady, property over which she was to have no power of anticipation, I always used to introduce an express proviso that no receipt should be a discharge to the trustees, except a receipt given by the lady for the rents or dividends (according to the nature of the trust property) then actually become due.

The proviso to which I have alluded declared, as far as my recollection serves me, that the receipts of the lady, under her own hand, to be given from time to time after the rents or dividends should have actually accrued due, should be, *and that no other receipts should be sufficient discharges to the trustees, for the amount of the monies therein expressed to be received.* In this case, however, there are no negative words in the receipt clause; and, therefore, there is nothing to restrict the power, which Mrs. Bamford had to dispose of, or charge the rents and dividends of the trust property, under the general direction to pay those rents and dividends to her for her separate use; and the consequence is that the demurrer must be overruled.

[132] PRUEN v. OSBORNE. PRUEN v. WILCOX. PRUEN v. GILBERT.
July 25, 1840.

[See *Ralph v. Carrick*, 1879, 11 Ch. D. 882.]

Will. Construction.

Testator bequeathed his residue to several classes of persons. Some of the parties were members of two of the classes. Held, nevertheless, that they were entitled to only one share each of the residue.

Testator bequeathed his residue to the children, then living, of T. B. and W. C., and the lawful issue then living of such of their children as were dead, as tenants in common, so, nevertheless, that such *issue* should, as amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*; it being his intention that such *issue* should have only the shares which their respective *parents* would have been entitled to, if living. Held, that the word "issue" must be taken in the restricted sense of "children."

John Wilcox Osborne, by his will, dated the 8th of December 1826, disposed of the residue of the monies to arise from the sale of his real and personal estate, in the following words:—

"And as to all the rest and residue of the monies to arise from the sale or sales hereinbefore directed, and all other the before-mentioned monies, trust monies, and premises respectively, and all the before-mentioned investments, subject to the trusts aforesaid, I will, declare and direct that they, the said William Ashmead Pruen and

Edmund Wells Oldaker, or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, do and shall stand possessed thereof and interested therein, in trust for and to pay and divide the same respectively, and every part thereof respectively, and I give and bequeath the same unto, between and amongst all and every the children of the brothers and sisters of my uncle John Wilcox's late father, and all and every the children of the brothers and sisters of the said John Wilcox's late mother, and all and every the children of Thomas Burton, who is mentioned in the will of the said John Wilcox, and all and every the children of William Coles (who is also mentioned in the said will), by the said John Wilcox's [133] late father's sister, and the said John Wilcox's cousins, William Wilcox and Mary Burton, who are both also mentioned in the said will, or such of the said several children and cousins respectively as are now living, and the lawful *issue* now living of such of them as are dead, leaving lawful issue of his, her or their body or bodies, in equal parts, shares and proportions, as tenants in common; so, nevertheless, that the issue of any such children and cousins respectively as are dead shall, as between or amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*: it being my intention that such *issue* respectively shall have only the share or shares to which his, her, or their respective *parent* or *parents* would have been entitled to, if living, under or by virtue of this my will."

The testator died on the 12th of December 1826.

It appeared, from the report made in pursuance of the decree at the hearing of the cause, that Thomas Burton married a sister of the father of John Wilcox, the testator's uncle, and had issue by her a daughter, Louisa, who was born at the date of the testator's will and was still living; and that William Coles married another sister of John Wilcox's father, and had issue by her three children, William, Mary and Hannah; and that they also were born at the date of the will and were still living; and that William Wilcox, who was named in the will and therein described as a cousin of John Wilcox, was a son of a brother of John Wilcox's father, and was still living.

On the cause coming on to be heard for further directions, one question was whether Louisa Burton was not entitled to a share of the testator's residuary estate, as [134] a child of Thomas Burton, and to another share as a child of a sister of John Wilcox's father. A similar question arose with respect to William, Mary, and Hannah Coles and William Wilcox; the three first of those persons being not only children of William Coles, but also of a sister of John Wilcox's father, and the last being expressly named as a legatee in the will, and being also a child of a brother of John Wilcox's father.

It was contended by Mr. Jacob, Mr. G. Richards and Mr. Anderdon that the testator's object was to give a double benefit to such of the parties as were members of two of the classes of legatees mentioned in his will.

THE VICE-CHANCELLOR, however, held that, although they were twice described in the will, yet they were entitled to only one share each of the residuary estate.

Another and the principal question was whether the word "issue" was used by the testator in its natural sense, or as designating *children* only.

Mr. Girdlestone, Mr. Koe and Mr. P. White contended that the word "issue" must be taken to mean "children" only, as the testator had used that word in connexion with the word "parent;" and that effect could not be given to the direction that the issue should have only the share or shares to which his, her or their parent or parents would have been entitled to if living, unless the word "issue" was taken in that restricted sense. *Sibley v. Perry* (7 Ves. 522).

[135] Mr. Knight Bruce and Mr. Tennant, for the Defendants, W. D. Giles and Mary Giles, who were the great-grandchildren and only issue living at the date of the will of a sister of John Wilcox's father, said:—

The case of *Sibley v. Perry*, when rightly understood, is no authority for construing this will. The word "issue" means, naturally, all descendants: but as it may be held, if the context requires it, to mean children only; so the word "parent," if the context requires it, may be taken to mean any lineal ancestor. The rule of construction cannot be applied to the one word without admitting it to be equally applicable to

the other. In *Sibley v. Perry* Lord Eldon says: "Upon all the cases this word (issue), *primâ facie*, will take in descendants beyond immediate issue. But, on the other hand, there is no denying (not applying to the state of the fund or the number of persons) that if, upon fair reasoning deduced from the words of the will, all the contents and the design and tenor of it, as manifested by its contents, shew it was meant in the more restrained sense, that sense may be given to it. The clauses of this will to which I have referred shew the testator was likely to use the words 'lawful issue' as descriptive of children only; and the question is whether, upon the whole will taken together, he did not use them in that sense. Cases of this kind, considering the precedent authorities, ought not to pass without observation. This decision is not right, unless upon the construction furnished by the different parts of this will." Then his Lordship, at the conclusion of his judgment, says: "I shall express the ground of my opinion in the declaration. Declare that, upon the construction of this will and the whole of it taken together, the testator, by the words 'lawful issue' in these clauses, [136] meant children; and the distribution shall be accordingly." (See 7 Ves. 531, 532 and 533.) If the testator, in the present case, had said merely, "and the lawful issue now living of such of them as are dead leaving lawful issue of his, her or their body or bodies, in equal parts, shares and proportions, as tenants in common;" then this case would have resembled the case of *Sibley v. Perry*. The testator, however, goes on to say, "so, nevertheless, that the issue of any such children and cousins respectively as are dead shall, as between and amongst themselves, take as tenants in common, and *per stirpes* and not *per capita*." But, in *Sibley v. Perry*, there were no words denoting any intention to give the property *per stirpes*. The only resemblance between that case and the present consists in the word "parent" being found in both. That case has no resemblance to the present; and all that it establishes is that the word "issue" may be held to mean "children," if the general tenor of the will requires it. There is another very striking reason, in this case, for giving to the word "issue" its natural import. The gift is not to issue, generally, but to the issue *now living*: the testator, therefore, had particular persons in his view; and the direction that the issue should take *per stirpes* would let in the individuals for whom we appear: whereas the construction contended for on the other side will exclude every member of the family to which those parties belong from participating in the residue; and, if there had been no other claimants, that construction would have caused an intestacy.

Mr. Simons and Mr. Bird appeared for the other parties.

[137] THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the great-grandchildren are excluded.

In the first place, the gift is to the children of the brothers and sisters of John Wilcox's late father and to the children of the brothers and sisters of his late mother, and to the children of certain individuals whose names are mentioned, or to such of the said several children as are now living, and the lawful issue now living of such of them as are dead. Under those words John Giles, who was the father of the claimants and the grandson of a sister of John Wilcox's father, and who was dead at the date of the will, never could have taken. Then the testator directs that the issue of such of the children as were dead should take only the share to which their parent would have been entitled if living. There is a difficulty, therefore, in making the children of John Giles take, when John Giles himself never could have taken. The substituted gift is only to the issue of children of certain persons; and John Giles not being a child of any of them, his issue are not pointed at. So that, on the very face of the will, there is no gift to the children of John Giles.

Moreover, I am of opinion that, if there be nothing more in a will or other written instrument whereby to construe the term "issue" than a direction that the issue are to take the shares of their parents, that is enough to confine the general meaning of the word "issue" to the particular meaning of "children" of that parent: and it was so held in *Leigh v. Norbury* (13 Ves. 340).

In *Sibley v. Perry* Lord Eldon put the same construction on the word "issue," because he found that, in a [138] particular clause, the use of the word "parent" restricted the meaning of the word "issue."

And the same construction was adopted in a case which came before Sir William

Grant, at the Rolls, on the 2d of March 1814. (*Harrington v. Lawrence*, not reported.) There, by an indenture, a fund was declared to be in trust for the children of a marriage living at the death of the husband and wife: and the deed then provided that if any should die in the lifetime of the husband and wife, leaving issue, such issue should take such share as their parent would have been entitled to in case he or she had survived the husband and wife. A grandchild of a child of the marriage was excluded.

Therefore I have always considered it as settled that, in a will or in a deed, if it is a question whether the word "issue" shall be taken generally or in a restricted sense, a direction that the issue shall take only the shares which their parents would have taken, if living, must be taken to shew that the word "issue" was used in its restricted sense.

"This Court doth declare that the several persons by the said Master's separate report in the said first-mentioned cause, dated the 26th day of July 1830, and the said Master's general report in the said two first-mentioned causes, dated the 14th day of April 1840, and the sixth schedule to such general report, found to have been children of brothers or sisters of the testator's uncle, John Wilcox's late father, or of brothers or sisters of the said testator's uncle, John Wilcox's late mother, and to have been living at the testator's decease, [139] became, upon such decease, entitled respectively to vested interests in equal 27th parts of the testator's residuary estate; and that the several persons by the same reports and schedule found to have been living at the decease of the said testator and to have been children of any such children as aforesaid as had died in the lifetime of the testator leaving issue became, upon the said testator's decease, entitled, as to each class of such children, to vested interests, as tenants in common, in one equal 27th part of the said residuary estate."

[139] GLYN v. DUESBURY. July 29, 1840.

[S. C. 9 L. J. Ch. (N. S.) 365; 4 Jur. 1080.]

Interpleader.

A., an architect and surveyor, brought an action against B., his employer, for £155, the amount of a running account between them; one item of which was £76, which A. had paid to D. by the direction of C., to whom it was due for plumber's work done for B. C. having taken the benefit of the Insolvent Debtors Act, his assignee demanded the £76 of B., insisting that the payment to D. was invalid. B. paid into Court, in the action, £79, being the £155 minus £76. A. took the £79 out of Court and proceeded with his action. B. then filed a bill of interpleader against A. and C.'s assignee respecting the £76. Held that the bill was not sustainable.

The bill stated that the Plaintiff, having occasion to build a new house at Ewell in Surrey, employed the Defendant, Duesbury, as his architect and surveyor: that S. B. Haynes entered into a contract with Duesbury, as the architect or agent of the Plaintiff, to do the plumber's, painter's and glazier's work of the house: that Haynes accordingly proceeded with the work comprised in the contract, and that all such work had been done and completed: that, according to the terms of the contract, the work was to be paid for as it proceeded, and, accordingly, sums of money were, from time to time, paid by the Plaintiff, on the certificate and authority of Duesbury and otherwise, to Haynes, for and on account of [140] the work so done by him, and, after deducting and giving credit for the sums so paid to him, there became and was, at the commencement of the action after mentioned, due from the Plaintiff, in respect of the work contracted to be done by Haynes, £98, 1s. 0½d.: that, in August 1839 and pending the completion of the work, Haynes took the benefit of the Insolvent Debtors Act, and the Defendant Obbard was appointed assignee of his estate: that, in June 1839 and during the progress of the work, Duesbury, at Haynes's request, accepted and paid, when it became due, a bill of exchange dated the 13th of June 1839, and payable six months after date for £92, 7s. 2d., being the balance which

Haynes claimed to be then due to him from the Plaintiff in respect of the work : that Duesbury alleged that certain parts of the work contracted to be done by Haynes had, by reason of Haynes's default therein, been actually done by him, Duesbury, and, on that ground, he claimed to have some portion of the balance of £98, 1s. 0½d. paid to him by the Plaintiff: that Duesbury also alleged that the amount of the acceptance so given by him as aforesaid was, in fact, more by the sum of £16 than was really and justly due to Haynes, and that consequently the sum of £76, 7s. 2d. only was so due, and was the utmost amount claimable, in respect of the matters in question, by Obbard as Haynes's assignee: that Obbard, as such assignee, disputed the validity of the alleged transfer or assignment to Rose of the debt due to Haynes from the Plaintiff, and insisted that, notwithstanding the acceptance alleged to have been given and paid by Duesbury, he, Obbard, was entitled to have the £76, 7s. 2d. paid to him by the Plaintiff; and that, in manner aforesaid, conflicting claims had arisen and still subsisted between the two Defendants in respect of the £76, 7s. 2d., as the balance remaining due and [141] owing from the Plaintiff on account of the work so actually done by Haynes for the Plaintiff: that, by reason of such conflicting claims to the last-mentioned balance, the Plaintiff did not know to which of the two Defendants he could safely pay the same: but he was ready to pay the same into Court, in order that the Defendants might interplead and settle their claims amongst themselves: that, save as thereafter mentioned, there was a balance of £57, 9s. due from the Plaintiff to Duesbury as such surveyor and architect as aforesaid on the balance of the account between them, exclusive of the balance due from the Plaintiff for the work contracted to be done by Haynes: that Duesbury had commenced an action in the Court of Queen's Bench against the Plaintiff; and, by the particulars of demand therein, he claimed the £57, 9s., the balance due to him as such surveyor and architect as aforesaid from the Plaintiff, and the further sum of £98, 1s. 0½d. for plumbing, painting and other work (making together £155, 10s. 0½d.), and he claimed £92, 7s. 2d., parcel of such last-mentioned sum as money paid for the Plaintiff's use: that the £98, 1s. 0½d. mentioned in the particulars of demand was the same sum as the balance of that amount thereinbefore mentioned to be due from the Plaintiff for the work contracted to be done by Haynes; and that the £92, 7s. 2d. was the sum which Duesbury alleged that he gave such acceptance for and paid as before mentioned: that the action was still pending, and the Plaintiff had pleaded thereto, and had paid into Court, in the action, £79, 2s. 10½d., which included the £57, 9s. due to Duesbury as aforesaid, and also the whole balance due from the Plaintiff, on account of the work contracted to be done by Haynes, exclusive of £76, 7s. 2d., being that portion of such last-mentioned balance as was claimed [142] by Obbard, as such assignee as aforesaid, to be due and payable to him; and that the Plaintiff had pleaded to the action, *non assumpsit* except as to £79, 2s. 10½d., and that, as to that sum, Duesbury ought not further to maintain his action, because the Plaintiff had brought it into Court, and Duesbury had not sustained damages to a greater amount: that Duesbury had replied to those pleas by joining issue on the first, and taking out of Court the £79, 2s. 10½d., in discharge so far of the action: that the £79, 2s. 10½d. was the full amount claimed by Duesbury by his particulars of demand, exclusive only of the £76, 7s. 2d., which was the subject of the conflicting claims between him and Obbard; and the right to such sum as between those parties could not be tried or decided in the action; but, nevertheless, Duesbury insisted upon the payment to him of such disputed sum, and had given notice of trial for the next Kingston Assizes; and Obbard threatened to bring an action against the Plaintiff for the £76, 7s. 2d., as the balance due to him from the Plaintiff on account of the work contracted to be done by Haynes: that Duesbury wrote two letters, one to the Plaintiff, dated the 13th of June 1839, and the other to the Plaintiff's solicitor, dated the 19th of July following, relating to the matters aforesaid, the first of which was as follows:—"Dear Sir,—In consequence of your letter to the party in the Blackfriars Road, concerning Haynes, the plumber, stating he must refer to myself as the person through whose hands all payments on the contract for your house at Ewell are to be made, I have accepted a bill drawn upon me for the balance due to him from you, as he, Haynes, has been suddenly involved in difficulties, and particularly wished to make the money immediately available; and I write this to particularly request

of you, on no account, to pay any money on that contract without previously [143] informing me on the subject. I shall, I believe, have the pleasure of seeing you next week, when I can explain the affair to you. The chief point is this, that, as I am to receive this money for Haynes from you, I have made myself responsible for it to the parties who wrote to you on the subject, at the urgent request of Haynes; as it will do him a great service.—I remain, &c., Henry Duesbury. P.S.—Pray be kind enough not to pay any monies, either on the contract or extras, of any description till I have seen you.” The other letter was as follows:—“I do not know whether you were able to explain to Mr. Rose that, through the false statements and accounts of Haynes, I certified that £92, 7s. 2d. was due to him on the contract. But I have since heard (as I believe was explained to you the other day) that he has received £16 more than he said he had, leaving only £76, 7s. 2d. as the balance; but even this is not due to him on the contract, as the work is left incomplete. However, I consider the value of the extra work performed would finish the work on the contract, and leave the entire sum due for Haynes’s work of every description, £76, 7s. 2d. You will naturally ask why I suffered myself to be involved in a transaction of this nature. The state of the case is simply this: Haynes came to me saying he was under temporary difficulty, but that if I would certify to his friend Mr. Rose that so much was due to him for work performed at Mr. Glyn’s house at Ewell said Rose would advance the money, and entirely release him from embarrassments. He told me how much he had received (which was a false statement); and I certified for the balance: this was £92, 7s. 2d. Some time after Rose called upon me expressing sorrow for Haynes, and giving me to understand he was about to assist him, but said there was no [144] other terms upon which he could advance the money but by my giving him a bill for the amount of Haynes’s balance. I objected for some time; but as I considered he did not know me and wished to make it imperative on me to pay him the money, as I was certain to receive it according to Mr. Glyn’s letter to him, and as I had always heard Haynes highly spoken of as an honest man, Rose himself holding the same language, but, above all, as I was particularly anxious nothing disagreeable should occur to Mr. Glyn in the completion of his house, I consented to give a bill for six months, making quite sure that, long before that time, everything would be satisfactorily concluded. I trust you will excuse my troubling you with this communication, and ask Mr. Glyn to be kind enough to give it his early attention.—I am, &c., Henry Duesbury.”

The bill prayed that the Defendants might severally set forth to which of them the £76, 7s. 2d. belonged and was payable, and how in particular they made out their claims thereto; and that they might interplead and settle and adjust their demands between themselves; the Plaintiff being desirous and thereby offering that the £76, 7d. 2d. should be paid to such of them to whom the same should, in the judgment of the Court, appear of right to belong; and that the Plaintiff might be at liberty to pay the last-mentioned sum into Court for the benefit of such of the Defendants as should appear to be entitled thereto, and that Duesbury might be restrained from all further proceedings in his action; and that both the Defendants might be restrained from commencing or prosecuting any other action or actions against the Plaintiff for the recovery of the £76, 7s. 2d., or touching any of the matters aforesaid.

[145] The injunction having been obtained *ex parte*, the Defendants now moved to dissolve it, on the coming in of their answers.

Mr. Knight Bruce and Mr. Norton, in support of the motion. This is not a case of interpleader: for there is no identity of subject, nor is there any right to make the Defendants interplead with each other. The subject of Obbard’s claim is a debt due from the Plaintiff to Haynes; and the subject of the action brought by Duesbury is the balance of a running account between him and the Plaintiff, consisting of various items, one of which was a sum of money which Duesbury had paid to or on account of Haynes on the Plaintiff’s account; and, consequently, there is no common subject of litigation between Duesbury and Obbard. *Crawshay v. Thornton* (*ante*, vol. vii. p. 391; and 2 Myl. & Cr. 1; see p. 19), *Dungey v. Angore* (2 Ves. jun. 304), *Wright v. Ward* (4 Russ. 215).

Mr. Jacob and Mr. Rogers, for the Plaintiff. The money having been paid into Court, the Defendants have no right to call on the Court to decide whether this case is

a case of interpleader or not; for Lord Eldon decided, in *Hyde v. Warren* (19 Ves. 322), that the money being brought into Court, the bill could not be demurred to as not being a bill of interpleader. [THE VICE-CHANCELLOR. No such point was decided by Lord Eldon in *Hyde v. Warren*.] The two Defendants in this case are, in point of fact, claiming the very same sum of money. Duesbury claims as having [146] paid the money to or on the account of Haynes as the agent of the Plaintiff; and Obbard says that the money was not paid by Duesbury as the agent of the Plaintiff.

The case of *Crawshay v. Thornton* was a case of an entirely different character from the present. There both parties might have been entitled to recover from the Plaintiff; and the demurrer was allowed on the ground that Crawshay had acknowledged himself to be the agent of Thornton, and, therefore, by his own act, he had placed himself in a situation which made him liable to Thornton at all events; and, besides, he might be liable to Daniloff also: but in this case, if Obbard's claim succeeds, the Plaintiff cannot be liable to pay Duesbury; and, if Duesbury succeeds in his action, the Plaintiff cannot be compelled to pay Obbard. This, therefore, is a proper case of interpleader. The Defendants' counsel assume the very point on which the right to make their clients interplead depends. They say that Duesbury paid Haynes, as the agent of the Plaintiff: but the truth is that Duesbury says one thing and Obbard says the contrary: for Duesbury says that he paid Haynes as the agent of the Plaintiff; and Obbard says that Duesbury did not pay Haynes as the agent of the Plaintiff.

Mr. Knight Bruce, in reply. If A. orders goods from a shop, which are delivered to him, and then the owner of an adjoining shop says that he furnished the goods, and claims to be paid for them: that does not make a case of interpleader. The mere assertion of a false claim does not create a case of interpleader. If Obbard, under an assignment made to him by Duesbury, had claimed the debt due from the Plaintiff, that might have been a case of interpleader. [147] So, also, if Duesbury had claimed the debt due from the Plaintiff to his tradesman, it might have been a case of interpleader. But the present case cannot be held to be a case of interpleader, unless the Court is prepared to say that, if a tradesman brings an action for his bill against his customer, the customer may refuse to pay the bill on the ground that his agent had had the money to pay it with, and it was an item in a disputed account between him and his agent. What right has the customer to bring the tradesman into conflict with his agent? The question at issue is whether the debt which was due to Haynes is extinguished or not: the Plaintiff says that it is; but Obbard says it is not. The balance due to Duesbury is not claimed by Obbard; and, therefore, there is no identity of debt or duty in this case.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not recollect that, when this case was first brought before me upon the motion for the injunction, anything more took place than an *ex parte* statement of the case, upon which the order was made without discussion; therefore I am not sorry that there has been this discussion; because it may serve to make clear the law of interpleader.

In the case of *Crawshay v. Thornton* the Lord Chancellor, speaking of the law of interpleader, uses this language: "In equity it is defined to be where two or more persons claim the same debt or duty." It is obvious that there may be a case of interpleader where no debt or duty is claimed. Lord Redesdale, in his Treatise on Pleading, twice asserts the proposition that, where two or more persons claim the same thing by different or separate interests, and another person, not knowing to which of the claimants he ought, of right, [148] to render a debt or duty or to deliver property in his custody, fears he may be hurt by some of them, he may exhibit a bill of interpleader against them: p. 48, 4th edition. And again, at p. 141, he says that, where two or more persons claim the same thing by different titles, and another person is in danger of injury from ignorance of the real title to the subject in dispute, Courts of Equity will assume a jurisdiction to protect him.

A case of interpleader then arises where the same subject, whether debt, duty or thing is claimed. Now, when the subject in dispute has a bodily existence, no difficulty can arise on the ground of identity; for no dispute can arise as to identity of matter. But, where the subject in dispute is a chose in action which has no bodily

existence, it becomes necessary to determine what constitutes identity. Where the claims made by the Defendants are of different amounts, they never can be identical; but where they are the same in amount, that circumstance goes far to determine their identity. The amount, however, may not be sufficient of itself to determine the identity; for the amount may be the same, and the debt may be different.

In this case, Haynes having become insolvent, Obbard, as his assignee, claims a debt due for work and labour done by him for the Plaintiff; and Duesbury, who was the Plaintiff's agent and who superintended the works, claims a debt due to him from the Plaintiff in respect of his having paid certain monies on the Plaintiff's account, amongst which is included a sum paid by him to or on account of Haynes, for work and labour done; and the question is whether the debt or duty claimed by Duesbury is the same as that claimed by Obbard. [149] It appears to me that, although there is a complication of circumstances which, *prima facie*, give colour to the assertion that the two sums are substantially the same debt; yet if Duesbury had brought an action against the Plaintiff, and had, in that action, recovered the whole amount of what he claimed, that would not have prevented Obbard, in right of Haynes, from bringing his action and recovering, even although the amounts might be the same. Suppose that Duesbury's claim of debt had originally arisen from one set of circumstances, and Obbard's claim from another source, could the Plaintiff, by paying the debt to Duesbury, be morally and conscientiously said to have paid the debt due to Haynes; or, *vice versa*, if he had paid Haynes, might not Duesbury have recovered?

The matter, I think, must depend on the original nature and constitution of the debt; and when the debt to Duesbury arose in respect of acts done by him in his character of architect and surveyor to the Plaintiff, and the debt to Haynes, in respect of work and labour done; I do not see how the two debts can be the same. It seems to me that they are originally and substantially different in their nature; and, therefore, that they cannot be properly made the subject of a bill of interpleader. The consequence is that the injunction must be dissolved.

[150] BLEAKLEY v. SMITH. July 17, 1840.

[See *Shardlow v. Cotterell*, 1881, 20 Ch. D. 96; *Evans v. Hoare* [1892], 1 Q. B. 595; *Plant v. Bourne* [1897], 2 Ch. 285.]

Agreement. Signature. Stat. of Frauds.

J. R. Bridges having five freehold houses but no other property in Cable Street, Liverpool, agreed to sell them to J. Bleakley for £248; and thereupon drew up the following memorandum in his own handwriting:—"July 26th, 1839.—John Bleakley agrees with J. R. Bridges to take the property in Cable Street for the net sum of £248, 10s." Held, that the agreement was sufficiently signed by the vendor.

John Robert Bridges being seised in fee of an undivided moiety of five freehold houses in Cable Street, Liverpool, agreed to sell it to the Plaintiff for £248, 10s.; and thereupon Bridges drew up the following memorandum, in his own handwriting: "July 26th, 1839.—John Bleakley agrees with J. R. Bridges to take the property in Cable Street for the net sum of £248, 10s."

Bridges had no property in Cable Street, except the undivided moiety before mentioned. On the 10th of February 1840 he died, having received the whole of the purchase-money, but without having conveyed the property to the Plaintiff.

The bill was filed against his executors and his heir at law (who was an infant) for a specific performance of the agreement.

Bridges not having written his name either at the foot of the agreement or in any other part of it except as appears above, the question was whether the agreement was binding on him and his heir.

Mr. F. J. Hall, for the Plaintiff, cited *Propert v. Parker* (1 Russ. & Myl. 625; see 1 Sugd. Vend. & Pur. 10th edit. 179).

Mr. James Russell, for the Defendants.

[151] THE VICE-CHANCELLOR was of opinion that the agreement was sufficiently signed to take it out of the Statute of Frauds, and decreed as follows:—

“This Court doth declare that the memorandum or agreement in the pleadings mentioned, dated the 26th day of July 1839, was a valid and binding contract in writing, as against J. R. Bridges, deceased, in the pleadings named, and that the same ought to be specifically performed and carried into execution; and doth order and decree the same accordingly: and the Defendants, John Smith and Alice Bridges, the executor and executrix of the said J. R. Bridges, by their answer admitting that the consideration or purchase-money for the undivided moiety or equal half part of the said J. R. Bridges, deceased, of and in the five several freehold messuages and dwelling-houses, with the appurtenances, situate on the south side of Cable Street in the town of Liverpool in the county of Lancaster, was fully paid and satisfied by the Plaintiff to the said J. R. Bridges in his lifetime, this Court doth declare that the infant Defendant, T. S. Bridges, the eldest son and heir at law of the said J. R. Bridges, is a trustee of the same undivided moiety or equal half part of and in the said five several freehold messuages or dwelling-houses and appurtenances, within the intent and meaning of an Act of Parliament made and passed, &c. (1 Will. 4, c. 60), and that the said infant Defendant is such trustee for the Plaintiff, his heirs and assigns: and it is ordered that the infant Defendant, T. S. Bridges, and all other proper parties do execute a proper conveyance or assurance of the said undivided moiety or equal half part of the said five freehold messuages, dwelling-houses and appurtenances to the Plaintiff,” &c., &c.

[152] FORBES v. PEACOCK. August 1, 1840.

[S. C. 11 M. & W. 630. For subsequent proceedings, see S. C. 12 Sim. 528; 1 Ph. 717; 41 E. R. 805 (with note).]

Power of Sale. Will. Construction. Implied Power.

Testator, after directing all his just debts to be paid, gave his personal estate and a freehold house, of which he was seised in fee, to his wife for life, with liberty to sell it, in case a good offer should be made, and to invest the proceeds in the funds for her benefit during her life; and he directed that, at his wife's death, the house, if not previously sold, should be sold (but without saying by whom), and that the proceeds, together with his personal estate, should be divided amongst the children of his brother and sister: and he appointed his wife his executrix, and requested J. H. F. and R. C., jointly with her, to become the executors and trustees of his will. J. H. F. and the testator's widow proved the will. R. C. died in the lifetime of J. H. F. and the widow, without having proved it. The widow died 25 years after the testator. Held that J. H. F. had power to sell the house, and to give a receipt for the purchase-money.

J. F. Throckmorton being seised in fee of a messuage, garden and other hereditaments in Hornsey Lane, Middlesex, made his will, dated the 18th of March 1815, in the following words:—

“All my just debts to be paid, and all my debts due to me to be collected. First, I give and bequeath to my dear wife, Elizabeth Throckmorton, all plate, jewels, wines, household furniture, monies at the banker's or elsewhere belonging to me, and all stock in the funds, partly during her natural life, and partly at her own disposal as shall hereinafter be provided for. Secondly, in order that she, my said dear wife, Elizabeth Throckmorton, may have wherewithal to support herself comfortably, I wish her to lay out in Government annuities, for her life, £2500 sterling, half in the consols and half in the Reduced three per cents., which will bring her payments in quarterly. The remainder of my property I desire may be invested in the five per cent. stock, for her benefit during her natural life. Thirdly, the house and ground on which it stands, garden and all thereto belonging, being now my own freehold pro-[153]-perty paid for and without incumbrance, I give to her for her natural life, with liberty to

sell it, in case a good offer is made, and invest the proceeds of it in the five per cent. stock for her benefit during her life; or she may let it on a running lease for 7, 14 or 21 years; said lease to expire and terminate on the first of the three above said periods that may happen subsequent to her demise. Out of my estate, the monies so directed to be invested as aforesaid or any part thereof, I give and bequeath at the death of my said dear wife, Elizabeth Throckmorton, to Mary May, great-niece of my said dear wife, Elizabeth Throckmorton, provided she conducts herself, as she has always hitherto done, to her aunt's and my satisfaction, £1000, for her sole use and benefit, and also the interest of £1000 five per cent. stock during her, the said Mary May's, natural life. Fourthly, should the aforesaid Mary May die before her aunt, Elizabeth Throckmorton, then the £1000 left as above for her sole use and benefit is to be with the rest of my remaining property to form a residuary trust fund to be disposed of as hereinafter to be named at the death of my aforesaid dear wife, Elizabeth Throckmorton; but in case of her the said Mary May's decease as aforesaid before that of her aunt, Elizabeth Throckmorton, then and in that case only I give, at the death of Elizabeth Throckmorton, the interest of the £1000 five per cent. stock, spoken of as aforesaid, to Mary Graham and Eliza Graham, daughters of my late good friend and brother-in-law Joseph Graham of Harwich, jointly and equally, or to the survivor of them during their lives, and, at their deaths, to be divided with the residuary property as above spoken of and to be hereinafter provided for. Fifthly, I desire that, at the death of my said dear wife, Elizabeth Throckmorton, the residue of my estate may then be collected, *including the profits of [154] the house and lot, if not previously sold, to be then disposed of to good advantage*, and divided as follows: my sister, Sarah Fordman, of Freehold Monmouth County, State of New Jersey in America, has four children, and my brother Samuel Throckmorton, deceased, has left three children, perhaps four, but to them, be they seven or be they eight, I give and bequeath all the said residue of my property as aforementioned, to be equally divided share and share alike, or to the survivors of them. Sixthly, on the decease of the aforesaid Mary May or of Mary Graham and Eliza Graham, whichever or whoever of them shall have the benefit and receive the interest of the £1000 five per cent. stock as aforesaid, the principal is then to revert to the residuary funds as aforesaid, and to be divided therewith. Seventhly, whatever property may be willed to me by my dear mother, Catherine Throckmorton, or by whomsoever, I give it to my aforesaid dear wife, Elizabeth Throckmorton, during her life, and, at her death, to form part of the residuary fund as before mentioned, and to be divided at her death with the same. I appoint my dear wife, Elizabeth Throckmorton, to be my executrix: and I request the favour of my good friends, John Hopton Forbes, Esq., of Ely Place, Holborn, and Robert Cooper, Esq., of Guildford Street, will, jointly with my aforesaid dear wife, Elizabeth Throckmorton, become my executors and *trustees* to this my will." The testator then gave legacies of ten guineas each to several individuals; and afterwards proceeded thus:—"My brother, Richard Throckmorton, enjoys a property in which I am interested or may be so on the decease of my mother: it is not my wish that he should be distressed or urged to pay my demand upon him during his life or that of his present wife, but, at their decease, if my wife, Elizabeth Throckmorton, is [155] then living, I give it to her for her life, and, at her decease to form part of the residuary funds as aforesaid, to be applied as directed in the fifth clause of this my will. I desire a copy of this my will to be sent to my sister, Sarah Fordman, wife of Dr. Fordman, Freehold Monmouth County, New Jersey, America."

The testator died soon after the date of his will, which was proved by his widow, Elizabeth Throckmorton, and by the Plaintiff, John Hopton Forbes. R. Cooper died many years before the bill was filed, without having proved the will or acted in the trusts thereof. Elizabeth Throckmorton died on the 7th of April 1840.

The bill stated that, in pursuance of the will, the Plaintiff caused the said messuage, garden and hereditaments to be put up to sale by auction on the 28th of May 1840; and that the Defendant became the purchaser thereof at the price of £1360: that an abstract of title to the premises was delivered to the Defendant on the Plaintiff's behalf, and was submitted by the Defendant to his counsel, whose opinion thereon was as follows:—"I think a good title is deduced to the late Mr. Throckmorton. The real difficulty in the title arises under the will of Mr. Throck-

morton, on which three distinct questions present themselves. Firstly, whether a power of sale can, by implication, be held to be vested in his executors. Secondly, whether a surviving executor and trustee can sell: and 3dly, whether a good discharge can be given without the concurrence of the *cestuis que trust*. On the whole, there appears to me so much doubt on the title, that a purchaser ought, I think, to have the sanction of a decree of a Court of Equity: or, otherwise, I think that the vendor should obtain the concurrence of the testator's heir, and of the parties beneficially entitled to the purchase-money."

[156] The bill further alleged that, save as to the aforesaid questions arising on the testator's will, the title to the premises, as disclosed by the abstract, was a perfectly good and marketable title: that the Plaintiff could not procure, and was not bound to procure, the concurrence in the sale, and conveyance of the premises, of the testator's heir and all the parties beneficially interested in his residuary estate, most of whom were resident abroad in different parts of the world: but the Plaintiff was advised that he, as the surviving executor and trustee of the will, had power to sell the premises and to make a good title thereto, and convey the same to the Defendant, and give him a valid discharge for his purchase-money, without the concurrence of such parties or any of them.

The bill prayed for a specific performance of the contract.

The Defendant demurred on the ground that the Plaintiff could not make a good title to the premises.

Mr. Coote and Mr. Bird, in support of the demurrer. The question in this case arises on the fifth clause in the will, where the testator directs that, at the death of his wife, the residue of his estate shall be collected, including the profits of the house and lot; if not previously sold, to be then disposed of to good advantage, and divided as therein mentioned. We contend that the Plaintiff, as the surviving executor of the will, is not enabled to make a title to the house. It will be said by the counsel in support of the bill that the Plaintiff has a right to sell the house, either to pay the testator's debts, which are charged by his will, on his real estate, or to pay the legacies; or because the produce of the real estate and the personal estate are blended [157] together, and are to be disposed of by the executors, as in *Tylden v. Hyde* (2 Sim. & Stu. 238). We concede that, if no person is appointed to sell the real estate, and the proceeds are to pass through the hands of the executor for the purpose of paying debts or legacies, then the executor is the person to sell the real estate: but here twenty-five years have elapsed since the testator's death, and therefore the executor is not at liberty to allege that he is under the necessity of selling the real estate to pay the testator's debts. At all events, he ought to have stated in his bill that he wanted money to pay the debts. *Shaw v. Borrer* (1 Keen, 559).

Secondly, as to the money being wanted to pay the legacy to Mary May. It is pretty clear that the £2500 directed to be invested in Government annuities is the fund out of which the testator intended that legacy to be paid.

Thirdly, with respect to the argument founded on the decision in *Tylden v. Hyde*, that, as the produce of the real estate is blended with the personalty and the aggregate fund is to be divided by the executor, therefore the executor is to sell. [Mr. Knight Bruce, for the bill. You do not allude to the request that the Plaintiff and Cooper should become the executors and trustees of the will.] The £2500 is the fund of which they are to be trustees. In *Tylden v. Hyde* Sir John Leach, V.-C., says: "Where there is a general direction to sell, but it is not stated by whom the sale is to be made, there, if the produce of the sale is to be applied by the executors in the execution of their office, a power to sell will be implied to the executors." It is not, however, very intelligible why a power to sell real estate should not be implied to the heir rather than to the [158] executor. This case, however, is distinguishable from *Tylden v. Hyde*, and falls rather within the principle of *Bentham v. Wiltshire* (4 Madd. 44). There the testator devised the estate to which the suit related to Hannah Barrett for her life, provided she did not marry; and directed that, after her decease, it should be sold (not saying by whom), and the monies arising therefrom divided amongst certain illegitimate children; and he appointed Bryan Bentham and Hannah Barrett his executors. The difficulty in that case was that, as the real estate was not to be sold until after the death of Hannah Barrett, the tenant for life, and, as she was an

executrix, it was necessary to imply a power of sale, not only in the executors, but in the surviving executor; and Sir John Leach, in his judgment in that case, says: "It is a further circumstance that the sale is directed to be made after the death of the tenant for life, who was one of the executors; there is here, therefore, no power of sale in the executors." If then it is held that the Plaintiff in this case has power to sell the property in question, the decision in *Bentham v. Wiltshire* will be contradicted.

Supposing that a power to sell is vested by implication in the Plaintiff, still, as the sale cannot be required for the purpose of paying the debts of the testator, who died 25 years ago, the Plaintiff cannot give a receipt for the purchase-money without the concurrence of the *cestuis que trust*. The Plaintiff, however, has sold the property without their knowledge; and he does not know who they are or where they reside. The probability is that they, or some of them at least, are aliens; consequently, the Attorney-General ought to have been made a party to this suit, as representing the Crown. [159] *Doe v. Acklam* (2 Barn. & Cress. 779). [THE VICE-CHANCELLOR. Is there any allegation that they are aliens?] No; but there appears, on the face of the will, strong ground for presuming that they are so. [Mr. Knight Bruce. Are you aware that, in *Du Hourmelin v. Sheldon* (4 Myl. & Cr. 525), the Lord Chancellor decided that aliens might take the proceeds of the sale of real estate?] At all events, all the *cestuis que trust* may have died in the lifetime of the testator's widow; and then the object of the sale would be at an end.

Mr. Knight Bruce and Mr. J. Parker appeared in support of the bill; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The testator directs that, at the death of his widow, the residue of his estate shall be collected, including the proceeds of his house, which, if not previously sold, is to be then sold. He then says: "My sister, Sarah Fordman, of Freehold Monmouth County, State of New Jersey in America, has four children, and my brother, Samuel Throckmorton, deceased, has left three children, perhaps four; but to them, be they seven or be they eight, I give and bequeath all the said residue of my property as aforementioned, to be equally divided, share and share alike, or to the survivors of them." He seems, therefore, to be doubtful how many children of his deceased brother were living. Therefore, when he says, "or to the survivors of them," he means not those who should be living at the decease of his widow, but those who should be living at his own decease.

When this case was opened, it brought to my recollection a note, which I made some years ago, of a very [160] remarkable case: *Ward v. Devon*, 9th February 1805. There a testator made his will, dated the 29th of August 1801, in the following words:—

"Sell all off, both real and personal property, and divide the produce between my wife, Mary Ann Ward, and my sons and daughters, each to share alike. The law gives the house at Teddington to the youngest son; but it is my will to sell all. I appoint Mr. Robert Ward, my brother, and my wife, Mary Ann Ward, my executors." That was the whole of the will.

The testator died seised in fee of freeholds and copyholds. The executors contracted to sell to the Defendant, who insisted that they could not make a title; but it was held that the executors had power to sell.(1) On the authority of that case, I am of opinion that the Plaintiff has power to sell the house which is the subject of the present suit.

The only other question is whether the Plaintiff can give a valid receipt for the purchase-money; and I am of opinion that he can do so; for the testator has charged his real estate with the payment of his debts; and, as the bill says nothing at all about the debts, *non constat*, but that some of them may still remain unpaid. At all events, the purchaser has no notice that they have been all paid; and he is not bound to inquire whether they have been paid or not.

Demurrer overruled.

(1) It appeared, from the note of the above case which His Honor kindly lent to the reporter, that Devon stated, in his answer, that he had taken the opinion of the late Mr. Shadwell on the question; and that that eminent conveyancer doubted whether the executors could sell.

[161] MARRIS v. BURTON. July 24, 1840.

[S. C. 9 L. J. Ch. (N. S.) 373.]

Will. Construction. Legacy Duty.

Testator directed his executors to set apart a sum not more than £7500, the dividends of which, when invested as after directed, would amount to or produce the clear yearly sum of £300, clear of all deductions whatsoever, and to invest the sum so to be set apart in Government or other securities; and he directed that if at any time the dividends of the trust monies should, from any cause whatsoever, prove insufficient to answer the purposes aforesaid, the trustees should, out of the residue of the monies that should come to their hands, raise such further sum as should be sufficient to make good any deficiency, and apply the same accordingly; and he gave the annuity to the Plaintiff for life. Held, that the annuity was free from legacy duty.

The testator in the cause directed his executors and trustees to set apart, out of the residue of his personal estate and the proceeds of his real estate, a sum of money not being less than £6500, nor more than £7500, the yearly dividends, interest and produce of which, when invested as thereafter mentioned, would amount to or produce the *clear* yearly sum of £300, *clear of all deductions whatsoever*, and to lay out and invest the said sum so to be set apart, in their names, in Government or other securities: and he gave the annuity to the Plaintiff for her life. The testator then directed that if at any time the dividends and annual produce of the trust monies should, from any cause [162] whatsoever, prove insufficient to answer and satisfy the purposes aforesaid, his trustees should, by and out of the residue of the monies which should come to their hands, raise such further sum or sums of money as should be sufficient to make good any deficiency, and pay and apply the same accordingly.

The question was whether the annuity was given free of legacy duty.

Mr. Knight Bruce and Mr. Bacon, for the Plaintiff the annuitant, cited *Smith v. Anderson* (4 Russ. 352) and *Barksdale v. Gilliat* (1 Swanst. 562).

Mr. Jacob and Mr. Walker, for the executors and trustees. This case is distinguishable from the cases cited: for there the annuity itself was given clear of all deductions; but here the fund that is to produce the annuity and not the annuity is so given. Besides, the sum that is to be invested is limited; it is not to exceed £7500. But that sum, if invested in the three per cents., would not produce even the annuity. Can you then say that a much larger sum than the testator has directed, that is, a sum sufficient to pay the legacy duty as well as the annuity, ought to be taken out of the residue?

The testator contemplated that the money directed to be set apart might be invested in the three and a half per cents., and that the dividends of that stock might be reduced; and it is in that event that he directs the deficiency to be made good. *Sanders v. Kiddell* (*ante*, vol. vii. p. 536).

[163] THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator has pointed out a clear intention that the annuity should be clear of all deductions. In *Sanders v. Kiddell* the testator did indeed use the word "clear," but he did not use the words "clear of all deductions;" and, besides, the parties were to take the annuity in succession. Here it is pretty plain from the words to which I have adverted, and from the other parts of the will, that the testator intended the annuitant to take the annuity free from any diminution whatever.

[163] DANIEL v. DUDLEY. July 31, 1840.

[S. C. on appeal, 1 Ph. 1 ; 41 E. R. 531 (with note).]

Deed. Construction. Executors and Administrators.

By a marriage settlement trusts were declared of a sum of money, the wife's property, for her separate use for life, for her husband for life, for their children as the wife should by deed or will appoint ; in default of appointment for the children equally ; if there should be no child, then for such persons as the wife should appoint by deed or will, and in default thereof for the *executors or administrators of the wife*. The ultimate trust took effect. Held, that by the *executors or administrators* of the wife, her next of kin at her death were meant, there being throughout the settlement an evident intention to exclude the husband from taking more than a life interest.

By an indenture, dated the 27th of May 1807, being the settlement made in contemplation of the marriage of Thomas Busby with Mary Henn, after reciting the intended marriage, and that as well in prospect thereof as of the portion which T. Busby would receive with Mary Henn, and for making a better provision for T. Busby and Mary Henn and the issue of the marriage, it had been agreed that the sum of £1100 secured by the mortgage therein mentioned should be settled upon and for the trusts, intents and purposes, and subject to the powers, provisions and agreements thereafter mentioned concerning the same ; it was [164] witnessed that, in pursuance of such agreement and for the consideration aforesaid, Mary Henn, for herself, her heirs, executors, &c., and Thomas Busby, for himself, his heirs, executors, &c., did severally covenant with John Land and Solomon Bowerman, that immediately after the execution of the settlement, the £1100 should be and be deemed as vested in Land and Bowerman ; and Land and Bowerman did thereby, for themselves severally and for their several executors, &c., declare that they would stand possessed thereof, and of the interest, dividends and produce thereof in trust, after the solemnisation of the marriage, to continue the same or any part thereof on the then present security at interest, or, *with the consent of Mary Henn*, testified by some writing under her hand, and, after her decease, *at the discretion of the trustees for the time being*, to call in the £1100 or any part thereof, and lay out or lend the same again, in the names of the trustees for the time being, in the purchase of some of the public stocks or funds, or upon some Government or Parliamentary or real security or securities at interest, and the same again, with such consent as aforesaid, or at the discretion of the trustees for the time being after Mary Henn's decease, from time to time to alter, vary, transfer, sell out or call in, and lay out and invest upon any new or other stocks, funds or securities of the like nature ; and, during Mary Henn's life, to receive the dividends, &c., of the £1100, or of the stocks, &c., upon which the same should then be lent, laid out or invested, and to pay such dividends, &c., to Mary Henn for her separate use ; and, after her decease, in case Thomas Busby should survive her, to pay the dividends, &c., to him for his life ; and, after the decease of the survivor of them, to stand possessed of the capital in trust for all and every or such one or more of the children of the [165] marriage as Mary Henn should, by deed or will, appoint, and, in default of such appointment, in trust to divide the same equally amongst all the children of the marriage, the shares of sons to be paid to them at 21, and the shares of daughters at that age or on marriage. The settlement then contained provisions for the maintenance of the children, and for the survivorship and accruer of their shares in case they should die before their shares should become payable. It then directed that, in case there should be no son who should attain 21, nor any daughter who should attain that age or marry, the trustees should pay and transfer the £1100, or the stocks, &c., upon which that sum should then be invested, to such person or persons, &c., as Mary Henn, *notwithstanding her coverture*, should appoint by deed or will ; and that, in default of such appointment, the trustees should pay and transfer the same unto the *executors or administrators of Mary Henn* : and Busby covenanted with the trustees that, in case

the marriage should take effect and Mary Henn should die in his lifetime, he would permit and suffer her to appoint the £1100, by deed or will, unto such child or children, person or persons, in such shares, manner and form as she should think proper; and that, *in case she should die in his lifetime and should make no appointment of all or any part of the £1100, and she dying without issue as aforesaid, the same or the unappointed part thereof, should be and remain unto and for the only use and benefit of her executors, administrators and assigns*: and Thomas Busby further covenanted with the trustees that, if the marriage should take effect, he would permit the will, to be made by Mary Henn in pursuance of the before-mentioned power, to be duly proved by the executors therein to be named, and probate [166] thereof to be taken, as was usual; and that the appointees should peaceably and quietly have, hold and possess the £1100, without any let, &c., of or by him, his executors, administrators or assigns: and also that it should be lawful for the trustees to sue for the £1100, or any part thereof, or the interest or dividends thereof, in his name and in the name of Mary Henn; and that he would not release the £1100, or any part thereof, or the interest or dividends thereof then due, or thereafter to grow due, to Mary Henn, without the consent in writing of the trustees; and that he would, as often as thereto desired by the trustees, join with Mary Henn in any release, receipt or discharges necessary to be given for any monies due or to grow due to her as aforesaid; and that he would, at all times after the marriage should take effect, upon every reasonable request and at the proper costs and charges of the trustees, (1) or the survivor of them, or the executors or administrators of the survivor, do and execute all such further acts and things for the better settling, recovering and receiving the £1100, and the interests and dividends thereof, upon and for the trusts and intents thereinbefore declared concerning the same, as by the trustees and the survivor of them, or the executors or administrators of the survivor, or by their counsel, should be reasonably required: and it was thereby agreed between the parties thereto that Busby, his executors and administrators, should, at all times thereafter, be indemnified, out of the trust premises, against all costs, charges, &c., that he or they should incur by reason of the said Thomas Busby joining or being made a party in any action or suit for recovering any part of the £1100, or the dividends or interest thereof, or on any other account whatsoever.

[167] The marriage was solemnised shortly after the execution of the settlement.

In September 1819 Busby took the benefit of the Insolvent Debtors Act; and the Defendant Dudley became the assignee of his estate. Mary Busby received the interest of the £1100 during her life for her separate use. She died in May 1823, intestate, leaving her husband and a son, who was the only issue of the marriage and her sole next of kin, her surviving.

After Mrs. Busby's death, the interest of the £1100 was paid to Mr. Busby's assignee during his life. In 1825 he died intestate, without having taken out administration to his wife, and leaving his son, his only child and next of kin, him surviving.

In January 1829 the son died, an infant, intestate and unmarried, leaving the Plaintiff Charlotte Daniel and the Defendant Martha Goodson, his two paternal aunts, his sole next of kin. The interest which became due on the £1100 from Thomas Busby's death up to the 24th of September 1828 was applied for the infant's use, but the interest which accrued subsequently to that day and up to the infant's death was in arrear at his decease.

In February 1834 administration to the estates of Thomas Busby and his infant son was granted to the Plaintiff Charlotte Daniel; and in April 1835 administration to Mary Busby was granted to the same person.

The Plaintiff, who had obtained payment of the £1100 and the interest due thereon from the mortgagee, [168] alleged by her bill that Dudley, as the assignee under Busby's insolvency, insisted that Busby became entitled to the £1100 and all interest due thereon at the death of his infant son, and also to all interest accrued thereon subsequently, as having survived his wife; and that the Plaintiff ought to pay the same to Dudley as such assignee: whereas the Defendant Martha Goodson,

(1) So in brief.

as one of the infant's next of kin, alleged that, according to the true construction of the settlement, Busby was excluded from taking in the events which had happened any benefit in the £1100 or the interest thereof, under the ultimate trust declared by the settlement for the benefit of Mary Busby's executors and administrators, such trust being meant, as Martha Goodson contended, *for the benefit of Mary Busby's next of kin, to the total exclusion of her husband surviving her*; and that Busby was bound, by his covenants in the settlement, to give effect to such settlement accordingly; and that the Plaintiff, as his administratrix, was then bound so to do; and that Martha Goodson accordingly insisted that the infant, as Mary Busby's only child and sole next of kin, became entitled to the £1100 and the interest thereof, subject to his father's life interest and to his own contingent interest therein, and that, on the infant's decease, the £1100, and all interest due thereon, devolved to his next of kin, and that Martha Goodson, accordingly, became entitled to one moiety of the trust money, as one of his next of kin at the time of his death, and that the Plaintiff Charlotte Daniel became entitled to the other moiety, as the other of such next of kin, and that she, as the infant's administratrix, was bound to pay and divide the trust money accordingly. The bill further alleged that Martha Goodson also insisted that, if Busby was not excluded by the settlement as before mentioned, [169] yet that the interest of the £1100, which accrued after Busby's death and in the lifetime of his son, and which remained unpaid at his decease, formed personal estate of the son, and as such became and was divisible among his next of kin.

The bill prayed that the rights and interests of the Defendants and of the Plaintiff in the monies received by the Plaintiff on account of the £1100 and interest might be ascertained and declared; and that such monies might be paid and applied accordingly: and, in the meantime, that the same might be secured for the benefit of the parties interested therein; and that all such accounts might be taken and inquiries made as might be necessary for the purposes aforesaid.

The Defendant, Dudley, by his answer, claimed, as Busby's assignee, all such right and interest in the matters in question, in trust and for the benefit of Busby's creditors, as he might appear to be entitled to. The other Defendants were Henry Goodson and Martha his wife, neither of whom answered the bill. With respect to the latter, the bill charged and Dudley admitted, in his answer, that she separated from her husband many years ago and went to America, where she was still resident. With respect to the former, the bill charged that the Plaintiff had not seen or heard of him, and that he had not been seen or heard of by any other person since 1835, and that the Plaintiff was unable to discover whether he was living or dead: in answer to which Dudley said he believed that the Plaintiff had not seen or heard of H. Goodson since 1835: but whether any other person had seen or heard of him since that time the Defendant was unable to set forth.

[170] The cause now came on to be heard as a short cause.

Mr. Knight Bruce and Mr. Parry, for the Plaintiff. The question is whether, according to the true construction of the settlement, the executors or administrators of the wife do not mean her next of kin.

There is a covenant, following the trust for the executors or administrators of the wife, which will be found material to the construction of those words. The husband covenants that in case his wife should die in his lifetime without making any appointment of the £1100 and without issue, that sum should be and remain unto and for the only use and benefit of her executors, administrators and assigns. So that he provides for the case of her dying under such circumstances that no one could take except himself. *Bulmer v. Jay* (ante, vol. iv. p. 48). That case was not so strong in favour of the next of kin as the present is, for there the £750 was to be raised after the death of the survivor of the husband and wife, whichever of them might be the survivor. In that case your Honor said: "I apprehend that, in putting a construction on the expression, 'the executors and administrators of Ann Prichard,' I ought not to look at those words only, but at the whole of the settlement, in order to discover what the intention of the parties was in using that expression; for, to adopt the language of Lord Thurlow in *Woodcock v. The Duke of Dorset*, the intention of the settlement is the truth and honour of the case." So, in deciding as to the construction of the words in question in this case, we submit that the Court is bound to look

at the whole of the settlement; and it [171] will then be seen that the property is the property of the wife; that the husband is anxiously excluded from taking any interest in it beyond a life interest; that he is to have no power to appoint the fund, nor even any control over the securities in which it is to be invested; and that there is that important covenant entered into by him, to which we have before alluded to. Your Honor's decision in *Bulmer v. Jay* was affirmed by Lord Brougham, C. (3 Myl. & Keen, 197; see 201): his Lordship in his judgment uses language which closely applies to the present case. He says: "Now, if it had been intended that the husband should take, or, after him, his personal representatives, can anything be more strange and unintelligible than that this roundabout method of giving the money to him should have been adopted? Instead of saying 'to the husband, his executors and administrators,' it is, that he shall take through the executor of the will, or the administrator to the estate and effects."

"How can one suppose the design to have been that he and his representatives should take, when, instead of giving the fund to them, the settlement gives it to the executors or administrators of his wife? No doubt he is entitled to it if those executors or administrators are to administer the estate and effects according to the law of distribution. But is not this a most extraordinary and roundabout way of giving it to him? Hence we are not only naturally led, but compelled to find some other meaning for the words. Then it is to be considered that nothing can be more likely than that the parties to the settlement should intend to give this sum, which formed originally a part of the wife's estate, and was by her brought into the settlement, to the [172] family of the wife. It is set apart, as it were, for her—she is to have, by express provision in terms, the absolute disposal of it. In whole or in part she may appoint to it, by deed in writing or will, notwithstanding her coverture; and it is only in the event of her having failed to dispose of it that the clause in question assumes to deal with it at all. All this clearly shews that the sum is set apart for her and hers. If 'executors or administrators' are to be taken in the ordinary sense of the words, it is set apart for her, if she chooses to appoint by deed or will; but otherwise, not at all—it falls at once to her husband."

The case of *Smith v. Dudley* (*ante*, vol. ix. p. 125; see 133) is also a very strong authority for putting such a construction on the words executors or administrators, as the intention of the parties, as it is to be collected from the instrument, requires; for their your Honour put one construction on those words in one part of the settlement, and a different construction on them in another part of it. Your Honor, towards the conclusion of your judgment, says:—"The next subjects of the settlement are the household furniture, and Mary Pountney's interest under Mrs. Pitt's will; and, with respect to them, the ultimate limitation is the same as the corresponding limitation of the leaseholds. Now, as the leaseholds and the household furniture were the property of Barnsley and wife, and the share of Mrs. Pitt's estate was the property of Mary Pountney herself, it is fair to put such a construction upon the foolish words which are found in the ultimate limitations of trust as to them as will have the effect of restoring them to Mary Pountney's own family." In the present case also the fund in [173] question was the property of the wife, and therefore it is fair to put such a construction upon the ultimate limitation of trust as will have the effect of restoring it to her family.

Mr. Jacob and Mr. Keene, for the Defendant Dudley. In *Bulmer v. Jay* the £750 was to be raised out of the husband's property; therefore, it was obvious that he was intended to be excluded. Lord Brougham relies on that circumstance in his judgment. His Lordship says: "The provision in the settlement, that if the real estate on which the £750 were to be raised, should prove insufficient, the husband's estate should bear the deficiency, makes it still more difficult to suppose that the husband is to benefit by that sum, as he must do if executors or administrators be taken in the ordinary sense of those words. According to the construction contended for, it would be provided that the husband's estate should be charged with a sum to be paid to the wife's representatives, in order that they might pay it over to the husband himself or his representatives; a kind of arrangement which, it may be safely asserted, no persons with their eyes open ever made." It has been said that the Court ought to put such a construction upon an instrument as the truth and honour of the case requires.

Here, if the construction contended for on the other side is to prevail, the fund would not have become the property of the wife if she had survived her husband. Is such a construction consistent with the truth and honour of the settlement?

In *Smith v. Dudley* there were special words which do not occur in the present case: for the words, "of her own family," were added to the limitation to the [174] executors or administrators of the wife: and, consequently, there was plainly an indication of intention in favour of her own relations; and, that being so, it was impossible to let in the husband. Here the limitations are the common ones: first, to the wife for life, then to the husband for life, then to the children, and ultimately to the executors or administrators of the settlor.

The covenants in the settlement do not tend in the least to support the Plaintiff's argument. They are merely covenants on the part of the husband to give effect to the limitations of the settlement, and were quite superfluous. Upon the whole we submit that there is nothing whatever to shew that the words under consideration ought to be taken out of their natural meaning.

Mr. Knight Bruce, in reply. If the fund was intended to become the wife's absolute property in case she survived her husband, that is, if the words "the executors or administrators of Mary Henn" were intended to have their natural effect, the general power of appointment given to her would, in that event, be nugatory.

One of the covenants entered into by the husband is that if his wife should die in his lifetime without issue and without making any appointment, then the £1100 should remain for the only use and benefit of her executors, administrators and assigns, that is, according to the Defendant's construction, that if the property should come to be his, it should remain to his own use and benefit: such a construction is manifestly absurd. Besides, executors and administrators do not take for their own use and benefit; and it is plain that the parties, [175] when they used those words, had in view some persons who would take for their own benefit. It is only reasonable to conclude that the covenants were entered into by the husband in order to prevent him from claiming any interest in the settled property, except that which was expressly limited to him. Lastly, it appears from the covenants that the instrument in question was intended to be executory or in the nature of marriage articles: and, therefore, the Court is not under the same obligation as it was in all the cases that have been cited to give to the words their natural and legal effect; but it is at liberty to put such a construction upon them as, regard being had to the nature and object of the instrument, the parties may be reasonably supposed to have intended.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have read through the whole of this settlement in order to see what the parties have *bonâ fide* expressed. One thing is marked, and that is the total exclusion of the husband from any power or control over the property, or any interest in it except that which is expressly given to him for his life. The wife alone is to consent to the change of securities; and the powers to dispose of the fund and to appoint new trustees of the settlement are, (1) expressly, confined to her.

Then there is a covenant that the husband will, at the request and at the proper costs and charges of the trustees, make, do and execute all such further acts and things for the better settling, recovering and receiving the £1100 upon the trusts and to and for the intents and purposes thereinbefore expressed, as, by the trustees or their counsel, shall be required. I cannot, therefore, [176] but think that to a certain extent the parties considered this instrument not to be a complete settlement: and, if the Court had been called upon to make a settlement, the question would have been whether something else was not meant than is expressed.

The first covenant is that, in case the marriage should take effect and the wife should die in the lifetime of her husband, it should be lawful for the wife to appoint the £1100 either by deed or will unto such child or children, &c., as she should think proper; but, if she should make no such appointment and should die without issue, then that the £1100 should be and remain unto and for the only use and benefit of her executors, administrators and assigns: so that the husband covenants that if his wife should die in his lifetime (in which case she could make no assignment or other

(1) The power to appoint new trustees was omitted in the bill.

disposition of the £1100 except by an execution of the power), and also that if she should not execute the power, then that the £1100 shall be and remain for the use and benefit of her assigns; that is, that, if she shall make no assignment, it shall go to her assigns. It is manifest from this covenant and also from other parts of the settlement that it was prepared by an unskilful hand: and as there is a plain intention throughout the settlement to exclude the husband from taking any interest in the settled property except that which is expressly given to him, the words, "the executors or administrators of Mary Henn," ought not to be construed so as to give to her husband that property from which it is plain that it was the intention of the parties to exclude him. And my opinion is that the reasonable construction of those words is that they mean the next of kin of the wife living at her death.

[177] The Plaintiffs appealed to the Lord Chancellor from the above decision. The appeal was heard on the 16th of January 1841. At the conclusion of the argument his Lordship said:—

"I shall look into the cases before I decide this case: but I feel very great difficulty as to what I can do with it in its present state. It is said that Martha Goodson, the wife of the Defendant, Henry Goodson, is out of the jurisdiction; but there is no proof of it. Then it is alleged that her husband has not been heard of for several years; but, for aught I know to the contrary, he may be in Court this very morning.

"Then there is another difficulty. The Plaintiff represents Thomas Busby, his wife and child; but, in the state of the suit with respect to parties, I cannot decide in which character the Plaintiff holds the fund in dispute; whether she holds it as the representative of Mr. Busby, of his wife, or of their child. I cannot assume that there was only one child of the marriage, nor can I assume that the persons who are named as parties to this record are the sole next of kin of Mrs. Busby. The Plaintiff certainly states that she and Mrs. Goodson are the sole next of kin of Mrs. Busby, and that Mrs. Goodson is out of the jurisdiction, and that Mr. Goodson has not been heard of; but a Plaintiff can admit nothing as against absent parties; nor can I, in the absence of parties interested, decide upon the application of a Plaintiff who represents three estates, which of those estates is entitled to the property in dispute.

"A creditor of Mr. Busby ought to be brought before the Court. Mr. Dudley may be a creditor; but he is a Defendant and is before the Court, not in the character [178] of a creditor, but as assignee under the insolvency. If a bill were to be filed by a creditor of Mr. Busby, bringing Mr. Dudley and the Plaintiff before the Court, then I could decide the question. But what with those who are out of the jurisdiction, and those who cannot be found, and those who can be found but are not here, I do not see how it is possible to go on.

"I shall look into the cases before I finally dispose of this case; and, when I find that the suit is in such a state as to have a decree made in it, I shall dispose of it."(1)

[178] *In re TAYLOR. July 27, 28, August 1, 1840.*

[S. C. 9 L. J. Ch. (N. S.) 399; 4 Jur. 983.]

Infant. Stat. 2 & 3 Vict. c. 54. Practice.

The father of infants, before a petition was presented by their mother for access to them, &c., under 2 & 3 Vict. c. 54, went with them to reside abroad. The Court ordered substituted service of the petition, but, at the hearing, declined to make the order (although the father had filed affidavits and appeared by counsel), because the father and infants were resident abroad, and because a suit by the mother for restitution of conjugal rights was pending, which, if successful, would have the same effect as the order prayed.

(1) A compromise took place in consequence of the above observations.

The Court will not make the order where the wife has left her husband without sufficient cause.

Semle, that the order may be made *ex parte*, if the necessity of the case requires it.

The petition in this case was presented under 2 & 3 Vict. c. 54 (to amend the law relating to the custody of infants).

THE VICE-CHANCELLOR having held that he had jurisdiction to make an order under the Act,⁽¹⁾ the petition [179] now came on to be heard. The material facts of the case were as follows :—

Mrs. Taylor, the Petitioner, was married to her husband, Mr. J. D. Taylor, in 1829. At the time of presenting the petition there were living five children of the marriage, two of whom, a son and a daughter, were more than seven years old, but the other three were under that age. The youngest child, a son, was born on the 23d of May 1837.

The Act under which the petition was presented received the Royal assent on the 17th of August 1839. Before that time Mr. Taylor, who was then living apart from his wife under the circumstances after mentioned, had left this country with his children, and gone to reside in France, but had occasionally visited England since ; the children, however, had continued in France, and, at the hearing of the petition, both they and Mr. Taylor were in that country.

The petition was presented on the 29th of October 1839, and prayed that such of the children of the marriage as were under the age of seven years might be delivered to and remain in the custody of the Petitioner until attaining that age, and that the Petitioner might be at liberty to have access to such of the children as the Court might not order her to have the custody of, under such regulations as the Court might deem convenient and just.

Affidavits were filed in support of the petition, stating the circumstances under which the separation between Mr. and Mrs. Taylor took place and had continued, and suggesting, among other things, that Mr. Taylor kept [180] out of the way to avoid personal service of the petition.

In December 1839 THE VICE-CHANCELLOR, on an application made for the Petitioner, ordered that service of the petition on Messrs. Freshfield, who had been employed by Mr. Taylor as his solicitors in various transactions relating to the matters mentioned in the petition, should be good service on Mr. Taylor. His Honor at the same time said he thought that, in a gross case, he might make an order under the Act, *ex parte*, on the ground of necessity.

The petition having been served as directed, Mr. Taylor filed affidavits in opposition to those of his wife ; and, she having replied to them, Mr. Taylor filed affidavits in rejoinder.

The affidavits on both sides were voluminous and contradictory, involving a variety of personal charges not necessary to be stated. The only facts of importance were the following :—That Mrs. Taylor (against whose character there was no imputation) on the 20th of October 1837 left her husband's house without cause, and took up her residence with another family ; alleging, in justification of that step, a charge of adultery which she then preferred against her husband, upon grounds of which she afterwards admitted the entire insufficiency, and which was, in fact, wholly without foundation.

Overtures for a reconciliation were immediately made by Mr. Taylor, and various negotiations followed ; but Mrs. Taylor, by the advice of her friends, at that time refused to return home. Circumstances occurred which convinced Mr. Taylor that his wife's affections were [181] alienated from him, and that no *bonâ fide* reconciliation could be expected ; and which compelled him to break off communication with her advisers. Mrs. Taylor afterwards, in 1838 and 1839, made various overtures on her part, and wrote several letters of submission and qualified retraction of the charge of adultery, which failed to give satisfaction to her husband : and, after the petition had been presented in consequence of a suggestion made by the Vice-Chancellor on

(1) See *ante*, vol. x. p. 291, where the first sect. of the Act is set forth.

its being first mentioned in Court, she wrote a letter, dated the 8th of November 1839, which amounted to an unqualified retraction of the charge.

Before that time, on the 27th of July 1838, Mrs. Taylor had instituted a suit in the Consistory Court of London for restitution of conjugal rights. To this suit Mr. Taylor put in an allegation in bar, stating the circumstances under which his wife had left his house, and the charge she had made against him, and adding, "that although she well knew the charge to be entirely devoid of foundation, she persisted in refusing to retract it." This allegation was heard on the 5th of February 1839, and was rejected by the Court. Mr. Taylor appealed to the Arches Court, where the judgment of the Consistory Court was affirmed on the 20th of June 1839. Mr. Taylor then appealed to the Judicial Committee of the Privy Council; and that appeal was pending when the petition came on to be heard.

In the second set of affidavits filed in support of the petition, there was a variety of personal charges against Mr. Taylor, which were completely answered by his affidavits in reply.

Mr. Knight Bruce and Mr. Simpson, for the Petitioner, argued that this was nothing more than an appli-[182]-cation to the Court to put the Petitioner in possession of her legal rights. That the Act of Parliament created a positive right of access in the mother, which the Court could not take away without repealing the Act. That the Court was only the instrument appointed by the Legislature to put her into possession of that right. That it was a right of which nothing but her own criminality could deprive her; the case of adultery, and that alone, being specially excepted. It was the right of every innocent mother living in a state of separation from her husband. A discretion indeed was given to the Court; but that discretion was to determine the manner in which the right was to be enjoyed, not to take it away; to carry out, not to defeat, the general intention of the Legislature; and the Court could not refuse access altogether, except in cases where the misconduct of the mother made it contrary to the interest of the children that she should see them without defeating the intention of the Legislature. The interest of the children was the only consideration which could be allowed to interfere with the mother's right. In the case of *Shaw* (1) (the only previous application under this Act) the application was refused on that ground; as it appeared that the grandmother, by whom the children were supported, would have ceased to maintain them if the mother had been allowed access.

In this case, not only was the conduct of Mrs. Taylor free from all imputation of criminality, but she was, in fact, asking from the Court no more than what a competent tribunal had already pronounced her to be entitled to; for access to her children was a part of those conjugal rights which had been solemnly awarded her [183] by two decisions in the Ecclesiastical Courts. It might be said that those decisions were appealed from; but it was impossible, from the nature of the allegation, that the Privy Council should do otherwise than affirm them. Ought an appeal of such a nature to tie up the hands of justice? The Court was not precluded from acting in execution of its own orders pending an appeal; and there was no reason why an appeal should prevent it from giving credit to the sentence of another jurisdiction.

In the present case it might be argued that, as Mr. Taylor and the children were abroad, an order, if made, could not be executed. But it was unnecessary to consider that question now; the first question being whether Mrs. Taylor had a right to the order or not; and, till that was settled, the Court had nothing to do with any question as to how the order was to be executed. Mrs. Taylor had a right to the order; the Act of Parliament gave it her; and the Court would execute that order, when made, as well as circumstances would allow. Even if it could not be executed at present, it would take effect as soon as Mr. Taylor or the children came within the jurisdiction; and, in the meantime, it would operate as a declaration of the Petitioner's right and of her entire innocence.

Sir William Follett, Mr. Jacob, Mr. Wigram and Mr. Roundell Palmer, for Mr. Taylor. The question in the Ecclesiastical Courts is undecided; it is as much a *lis*

(1) This case was privately heard.

pendens as if no judgment had been given. This Court will not anticipate the judgment of the Privy Council; it cannot be informed of the principles on which that tribunal will decide. Even if the Privy Council were to affirm the sentence of the Inferior [184] Court, this Court would remain uninformed of the effect of such an affirmation. It does not follow, from anything before this Court, that the rejection of an allegation is equivalent to a sentence for restitution of conjugal rights. If it were so, the sentence, after rejecting the allegation, would proceed, in terms, to decree restitution; which it does not. It is certain that, according to the practice of the Ecclesiastical Courts, a Defendant may, at any stage of the proceedings before final judgment, put in a new allegation of *res noviter ad notitiam perventæ*; and Mr. Taylor may do so in this case, and may succeed on such a new allegation, for anything which this Court can know to the contrary.

At the present moment, therefore, it stands undecided by the proper *forum*, whether Mrs. Taylor is, in point of law, entitled to conjugal rights. But, if it were decided that she is so entitled, this Court would not be bound by the decision of the Ecclesiastical Courts. If those Courts decree restitution of conjugal rights to Mrs. Taylor, they can and will execute their own decree. That is no matter for the consideration of this Court, it must be left to them. The present jurisdiction is not given to the Lord Chancellor to be exercised in aid of the Ecclesiastical Courts, but to be exercised "if he shall see fit," that is, according to his own discretion. He is in no way bound by the principles or by the facts on which the judgments of the Ecclesiastical Courts proceed. A wife may be legally entitled to conjugal rights according to the doctrine of those Courts, and yet not morally entitled, according to the discretion of this Court. It would seem that, in the Ecclesiastical Courts, habitual slander of the husband by the wife would furnish no defence against a suit for restitution; but it might be a perfect moral justification to the husband for [185] determining to live apart, and would be so recognised here. And, if this Court is informed of a mass of facts which have influenced the conduct of the parties, it will exercise a discretion formed upon the whole of those facts, and not upon such of them only as may have been disclosed to the Ecclesiastical Judge.

It is said that the Act of Parliament gives a legal right to the mother: but that conclusion cannot be arrived at upon any sound principles of construction. It is necessary to look at the previous state of the law and the terms of the Act, in order to ascertain its true construction. By the common law, the absolute dominion over children during infancy was in the father; and any right in the mother was totally unknown. She was supposed to be living with her husband; and, whether she did so or not, the legal right was in him. This was carried so far that the Courts not only did not recognise a mother's claim to custody or access, but even when the father was living in adultery and the mother entirely innocent, they interfered to compel the delivery of the children by the mother to the father. *Rex v. Greenhill* (4 Adol. & Ell. 624). The Court of Chancery was accustomed to interfere in the case of wards of Court, with a view not to the relief of the mother, but only to the benefit of the children. It never interfered against the right of the father, unless upon distinct proof, not only that the father was a person of immoral or irreligious conduct or principles, but that his children were in a position to be injured and corrupted by him. In *Ball v. Ball* (*ante*, vol. ii. p. 35) the father was living in adultery; yet, as it did not appear that his children were brought into contact with the adulteress, the Court refused to interfere.

[186] Such was the state of the law when the Act, under which this petition was presented, was passed; and it was on account of those very cases, and especially of the case of *Rex v. Greenhill*, that it was judged "expedient to amend the law relating to the custody of infants." The jurisdiction already existing in the Court of Chancery was found insufficient to reach the whole of those extreme cases in which an interference with the right of the father was necessary for the benefit of the children; the Legislature considering that infants on whom no property was settled and who could not, therefore, be made wards of Court, were nevertheless fit objects for its care and protection. The Act leaves the legal right of the father exactly where it found it: there is not a syllable to abridge it or take it away. It establishes no new jurisdiction, but simply enlarges a jurisdiction already existing; and leaves the

character of the enlarged jurisdiction as it found it, that is, merely discretionary. It impowers the Court, under certain restrictions, to make the same order with respect to children not being wards of Court, as it could previously have made in the case of children who were wards; and *that* according to the discretion of the Judge to whom the application is made. But that discretion is a judicial discretion, and must be exercised on some principles. The Act no more suggests the desire of the mother as a new principle on which the discretion of the Court is to proceed than it creates a new jurisdiction. The jurisdiction existed before, within narrower limits: but the principles on which it was exercised were equally applicable to other cases; and, now that the jurisdiction is enlarged, there can be no change of the principles. The effect of the enlargement is only to let in other cases to be governed by the same rule. The principles therefore which have deter-[187]-mined the discretion of the Court in cases where the custody of its wards was concerned are the principles by which the Court will be regulated in exercising the enlarged jurisdiction given to it by this Act; and all the cases from which those principles are to be collected are applicable to the present application. In all those cases, the Court has grounded its interference on the interest of the infants only, and has refused to act against the legal rights of the father, unless a very clear case has been made out of danger to the moral or religious principles of the children. In *Shaw's case*, which is the only one that has arisen since the passing of this Act, the decision was in perfect accordance with that principle. The pecuniary interest of the children there prevailed against the petition of the mother.

There is no ground for contending that the mother has, by this Act, acquired a right which would not go to the extent of proving that such a right will exist in all cases except the single case of adultery, which is expressly excepted. The Court would be bound, upon such a construction, to order access in all cases; however causeless or wilful, on the part of the mother, the separation may have been; however culpable her conduct; and however free from blame the conduct of her husband may be. If this jurisdiction is not exercised with the utmost caution, the greatest encouragement will be given to separations between husband and wife, when it is known that such a step on the part of the wife will not cause the loss of her children's society. The greatest inducement to the reconciliation of married people already separated will be removed, by enabling the mother to gratify the affections of a parent, without returning to the duties of a wife. The regulation of access will be found a matter infinitely difficult; and the [188] nature of the intercourse between the children and their parents will have the worst possible effect upon the minds of the children. They will grow up without filial respect for either parent. If such a construction is to be put upon the Act, it may safely be pronounced one of the most mischievous which ever passed the Legislature.

It has been said that the Court will make this order without considering whether it can be immediately executed. [THE VICE-CHANCELLOR. Mr. Knight Bruce said that the Court had nothing to do with the question whether the order could be executed or not. I thought, at the time, that that was a strong proposition.] It is impossible that that question can be immaterial to the Court; for the order must be for access at given times and under given regulations. The order is special, not general; and, as circumstances vary, the parties must come again to the Court, and obtain a renewal of the order from time to time. The order, if made now, is to take effect at the present time and under the present circumstances; not at a future time or under future circumstances: therefore, if the present circumstances are such that it cannot take effect at the present time, it cannot be made at all. Future circumstances may be such that the Court, in the exercise of its discretion, might refuse access altogether, though it might be disposed to grant it now. It was said that the order, though ineffectual at present, would operate as a declaration of right on behalf of the petitioner, and that she is entitled to such a declaration. But that is altogether foreign to this jurisdiction, and to the intention of the Act by which it is created. The Act does not direct or enable the Court to adjudicate upon disputed questions between the father and the mother, or to give any merely declaratory judgment: the order is to determine, not who [189] ought to have, but who shall have the custody of the infants; and, with regard to access to them, not merely that the mother is entitled to it, but in what manner she shall enjoy it. If the order stops short of that,

it is not authorised by the Act. Would the Court make an order for the access of a mother resident in England to children resident with their father in the East Indies? The order, if disobeyed, is to be enforced by process of contempt. That supposes the persons on whom the order is made to be in a position to commit a contempt. What contempt can the father be guilty of in this case, he having gone to reside out of the jurisdiction before the petition was presented, and not, in fact, having ever been within the jurisdiction with his children since the Act was passed: or what process of contempt would be applicable to his situation?

The Act was never meant to apply, and evidently does not extend to the case of children resident out of the jurisdiction, where such residence has commenced before proceedings under the Act were taken. Mr. Taylor having appeared may be said to have submitted to the jurisdiction: but his submission cannot alter the construction of the Act, or give jurisdiction where the Act, according to its true construction, does not give it. There must be express words in an Act of Parliament to make it extend to matters domestic and personal relating to British subjects while out of the jurisdiction of the British Courts. There is a distinction between domicile and residence. A man may be a domiciled British subject, yet be resident in a foreign country, and have no residence in Great Britain. If he dies, his property is distributed according to the law of the domicile; yet, while he lives, he is, in his person and as to his personal rights and liabilities, subject [190] to and entitled to the protection of the law of the country of his residence. If the children of British parents are resident in France, they must be subject to and they will have the benefit of the law of France in all personal matters; and custody and access are matters of that kind. The children are subject, in their country of residence, to such parental rights as the law of that country has established in each parent respectively; the *status* of the parents, as husband and wife, being established by reference to the law of the country in which it was constituted. The parents, therefore, must have recourse to the law of the country in which their children are domesticated (though not domiciled) to ascertain and enforce their respective rights. If Mr. Taylor were a French subject resident with his children in England, under circumstances like those now before the Court, his children would be subject to the operation of this Act, and not to the law of France. Mrs. Taylor, though a domiciled French subject, would come before this Court, and, if she succeeded in satisfying the Court that the case was proper for the exercise of its jurisdiction, an order under this Act would be undoubtedly made. By the same rule the English law would cease to be applicable, when the children of an English subject were resident in France; and the remedy of the mother would be before the French tribunals. Is the same person to be subject, at the same time, to two different laws, possibly contradictory to and conflicting with each other? This Court is not informed what is the law applicable to this subject in France. For anything that appears to the contrary, Mrs. Taylor may be absolutely entitled by the law of France to unlimited access to all her children, and to the absolute custody of such as are under a certain age. If so, why does she come here? or if, on the other hand, she [191] is absolutely excluded by that law, will this Court take upon itself to alter or overrule the law of France, to which these children are now subject? The children, and not the parents, are the subjects of this jurisdiction.

If, therefore, the wording of the Act had been general, it could not have been construed to extend to cases of infants resident under the protection of a foreign law. But the wording of this Act is special, indicating, by direct and necessary implication, the limits within which its operation ought to be confined. The Act operates only through the judicial discretion which it gives. That discretion is vested in certain officers of the law of limited local jurisdiction. There is nothing in the nature of that discretion to enlarge, with respect to its subject-matter, the local jurisdiction of those officers; on the contrary, it is recognised as a limited jurisdiction, and the limits are pointed out by the Act itself. "It shall be lawful for the Lord Chancellor and the Master of the Rolls *in England* and the Lord Chancellor and the Master of the Rolls *in Ireland respectively*, upon hearing the petition of the mother of any infant, if he shall see fit, to make order," &c. The words "*in England*" and "*in Ireland, respectively*," must, of necessity, mean where the subject-matter to be dealt with is in England or in Ireland respectively; and the children whose custody or access is in question constitute that subject-matter.

It is clear that two distinct jurisdictions, *quoad locum*, are intended to be given to the respective Courts of Chancery of England and Ireland: they are not to interfere with one another: each is to act where the subject-matter belongs to its proper jurisdiction. Where the Irish Court of Chancery has jurisdiction, the English [192] Court of Chancery has none; and *vice versâ*. The words "in Ireland" cannot have reference to the presentation of the petition: if so, a petition might be presented in the same matter in Ireland and in England at the same time; and the two Chancellors might make conflicting orders, and each proceed to enforce his own order by process of contempt. It is clear then that separate jurisdictions are intended; and, if so, it is equally clear that each jurisdiction will take place according as the subject-matter on which it is to be exercised is or is not situate within its limits. If the children of an Irish-born subject are resident in England, this Court will have jurisdiction, and Irish Chancery will be excluded. On the other hand, if the children of an English-born subject are in Ireland, the petition must be presented to the Irish Chancellor. But, if the children are resident in Scotland, whether of English, Irish or Scottish birth and domicile, the jurisdiction of either Chancellor will be altogether excluded; otherwise they would have a concurrent jurisdiction, for there is nothing in the Act on which one of these jurisdictions could be established, in such a case, rather than the other; nor is there anything to give jurisdiction in the case of English or Irish-born subjects resident in Scotland which would not equally apply to resident natives of Scotland themselves. But, in fact, neither the English nor the Irish Court has jurisdiction to pronounce an order in any such case: their powers under this Act are commensurate with the limits of their official authority, which does not, in either case, extend to persons subject to the law of Scotland; and the Act itself, operating solely through their administration, is of no force beyond those limits. If the Legislature had intended to extend this Act to Scotland, it would have vested in some Scottish functionary the [193] same discretionary power which is given to the English and Irish Chancellors. As it is, the law of Scotland relating to the custody of infants and the rights of their respective parents over them remains unaltered by this Act; and no jurisdiction over infants subject to that law, either as to custody or as to access, is given to any English or Irish tribunal. If it were not so, power would be given to an English or an Irish tribunal to alter or supersede, in Scotland, the Scottish law relating to the custody of infants. But it is not so: the English Judge is to act in England, that is, he is to make such an order as will take effect in England; and the Irish Judge is to make such an order as will take effect in Ireland. Where the subject-matter is in Scotland, no order can be made under this Act. The machinery of the Act is not applicable to Scotland, nor to any of the colonies or dependencies of the British Crown. Much less can it be applicable, when the subject-matter is situate in a foreign country, governed by independent laws, and not subject to the British Crown. This is the only construction consistent with those further provisions of the Act, which direct that the order shall regulate the times and manner of access, and shall be enforced by process of contempt. They suppose an order capable of taking effect, and incapable of being frustrated except by the disobedience of persons within the jurisdiction.

Mr. Knight Bruce, in reply. The construction of this Act, which denies that any new right is given to the mother, and contends that it merely enlarges the old jurisdiction of this Court, leaving it to be exercised on the same principles as before, is ingenious, but purely arbitrary. It is utterly inconsistent with the known intention with which this Act was intro-[194]-duced, and, if adopted by the Court, would have the effect of repealing the Act. The intention was manifestly to create a right in the mother to which the Court should give effect in all cases of separation between husband and wife where the wife had not been guilty of criminal conduct. Why was the mother to be the only person competent to petition for this order; and why did not the Act enable the Court to make the order for custody to be delivered to other parties, if it should think fit, as well as to the mother? Evidently because it was the interest of the mother which the Legislature had solely, or primarily, in view. How can it be said that this Act was made to extend the former jurisdiction of the Court to the cases of infants who were not wards of Court when it does not in fact so extend the jurisdiction? The Court cannot, under this Act, make an order

for depriving the father of the custody of any child above the age of seven years, or of any child under that age, except upon the petition of the mother, however strong a case may be made to shew that the father is unfit to have the custody of his children. Is it possible that the powers of the Court could have been so restrained if the Legislature had intended to create a jurisdiction to be exercised merely for the benefit of infants who were not wards of Court in the same manner as the previous jurisdiction was exercised in favour of those who were? There is no distinction taken by this Act between such infants as are and such as are not wards; it applies equally to both. According to the construction contended for on the other side, the Act has no application to the cases of wards; but that construction almost contradicts the preamble of the Act by denying that it has made any alteration in the law relating to the custody of infants. The clause which provides against the exercise of this jurisdiction [195] in favour of an adulterous mother is out of place if this Act is not to be understood as conferring, upon the mother, a *prima facie* right; the Court, acting upon the principles of its former jurisdiction, never could have interfered in the manner provided against by that clause. That clause, by pointing out the criminality of the mother as the only cause which shall absolutely exclude her from the benefit of the Act distinctly recognises her general right in cases where no criminality can be imputed. In *Shaw's case*, besides the pecuniary interest of the children, there were other circumstances affecting the conduct of the mother.

It is stated that great mischiefs will result from this construction, and that it will operate to increase the inducements to separation between husband and wife by making the wife too independent of her husband. That might have been a very good argument in Lord Apsley's time, when precisely the same reasons were urged against giving effect to settlements of property to the separate use of married women. A different doctrine as to that point prevails now, and no inconvenience is found to be the result. But what justice or reason is there in the proposition that, when a separation has actually taken place, no protection is to be given to an unoffending woman; but she is to be left, in the tenderest point, at the mercy of a husband, who may have been originally to blame, and who may obstinately reject all overtures towards a reconciliation? Even if it might be contrary to public policy to interfere where the wife was blamable for the origin and continuance of the separation, how does that reason apply when the cause of the continuance, at all events, lies entirely with the husband?

[196] But it is said that these children are abroad, and not subject to the jurisdiction of the Court. It is immaterial whether they are or not. The person on whom the order is to be made, who is to deliver up the custody, or to permit access, is the proper subject of the jurisdiction. No order can possibly be made on the children themselves; it must be on the father, or the person in whose custody they are. In this case Mr. Taylor is that person; and the Court has already decided in favour of its jurisdiction over Mr. Taylor, notwithstanding his foreign residence, by making the order for substitution of service of the petition upon his solicitors. That order might have been appealed from, or a petition might have been presented to have it discharged, which was not done. It was submitted to; and, having been submitted to, it is a positive decision upon the point of jurisdiction now attempted to be raised. Not only were no proceedings taken to set aside that order, but Mr. Taylor has appeared, has filed affidavits, and is now, by his counsel, before the Court. Can he be heard after this to say that the Court has no jurisdiction to make an order upon him on this petition because he is resident abroad? If that were admissible, you might as well suffer a Defendant, who has appeared and answered to any common bill, to set up the objection, after a decree has been made, that he cannot be bound by it, because he has been all along out of the jurisdiction. If the Court should hold that the mere circumstance of a residence abroad is sufficient to exclude its jurisdiction over domiciled British subjects, nothing more need be done by a father who is desirous of evading the operation of this Act than to take his children abroad after a petition has been presented, or at any stage of the proceedings before the order has been actually made. As to the argument [197] that the law of the foreign country in which the children and the father reside is the law by which questions relating to the custody of the children are to be determined, that is not so; the law of the

domicile will govern all such questions even in a foreign country ; and the order of this Court, in the present case, would be enforced by the French tribunals. That is a question which it may be necessary for the Court to consider with reference to the mode of executing its order ; and, with that view, it may be proper that the order should direct a reference to the Master to inquire what is the state of the French law. But the question whether the Court has jurisdiction or not depends upon other considerations.

With reference to the mode of enforcing the order, the Court will not presume that Mr. Taylor, who has appeared and submitted to its jurisdiction, will refuse to obey the order when made. If he does, he will be in contempt ; and this Act directs the order to be enforced by process of contempt of the High Court of Chancery. There is a process of contempt against the property as well as against the person. The practice of sequestration has been much more common of late than formerly, and Mr. Taylor's property is within the power of the Court, though his person is not.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is one of the most painful cases that has ever come under my consideration. It does not appear to me to be necessary, for disposing of the point, to enter into a consideration of a great number of the charges which have been brought forward on the one side and on the other, and with respect to which it is almost impossible to ascertain the [198] truth on the affidavits now before me. But, for the purposes of this case, as far as the jurisdiction is to be exercised, I must look at the facts of the case, about which there is no dispute.

It appears that, on the 20th of October 1837, Mrs. Taylor (under what I shall always consider the most unfortunate advice which a woman could receive) thought proper to absent herself from her husband's house ; and, whether there was more or less disclosure made to her of the real circumstances of the case does not appear to me to be very material, because she commenced the separation. In consequence of that separation, the husband, naturally feeling extremely hurt by the step which his wife had taken, took measures for leaving the country ; and in the course of the year 1838 he left England, and has substantially lived abroad ever since that time. On the 27th of July 1838 Mrs. Taylor commenced her suit in the Ecclesiastical Court for a restitution of conjugal rights. The husband put in what is called a defensive allegation ; and that allegation was rejected by the sentence of the Consistory Court on the 6th of February 1839. And then, there being an appeal from that decision, it was affirmed by the Arches Court on the 20th of June 1839 ; and the husband appealed from that decision as well as from the former one. Then, in the course of the summer of last year, a certain letter of retractation was written by Mrs. Taylor ; and on the 29th of October last the present position was presented to this Court.

Now I am not informed at present what would have been the effect of the sentence of affirmation had it never been appealed from ; but, inasmuch as there is an appeal, one thing is quite certain, namely, that the suit is by no means determined. And I think it would be highly improper for me to give any opinion on the [199] question whether the affirmation by the Court of Arches of the sentence of the Consistory Court was right or wrong ; because, in the first place, this Court, or at least the jurisdiction given to the Lord Chancellor by this Act, has nothing of an appellate jurisdiction over the proceedings of the Ecclesiastical Court : and, as a further reason, it occurs to me that it may be possible that I myself may have to sit as one of the appellate Judges in the Privy Council judging of that appeal ; and, therefore, I shall refrain from pronouncing any opinion at all upon the matter. But certain it is that, at present, the wife having commenced the suit for restitution of conjugal rights, the final issue of that suit is uncertain : and it is in that state of the proceedings in the Ecclesiastical Court that this lady has presented the petition which is now under consideration, and which, it should be observed, asks for a portion of that relief of which she will certainly have the whole, if her husband's appeal to the Privy Council is dismissed. She will have access to her children if a restitution of conjugal rights be finally decreed ; for that decree of itself infers access to her children. [Mr. K. Bruce. The husband might keep them apart.] I am proceeding on the supposition that the decree of the Inferior Courts would be enforced. At any rate, it would be then established by the law of the land that she had an unqualified right of access to her children.

Now it strikes me that the jurisdiction which this Act has given, being to be exercised solely in the discretion of this Court, it would be hardly right for the Court to say that the lady was entitled to have access to her children, pending the question in the Ecclesiastical Court which she has thought proper to raise.

The conduct of the husband, as far as I am enabled [200] to judge of it, has been *bonâ fide* throughout. He went to France and began his foreign residence prior to the institution of the suit in the Ecclesiastical Court: and my opinion is that, if this Court were to direct access at such times and subject to such regulations as it should deem convenient and just, it ought to be reasonably assured before it did interfere at all that it can carry its order into execution. If the children were here, the Court might then easily execute its order: but I doubt very much whether this Act was meant to be applicable to a case where the husband, *bonâ fide*, before the presentation of any petition by the wife, had actually removed his children to a foreign country. It seems to me rather to be inferred from the Act, that, as far as the husband and the children are concerned, their residence was to remain the same; and that the Act never meant that that should be altered; and I confess that I do not at present see (supposing that Mr. Taylor perseveres in residing abroad, which, as the law at present stands, he may lawfully do), how I could make any order which could be carried into effect. And the circumstances that no jurisdiction ought to be exercised under this Act, pending the question in the Ecclesiastical Court, combined with the difficulty of making any order which could be enforced, appears to be a reason for not interfering under the Act. There are no particular directions given by the Act, except that it should be lawful for the Lord Chancellor, on hearing the petition of the mother, if he should see fit to make an order for the access of the Petitioner to the infant or infants, at such times, and subject to such regulations as he shall deem convenient and just. And, independently of that, the very fact that this lady did, without cause, remove herself from her husband, appears to me to be a reason why [201] this Court ought not to exercise the jurisdiction of ordering any access.

I am of opinion, therefore, that no order should be made upon the petition at present; and what I am inclined to do is this, simply to make no order on the petition, but to give leave to the parties to apply; because *non constat* that there may be such a termination of the proceedings in the Ecclesiastical Court as may make it right, coupled with other circumstances which may happen, for this Court to interfere on the ground of the facts stated in this petition.

But before I finally dispose of this case, I cannot help saying that there is nothing whatever to sully the character of Mrs. Taylor in the slightest degree. The persons who are most culpable are those who have so injudiciously advised her to continue living apart from her husband.

With respect to Mr. Taylor, although he appears to have been hasty in some things, yet he seems to have acted with very great kindness and generosity, not only to his wife, but to his friends, dependents, and to a variety of other persons with whom he was accidentally connected. And I sincerely hope that he will allow his generous disposition to have its full scope; and although he has suffered deeply and received injuries, that he will forgive what has passed, and no longer keep his wife from her children and her home.

Under all the circumstances of this case, I will not make any order on this petition, until I know what will be the result of the proceedings in the Ecclesiastical Court. The petition therefore will stand over, with liberty to apply.

[202] GRIFFITHS v. PRUEN. August 7, 1840.

Will. Construction. Executor. Heir and Executor.

Testator, after reciting that his property consisted of a house at C. (which was freehold), and of mortgages, &c., directed the house to be sold; and then gave several pecuniary legacies, and, amongst them, £300 to G. and £100 to P., whom he appointed his executors. The will concluded thus: "And to Mr. G., who is likewise my executor, any sum then appearing after the contents of this my will are fully

complied with and fulfilled." G. died the day after the testator, without having proved the will. Held, in a suit by his executors against the testator's heir and next of kin, that the Plaintiffs were entitled to the residue of the testator's estate, including the proceeds of the house.

If an executor is also the residuary legatee, he is entitled to the residue, although he does not prove the will.

The testator in the cause, by his will, after reciting that his property consisted of a dwelling-house in Cheltenham, sundry mortgages and monies in the English funds, directed the house (which was freehold) to be sold; he then gave pecuniary legacies to his brothers and several other persons, and concluded his will in the following words:—

"I give and bequeath to Mr. Thomas Griffiths, solicitor, of Cheltenham, the sum of £300; and to Mr. Pruen, his partner, £100; and I constitute and appoint those two gentlemen my executors and trustees. I request to be buried in the family vault at Trowbridge, where my father and mother rest. After providing for all the various legacies specified in the foregoing, and paying my debts and funeral and other expenses, I direct the sum of £50 to be given to E. M. and £50 to Mrs. C.; and to my friend Mr. Thomas Griffiths, who is likewise my executor, any sum then appearing after the contents of this my will are fully complied with and fulfilled, agreeably to this my determination."

Both Griffiths and Pruen survived the testator; but Griffiths died on the day after the testator's death, and [203] consequently, without having proved the will. His executors, however, claimed the residue of the testator's estate, including the legacy of £300 and the proceeds of the sale of the house.

It was objected, for the Defendants, that Griffiths ought to have proved the will, in order to entitle himself to the benefits under it. And the testator's heir at law claimed the proceeds of the sale of the house, on the ground that they were not expressly disposed of, and that the direction to sell the house was not of itself sufficient to deprive him of his right as heir.

Mr. Jacob and Mr. Blower, for Griffiths's executors, relied on *Parsons v. Saffery* (9 Price, 578).

Mr. Knight Bruce and Mr. Stinton, for the testator's next of kin, cited *Reed v. Devaynes* (2 Cox, 285), and said that it was clearly settled that an executor must prove the will in order to entitle himself to a legacy, and that there was no case which shewed that there was any difference, in that respect, between a legacy and a residue.

Mr. Bethell and Mr. Hallett, for the testator's heir, cited *Kellett v. Kellett* (1 Ball. & Beatt. 533; and 3 Dow. P. C. 248), *Maugham v. Mason* (1 V. & B. 410); *Wilson v. Major* (11 Ves. 205) *Dunnage v. White* (1 Jac. & Walk. 583), *Dixon v. Dawson* (2 Sim. & Stu. 327).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have always understood the rule to be that, where either a general or a specific legacy is given to an exe-[204]-cutor, he must prove the will, in order to entitle himself to it; but that does not apply to the case of a residue.

With respect to the second point, it is manifest, on the face of the will, that the testator meant to dispose of the whole of his property. He begins by saying that his property consists of a dwelling-house in Cheltenham, sundry mortgages and monies in the English funds; and then he directs the house to be sold. That direction has the effect of converting the house into money. Then, after giving pecuniary legacies to Mr. Griffiths and several other persons, he says: "To my friend, Mr. Thomas Griffiths, who is likewise my executor, any sum then appearing, after the contents of this my will are fully complied with and fulfilled." It is expressed, therefore, that everything, after satisfying the contents of his will, should go to Mr. Griffiths.

I am of opinion, therefore, that that gentleman's executors are entitled to the whole residue of the testator's estate, including the proceeds of the house directed to be sold.

[205] HASTINGS v. ORDE. August 7, 1840.

[See *Meredyth v. Meredyth* [1895], P. 93.]

Marriage Settlement. Deed. Infant. Trust. Next of Kin.

On the marriage of a female ward of Court, her fortune, consisting of choses in action, was settled, with the sanction of the Court, in trust for her husband and herself for their lives, with remainder for their children, with remainder for her absolutely, if she survived her husband, but if not, then *as she should appoint by will, with remainder for her next of kin*. Some years afterwards the marriage, of which there was no issue, was dissolved by Act of Parliament. After which the husband released all his right and interest under the settlement to the wife. Held, that the settlement was not binding on the wife, and that she was at liberty to resettle her property on her second marriage.

By an indenture, dated the 31st of March 1832, being the settlement made, with the approbation of the Court of Chancery, in contemplation of the marriage between William Carleton and Harriet Orde, who was then an infant and a ward of the Court, certain sums of stock and other choses in action, some of which were the property of the intended husband, and the remainder the property of the intended wife, were assigned to trustees, in trust, during their joint lives, to pay the yearly sum of £100 to the intended wife for her life, for pin-money, and, subject thereto, in trust for the intended husband for life, and after his decease in trust for the intended wife for life, and, after the decease of the survivor of them, in trust for their children as therein mentioned; and, in case there should be no child of the marriage, in trust, as to the property of the intended husband, for him, his executors, &c., and, as to the property of the intended wife, in trust for her, her executors, &c., in case she should survive her intended husband, but in case she should die in his lifetime, then in trust for such person and persons, &c., as she should by her will, to be executed in manner therein mentioned, appoint, and, in default of such appointment, in trust for her next of kin, according to the Statutes of Distribution, as if she had died unmarried and intestate.

[206] On the 1st day of July 1839 the marriage between Mr. and Mrs. Carleton, of which there was no issue, was dissolved by Act of Parliament.

Pending the bill for dissolving the marriage, a deed of arrangement was entered into between Mr. and Mrs. Carleton and the trustees of the settlement, dated the 6th of June 1839, by which Mr. and Mrs. Carleton agreed that, as soon as the marriage should be dissolved, the trustees should stand possessed of Mrs. Carleton's property then subject to the trusts of the settlement, in trust for her, her executors, &c., freed and discharged from all Mr. Carleton's right and interest therein, as if the marriage had never been solemnised; and Mr. Carleton directed the trustees to assign such property to Mrs. Carleton, her executors, &c., accordingly; and Mrs. Carleton agreed with Mr. Carleton that, within 60 days after the dissolution of the marriage, she would release his property, then subject to the trusts of the settlement, from the £100 a year pin-money, and also from her life interest and all other her right and interest therein, to the intent that such property might be absolutely freed and discharged from all her right and interest therein, in the same manner as if the marriage had never been solemnised. This arrangement was carried into effect by an indenture dated the 24th of July 1839.

Shortly afterwards Mrs. Carleton married James Hastings; and, by the settlement on their marriage, part of the lady's property was settled in trust for her separate use, and the remainder in trust for her and Mr. Hastings and their children. There was issue of that marriage one child.

The bill was filed by Mrs. Hastings against the trustees of both the settlements, Mr. Carleton, Mr. Hastings, [207] and the child of the second marriage, alleging that the trustees of the settlement of March 1832 had refused to transfer Mrs. Hastings's property to the trustees of the settlement of July 1839, on the ground

that the trusts of the former settlement were still binding on Mrs. Hastings and the other parties thereto; but Mrs. Hastings charged that those trusts had been put an end to by the Act of Parliament and the deeds of arrangement; in consequence of which she became as absolutely entitled to her property as if the first settlement had never been executed, and as if her first marriage had never been solemnised.

The bill prayed that the trustees of the first settlement might be decreed to transfer and assign Mrs. Hastings's property to the trustees of the second settlement, upon the trusts thereof.

The cause now came on to be heard as a short cause.

Mr. Jacob and Mr. Walpole, for the Plaintiff, cited *Simson v. Jones* (2 Russ. & Myl. 365), and *Godsal v. Webb* (2 Keen, 99).

Mr. Ellison, for the trustees of the first settlement, contended that the trust, in that settlement, for the Plaintiff's next of kin, could not be defeated except by a testamentary appointment made by her, and, consequently, that trust was still subsisting. He said that the case of *Simson v. Jones* had been appealed from, but the appeal was afterwards abandoned, as it was found that the lady would be of age, and would have the power of confirming the settlement, before the appeal could be disposed of. (See 2 Russ. & Myl. 377.)

[208] Mr. Parker and Mr. Lefroy appeared for the other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case is this. A female infant being entitled to choses in action, a settlement was made of them, on her marriage, in trust for her husband for life, and, after his decease, in trust for her for life, and, after the decease of the survivor, in trust for the children of the marriage, and, if there should be no child, then in trust for such persons as she should appoint by her will, with the ultimate trust for her next of kin; and, the marriage having been put an end to, and there being no issue, the question is whether the lady is still bound by the settlement.

I am of opinion that she is not bound by it.

[209] MADDEFORD v. AUSTWICK. Nov. 3, 4, 1840.

[S. C. 10 L. J. Ch. 105; 4 Jur. 1107. For previous proceedings, see 1 Sim. 89; 57 E. R. 512 (with note); 2 My. & K. 279; 39 E. R. 950.]

Defendant. Supplemental Answer. Practice.

A Defendant in a suit for taking accounts omitted to insert, in his examination, any receipts or payments by him during a certain period. The Plaintiff, however, proved receipts by him during that period. The Court refused to allow the Defendant to bring in a further examination or additional accounts, or to give any evidence of payments in order to discharge himself from those receipts.

Pending an inquiry before the Master, the Court will not interfere with his conduct. The dissatisfied party must wait until the report is made, and then except to it.

The Plaintiff and the Defendant having been co-partners as carriers, and the co-partnership having been dissolved in 1821, a decree was made by Sir J. Leach, V.-C., in 1826, and was affirmed by Lord Brougham, C., in 1833 (see *ante*, vol. i. p. 89; and 2 Myl. & Keen, 279), for taking the accounts of the concern. The Plaintiff having carried into the Master's office interrogatories for the examination of the Defendant under the decree, the Defendant put in his examination thereto. The examination having been held to be insufficient the Defendant put in a further examination, which was held to be sufficient. It appeared, from both those examinations, that during two of the years that the partnership consisted, namely, 1817 and 1818, the Defendant had neither received nor paid anything on account of the concern. The Plaintiff, however, afterwards succeeded in charging him with the receipt of large sums of money during those years. In consequence of which the Defendant, in order to discharge himself from those receipts, offered evidence of payments made by him during the same time. But the Master held that, as the payments were not

mentioned in the Defendant's examinations or in the schedules thereto, the evidence tended to contradict the examinations, and, therefore, was inadmissible. That decision was made in June 1838. In July following the Defendant gave a notice of motion, which was substantially the same as the one after mentioned; but, shortly afterwards and before the motion was heard, he [210] died. The suit having been revived against his widow and personal representative, a motion was now made on her behalf, in pursuance of a notice dated the 28th of January 1840, that she might be at liberty to carry into the Master's office such accounts as she might be advised, and that she might be at liberty to examine witnesses and tender evidence on her behalf on the taking of the said additional accounts in the Master's office under the decree, notwithstanding the said additional accounts might not have been included in the examinations filed by the late Defendant, Austwick: or, otherwise, that she might be at liberty to file a further examination in answer to the interrogatories exhibited before the Master for the examination of the late Defendant; and also that she might be at liberty to examine witnesses and tender evidence, on her behalf, in opposition to the charge brought into the Master's office against the late Defendant; or that the Court would make such further or other order as the circumstances of the case might require.

Mr. Jacob and Mr. Steere supported the motion on the ground that it appeared, from the affidavits, that the omission to insert the payments made by Austwick in 1817 and 1818, in the schedule to his examinations, arose from mistake. They added that, if the rule was that no item in a discharge could be allowed unless it was contained in the previous examination of the party, there could be no such thing as a discharge: that if Mr. Austwick had stated in his examination that no such payments as those in question had been made, *that* might have been a sufficient reason for the Master's not allowing him to give evidence that the particular payments had been made; but it furnished no ground for refusing evidence in support of items in a discharge, that the examination wholly omitted to mention [211] them; for they might have come to the examinant's knowledge after he had put in his examination.

Mr. Knight Bruce and Mr. Roupell, for the Plaintiff, contended that the omission, on the part of Austwick, to insert his receipts during the years 1817 and 1818, in his examinations, was intentional and fraudulent: that the case made by the affidavits in support of the motion was completely disproved by the affidavits in answer to them; that it was in evidence in the cause, and was noticed by Sir John Leach in his judgment at the hearing, that, during the continuance of the partnership, the Plaintiff was wholly employed in the outdoor business of the concern, and that Austwick was principally employed in the indoor business, and especially in keeping the accounts and superintending the clerks who were employed for that purpose (see *ante*, vol. i. p. 90): that the statement deliberately made by Austwick, that he had received nothing during the years 1817 and 1818 had been completely falsified: that, notwithstanding a Defendant was never allowed to give evidence to contradict his own answer, the object of the present motion was to allow an unlimited contradiction to what had been before stated upon oath; that the Court was extremely cautious in allowing a Defendant to put in a supplemental answer; *Livesey v. Wilson* (1 Ves. & Beam. 149); *Curling v. Marquis Townshend* (19 Ves. 628, 631, 632); *Greenwood v. Atkinson* (*ante*, vol. iv. p. 54); that, in the second of those cases, Lord Eldon, C., said: "In every former instance the party proposing to obtain this permission has been required to give a precise statement of what he means to put upon the record; the Court, with great care and jealousy, before it will allow a Defendant to withdraw a statement that is bene-[212]-ficial to the Plaintiff, requiring to be clearly satisfied that justice demands such a benefit to the Defendant; and, to secure that effect, has required him specifically to state what he wishes to put upon the record, that the Court may judge how far his application is reasonable. . . . It would be very difficult, even upon negligence, unless the party was led into it, to have the records of the Court altered: and I dare not, in such a case, let it be in fact what it may, lay down a principle that would form a precedent for permitting an answer, after the lapse of two years, to be altered in effect from one end to the other. This must, therefore, be considered as it stands upon the record unaltered; and I should be sorry to be thought to have much doubt upon a point of so much import-

ance;" that, in the present case, Mrs. Austwick had made no affidavit as to the *bonâ fides* of what she proposed to introduce, notwithstanding she was asking the Court to allow an unlimited contradiction of that which her husband had before stated on his oath; that it was directed by the 69th of Lord Lyndhurst's Orders that the Master should have power at his discretion to examine any witness *vivâ voce*; and, consequently, the examination of a witness was the act of the Master, not of the party; and the Master was bound to exercise a judicial discretion as to whether he would take that step or not: that, at all events, the application was premature and irregular; as Mrs. Austwick ought to have waited until the Master had made his report, and then to have excepted to it; according to what was laid down in *Chennell v. Martin* (*ante*, vol. iv. p. 340).

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case there are two questions. The first is whether I ought now to interfere with what is doing in [213] the Master's office. The second is whether I ought to make any order which will have the effect of relieving the estate of Austwick from the consequences which may ensue from the examinations which he has put in.

With regard to the first question, I apprehend it is not the course of this Court to interfere in a case where the parties dispute between themselves whether the Master is right in a particular step. It frequently happens that, where the Master has any difficulty, he himself desires the parties to make an application to the Court; and then the Court makes an intimation for the Master's guidance. But it is inconsistent with the practice of this Court that, because the Master has determined to do a particular act, the party objecting to it should apply to this Court and ask the Court to overrule the Master. Whilst the reference is pending, the question whether the Master is right or wrong is one which the Court cannot enter into. When the Master has made his report, then and not before, his course of proceeding on the reference may be legitimately made the subject of exception.

The 69th New Order first gave to the Masters of this Court a discretionary power as to examining witnesses *vivâ voce*; and the conduct of the Master in the exercise of that discretion may be made the subject of exception in the same manner as anything done by him prior to that order might have been. But I cannot, on a motion, interfere and say that what the Master has done as to a particular witness is right or wrong.

The next question is whether, supposing that the Court does not now interfere in the way suggested, it ought now to make some order to enable the party to [214] introduce other evidence before the Master. It is represented that Mr. Austwick did unintentionally and by mistake make a representation in his examinations that was incorrect, and that, having regard to the facts now appearing, I ought to enable his representative to make a case in opposition to that which is the result of the examinations already put in. Now, does it sufficiently appear that there has been such mistake?

The joint affidavit of Mr. Austwick and his solicitor, after representing certain preliminary matter not now necessary to be observed upon, states that the interrogatories for the examination of Austwick were allowed by the Master in January 1836, and that steps were so far taken for putting in his examination that, before the end of the next month, his counsel had prepared the body of the examination, and written on the draft this very proper advice: "The material part of the examination is the schedules; please to see that they are correct." It was clear that the most important part of the examination was the schedules. It appears that it was represented by Austwick that, before putting in his examination, the books and accounts of the partnership, which Austwick had delivered up to the Plaintiff, in obedience to an order in the cause made in 1825, ought to be produced; and a warrant having been taken out for the production of them, the Master, on the 8th of February 1836, fixed a day for that purpose, but gave notice to Austwick to be preparing his examination. His counsel had performed his part, and had given advice which was most proper and judicious. Then a warrant was issued on the 6th of July to compel Austwick to bring in his examination; and the Master fixed the 13th of July for him to [215] bring it in. [His Honor here read several passages from the affidavits, and then stated the conclusion which he drew from them in the following words:]—It appears to me that Mr. Austwick was struggling to gain time; and, when he found that he could not get

further time, he was reckless of what he did. He put upon the files of this Court a document, the contents of which he knew to be incorrect. And, when he was ordered to put in his further examination, he pertinaciously adhered to the same line of conduct as he had pursued with respect to his first examination.

Under these circumstances, I do not think it is consistent with the duty of this Court to go out of its way to relieve him, or, which is the same thing, to relieve his personal representative. It sufficiently appears, from the affidavits, that the fact is that, whether Austwick formed in his mind a scheme of fraud or not, he intended to state that which he knew not to be true.

This Court has granted relief in cases of mistake; but in that case of the solicitor (1) which has been mentioned I refused to relieve; and that decision was affirmed by the Lord Chancellor.

Taking all the circumstances of this case into consideration, I cannot but think that it is one in which this Court ought not to give relief; and, therefore, I shall refuse the motion with costs.

[216] ROOKE v. WORRALL. Nov. 6, 1840.

Will. Construction. Legacies. Charge of Legacies.

Testator, by his will, after devising his real estates and giving pecuniary legacies, directed his debts, funeral and testamentary expenses, and the legacies *thereby* given, to be paid as soon as conveniently might be after his death: "And I charge my debts and legacies on my real and personal estate." By a codicil he gave to A. and B. a sum of stock, and directed the trustees and executors of his will (who were the same persons) to purchase and transfer the stock to A. and B. in trust for C. for life; and, subject thereto, in trust to permit the same to *return to* and become part of his personal estate. Held, that the charge in the will extended to the legacy given by the codicil.

George Rooke, the testator in the cause, by his will, dated the 14th of May 1827, devised his real estates to three persons in succession, and to their sons and daughters, in strict settlement, and directed that, on their becoming entitled in possession to his estates, they should assume his name and arms; and he bequeathed certain articles of plate to the trustees of his will, in trust to hold the same as heirlooms to his real estates, so far as the rules of law and equity would permit. He then gave some pecuniary legacies, and directed all his just debts, funeral and testamentary expenses and the legacies *thereby* given, to be paid as soon as conveniently might be after his decease: "And I charge my debts and legacies on my real and personal estate." He then gave the residue of his personal estate to the trustees, upon trust to complete the contracts which he had entered into for the purchase of real estates, and to take conveyances thereof to the uses thereinbefore declared of his real estates, and, subject thereto, upon trusts corresponding with the uses thereinbefore declared of his real estates, except that, after the decease of the respective tenants for life, the same was to be divided equally amongst the younger children of such tenant (2) for life, as tenants in common; and he appointed the trustees executors of his will.

The testator, by a codicil, dated the 22d of January 1833, and duly executed and attested to pass freeholds [217] of inheritance, after reciting that two of the tenants for life named in his will had died without issue, gave all his real estates, after the death of the surviving tenant for life, to the Plaintiff in fee; and, after payment of his debts, funeral and testamentary expenses and the legacies *given by his will*, he bequeathed all the residue of his personal estate, subject to the life interest therein of the same tenant for life, to the Plaintiff, his executors, &c.; and he thereby confirmed his will.

(1) *Greenwood v. Atkinson*. See *ante*, vol. iv. p. 64. The appeal appears not to be reported.

(2) So in brief.

The testator, by another codicil, dated the 26th of April 1839, and executed and attested in like manner as the preceding one, gave to R. L. Fisher and Henry Ward the sum of £13,433, 6s. 8d. three per cent. consols; and he directed the trustees or executors of his will to purchase and transfer the same into their names at the expiration of three calendar months after his decease; and he directed Fisher and Ward to pay the interest, dividends and annual produce of the said trust monies, stocks, funds and securities to the Defendant, Frances Thorne, during so long as she should live and should not sell, mortgage or otherwise charge or dispose thereof by anticipation, or become bankrupt or insolvent; and, subject to the trusts thereinbefore declared, to permit the said trust monies, stocks, funds and securities to return to and become part of the residue of his personal estate.

Sir W. H. Robinson, one of the trustees and executors of the will, died in the testator's lifetime. The testator died on the 15th of September 1839: and shortly afterwards his will was proved by the Defendant, George Worrall, the surviving executor and trustee.

One question was whether the legacy given in trust for Frances Thorne was charged upon the real estates.

[218] Mr. Knight Bruce and Mr. Romilly, for the Plaintiff. The charge in the will is confined to legacies thereby given. In the codicil by which the legacy in question is bequeathed, there are no words charging it on the real estates; but there are words in it which shew that the testator never contemplated that that legacy would be a charge on his real estates: for he directs that it shall return to the residue of his personal estate. A charge of legacies in a will does not extend to legacies given by a codicil, unless words are used referring to legacies thereafter given. *Bonner v. Bonner* (13 Ves. 379), *Strong v. Ingram* (ante, vol. vi. p. 197).

Mr. Jacob and Mr. Freeling, for Defendants, who were in the same interest as the Plaintiff.

Mr. Stuart and Mr. James Parker, for the Defendant Frances Thorne. The charge in the will is a general charge of debts and legacies; and therefore it extends to legacies given by a subsequent instrument. *Hyde v. Hyde* (1 Eq. Ab. 409), *Masters v. Masters* (1 P. W. 421). A charge of debts includes not only debts then due, but those afterwards incurred; and on the same principle, where a testator unites debts and legacies in one charge, it includes legacies given by a subsequent instrument. Unless there are restrictive words in the will which confine the charge to legacies thereinbefore given, it extends to legacies given by a subsequent instrument. In *Bonner v. Bonner* the charge was not a general one; and that is the ground on which Lord Eldon rests his judgment in that case. There is no case in which a charge expressed in terms equivalent [219] to those used in this will has not been held to be a general charge.

It must be observed, too, that the legacy is not a legacy of stock; but of money to be laid out in the purchase of stock; and it is not to be paid by the executors, but by the trustees and executors.

Mr. G. Richards and Mr. James, for the Defendants Fisher and Ward, the trustees of the legacy.

Mr. Knight Bruce, in reply, said that the executors and trustees were the same persons; and that the testator had put his own interpretation on the charge, when he directed the legacy to return to his personal estate.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The first question is with respect to the charge in the will.

I think that the legacy is charged on the real estate; because the expression is this: "I direct all my just debts, funeral and testamentary expenses, and the legacies hereby given to be paid as soon as conveniently may be after my decease." That is one distinct sentence, and it is applicable to the legacies thereby given. Then these words follow: "And I charge my debts and legacies on my real and personal estate." Now there is nothing in those words which necessarily makes them applicable only to the debts and legacies that were before spoken of. The legacies before spoken of were legacies of a particular description; legacies "hereby given:" and there is no repetition of those words in the second member of the sentence, nor any reference to what had gone before, by any such words as "said" or [220] "aforesaid." Therefore,

taking the words as they stand, it appears to me to be a charge of all debts and legacies on the real estates. And I do not think that the effect is cut down at all by the particular expression found in the codicil itself, where the testator has directed that, subject to the trust, the trust money should return to and become part of his personal estate.

Then there is this observation to be made. The direction is that the trustees or executors shall purchase and transfer the stock. Now though it is true that the same persons were named trustees as were named executors, yet it might easily have happened that one of them might have refused to prove the will. Nevertheless he would have remained a trustee. And in my opinion it is quite plain that the expression "trustees or executors" did apply to the money being raised out of the land as well as out of the personal estate.

[221] JONES v. BRUCE. Nov. 6, 1840.

[S. C. 4 Jur. 1055. See *Robertson v. Broadbent*, 1883, 8 App. Cas. 816.]

Will. Construction. Exoneration. Debt. Charge of Debts and Legacies. Lunatic.

Testator gave to his wife all his goods, chattels, and personal estate whatsoever, and charged his real estates with the payment of his funeral and testamentary expenses and debts, and exempted his personal estate from the payment thereof. He then gave pecuniary legacies to two of his children, and charged his real estate with the payment of them; and directed that, during the minority of the legatees, his trustees, their heirs and assigns, should raise out of the rents of his real estate, or by any other means they might deem expedient, annual sums for the maintenance of the legatees, not exceeding four per cent. per annum, upon their respective legacies. Some years afterwards the testator was found a lunatic; and, by an order in the lunacy, £4250 was allowed yearly for the maintenance of him and his family; and such allowance was to be made from the 6th of April 1834, and to be continued from time to time, until further order, and to be paid to his wife by the committees of his estate out of the rents and profits thereof. The testator died on the 6th of October 1839. His wife had received all that was due in respect of the allowance down to the 6th of April 1839, but nothing afterwards. She claimed, under his will, his personal estate, including the rents of his real estates due at his death, free from the payment of his funeral and testamentary expenses, debts and legacies; and she also claimed one moiety of the £4250 for the last six months of the testator's life, and insisted that it ought to be raised, as a debt, out of the real estates. Held that the funeral and testamentary expenses, debts and legacies were payable out of the real estates only, and that the widow was entitled to the whole of the personal estate including the arrears of rent; but that she was not entitled to the moiety of the £4250, that sum being payable only out of the rents, and there being in consequence of her claim before mentioned no rents to pay it with.

Sir Thomas John Tyrwhitt Jones made his will, dated the 17th of February 1826, and which was partly as follows: "I give and bequeath, unto my wife absolutely, *all my goods, chattels and personal estate whatsoever, wheresoever* and of what nature or kind soever. I charge all my real estates, situate, lying and being in the counties of Denbigh and Salop, with the payment of all my funeral and testamentary expenses, and all such debts [222] as may be due and owing from me at the time of my decease: and I hereby exempt, so far as I am able, all my personal estate from the payment of the same or any part thereof. I give, devise and bequeath to my natural son, Charles Tyrwhitt Jones, the sum of £20,000, and to my natural daughter, Eliza Jones, the sum of £5000: and *I hereby charge all my real estate with the payment of the said several sums.* And my will is that the said sum of £20,000 shall be paid to my said son upon his attaining his age of 25 years, and that the said sum of £5000 shall be paid to my said daughter upon her attaining her age of 25 years or day of marriage whichever shall first happen; and that, in the meantime, in case my wife shall die

during the minority of the said two children but not otherwise, the *trustees of this my will*, their heirs and assigns, *shall levy and raise, from and out of the rents, issues and profits of my said estates*, or by any other means they may deem expedient, such annual sums for the maintenance, education and support of my said son and daughter as shall not exceed four per cent. per annum, upon the respective provisions intended to be made for them, and do and shall pay and apply such sums accordingly." The testator then gave all his real estates *subject*, nevertheless, as to such portions thereof as were situate in the counties of Denbigh and Salop, *to the charges thereinbefore mentioned*, and subject also to the charges to which they were then liable, to his wife, Eliza Walwyn Tyrwhitt Jones, for her life, with remainder to his son Henry Thomas for life, with remainder to his first and other sons in tail male, with remainder to his son Edmund for life, with remainder to his first and other sons in tail male, with remainder to his natural son Charles Jones for life, with remainder to his first and other sons in tail male, with remainder to his own right heirs.

[223] Some years after the date of the will a commission issued under which the testator was found a lunatic; and, by an order in the lunacy, dated the 25th of April 1835, it was ordered that £4250 per annum should be allowed for the maintenance of the lunatic and his family, and that £300 per annum should be allowed to his wife, Lady Jones, who was the Plaintiff in the cause, for pin-money, and that such allowances should commence and be made from the 6th of April 1834 and be continued, from time to time, until further order, and he paid to Lady Jones, by the committees of the lunatic's estate, out of the rents and profits thereof.

The testator died on the 6th of October 1839; at which time the rents of his estates, which became due on the 29th of September preceding, were unpaid. Lady Jones, who was the committee of the testator's person, had received all the payments that became due in respect of the before-mentioned allowances down to the 6th of April 1839; but no payment had been since made to her on account thereof.

At the hearing of the cause for further directions, the questions were, first, whether the testator had, by his will, exonerated his personal estate from the payment of the legacies given to his natural son and daughter.

And, secondly, whether one moiety of the £4250 was, as Lady Jones alleged, due to her at the testator's death, and ought to be raised and paid to her out of the testator's real estates, as one of the debts charged thereon by the will.

Mr. Jacob and Mr. Loftus Wigram, for the Plaintiff, contended, first, that she was entitled, under the will, to [224] the testator's personal estate, free from the payment of his funeral and testamentary expenses, debts and legacies. They cited *Greene v. Greene* (4 Madd. 148), and *Michell v. Michell* (5 Madd. 69).

With respect to the second question, they said that Lady Jones was clearly entitled to stand as a creditor on the testator's estates, in respect of the arrears of the yearly allowances directed to be made to her by the order in the lunacy: that that order directed those allowances to commence and be made from the 6th of April 1834, and therefore one whole year ought to have been paid to her, by the committees of the lunatic's estate, on the 6th of April 1839. [THE VICE-CHANCELLOR. The order directs the allowances to be paid out of the rents of the lunatic's estate: therefore it presumes a receipt of the rents, prior to the payment to Lady Jones.]

Mr. Dean appeared for the executors of the testator.

Mr. Parry, for the testator's legitimate sons. I submit that the testator's real estates are not charged with the legacies of £20,000 and £5000, so as to exonerate his personal estate from the payment of them. The language of the will is quite peculiar. The testator gives all his personal estate to his wife, and charges his real estates with the payment of his funeral and testamentary expenses and debts. Then he exempts his personal estate from those expenses and debts. But, after giving the two legacies by an independent gift, and charging his real estates with the payment of them, [225] he does not do, with respect to them, as he had done with respect to his funeral and testamentary expenses and debts, that is, he does not exempt his personal estate from the payment of them. It is to be presumed, therefore, that he did not intend to exempt his personal estate from the payment of those legacies. In *Bootle v. Blundell* (1 Mer. 193. See pp. 216, 219, and 230) Lord Eldon, C., says: "I agree that it is not enough that the testator has charged the real estate, to shew

that he intended to discharge the personal. . . . I can find no rule deducible from all that has been said on the subject but this (which appears to be a rule supported by all the cases taken together), namely, that since it has been laid down that express words are not necessary to exempt the personal estate, there must be in the will that which is sometimes denominated, 'evident demonstration,' sometimes 'plain intention,' and 'necessary implication,' to operate that exemption. . . . Then it comes to this. Upon each particular case, as it arises, the question will be, does there appear from the whole testamentary disposition, taken together, an intention on the part of the testator so expressed as to convince a judicial mind that it was meant, not merely to charge the real estate, but so to charge it as to exempt the personal? For it is not by an intention to charge the real, but by an intention to discharge the personal estate, that the question is to be decided."

These two legacies are not payable until a future time. They do not, however, carry interest in the meantime: and, consequently, no inference can be drawn in favour of their being payable only out of the real estate, from the circumstance that there is a provision made for the maintenance of the legatees, out of the real estates, until their legacies become payable.

[226] Next, with respect to the other question; that is, whether the arrears of the allowances are to be considered as a debt and to be raised out of the real estate. I submit that they cannot be considered as a debt; for the Great Seal has no power to contract a debt on behalf of the lunatic. [THE VICE-CHANCELLOR. Have the committees any balance in their hands in respect of the rents?] Yes. On the 29th of September 1839 rents became due to an amount sufficient to pay the allowances, but, as is usual, those rents were not paid until two or three months afterwards; and they were then received by the receiver appointed in the lunacy.

Mr. Jacob, in reply. The gift of the personal estate is not a residuary but a specific gift. It is a gift of "all my goods, chattels," &c. Then follows the gift of the legacies: and, as there was no fund for payment of them, the testator says immediately afterwards: "And I hereby charge all my real estate with the payment of the said several sums." Then he directs the trustees of his will, not his executors, in case his wife shall die during the minority of the legatees, to *levy and raise*, for their maintenance and support, not exceeding four per cent. upon the provisions intended to be made for them. Those words, "levy and raise," are applicable not to personal estate but to real estate: and, when the testator disposes of his real estate he gives it, "subject to the charges hereinbefore mentioned." I submit, therefore, that the legacies are clearly charged on the real estate; and that the personal estate is exonerated from payment of them by a prior, specific gift of it. The case of *Michell v. Michell* is precisely like this. The rents which were due at the testator's death were part of his personal estate, and, as such, they passed to his widow, the [227] specific legatee of the personal estate. All that is to be paid is to be paid out of the property on which the burden is thrown: therefore the Plaintiff is entitled to be paid the arrears of the allowances out of the real estate.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the maintenance, I think that it stands thus: there was no right in the committee to receive any payment for the maintenance of the lunatic, any further than as it might be made out of the rents and profits; that is, the committee was no otherwise entitled than as there might be rents and profits applicable to the payment of the maintenance. Now the rents which were due at the testator's death were, strictly speaking, part of his personal estate, and if Lady Jones says that the rents are personal estate, and that they belong to her as such, the consequence is that there is nothing to pay the maintenance out of. She cannot say that she will take the rents, and that the order in the lunacy created a debt due to her. It in no sense created a debt, otherwise than as there was a fund to pay the maintenance; and, if there was no fund, there was no debt.

The legatees of the £20,000 and £5000 can only claim their legacies out of the real estates on which they are expressly charged. There is a distinction between the case of a creditor and the case of a legatee which is not always sufficiently attended to, and which makes the propositions which are laid down by text-writers, and which are found in the reports with respect to the one class of claimants, inapplicable

to the other class. A creditor has a claim by operation of [228] law; but a legatee can only claim his legacy in the manner and form in which it is given by the will.

The testator, at the commencement of his will, after giving directions respecting the place of his burial, says: "I give and bequeath unto my wife, absolutely, all my goods, chattels and personal estate whatsoever, wheresoever and of what nature or kind soever." That gift is as much a specific gift as if he had enumerated every chattel, and then said, "I give them to my wife."

Then, with respect to the debts. The testator seems to have been aware that, by law, they would be payable out of his personal estate; and, therefore, after charging his real estates with the payment of them, he adds: "And I hereby exempt, so far as I am able, all my personal estate from the payment of the same or any part thereof." Then he says: "I give, devise and bequeath"—the use of the word *devise* is singular—"to my natural son, C. T. Jones, the sum of £20,000, and to my natural daughter, Eliza Jones, the sum of £5000; and I hereby charge all my real estate with the payment of the said several sums." Then he directs that, in case his wife should die during the minority of the legatees, the trustees of his will, their heirs and assigns, should raise, out of the rents of his real estates or by such other means as they might deem expedient, such annual sums for the maintenance of the legatees as should not exceed four per cent. per annum upon the respective provisions intended to be made for them. Now it is obvious that there would be an incongruity in saying that the legacies should be paid out of the personal estate, and that the interest of them should be paid out of the real estate.

[229] For these reasons, I think that Lady Jones takes the personal estate free from the obligation of paying the debts and legacies. (See *Carter v. Beard*, ante, vol. x. p. 7.)

[229] BEEVOR v. PARTRIDGE. Nov. 6, 1840.

[S. C. 10 L. J. Ch. 89.]

Will. Construction. Power. Trust.

Testator bequeathed the residue of his personal estate to three trustees, in trust to pay, apply and dispose of all the interest thereof for the maintenance, support and benefit of his three children and the survivors and survivor of them, in such shares and proportions, and in such manner as they should think most proper and advisable, and, if all the children should die without leaving issue, then that the trust fund should remain vested in two of the trustees, in trust for the persons thereafter mentioned. Held, that *the whole* income of the residue was given for the children's benefit, and, the trustees having applied only part of it for their benefit, that the surplus devolved, on the survivor's death, to his personal representative.

Robert Partridge, by his will, dated the 20th of January 1789, gave all the residue of his personal estate, after payment of his debts and funeral and testamentary expenses, to three trustees, in trust to invest the same in the usual securities, and, out of the interest, dividends and annual produce thereof, to pay an annuity of 12 guineas to Ann Simpson for her life, and another annuity of the same amount to Ann Blackmore for her life; and upon further trust *to pay, apply and dispose of all the rest and residue of the said interest, dividends and produce of the said trust money for the maintenance, support and benefit of his (the testator's) son Robert, and his (the testator's) daughters, Lydia and Mary, and the survivors and survivor of them, in such shares and proportions, and in such manner as his trustees and executors, or the survivors or survivor of them, his executors or administrators, should think most proper and advisable*; and upon further trust to lay out all or any part or parts of the trust money, as they should [230] think proper, in the purchase of any annuity or annuities for and during the term of the natural life or lives of all or any of his said son and daughters, and to be secured to be paid by Government or real security to them, his said trustees, or the survivors or survivor of them, or the executors or administrators of such survivor, in trust to

be by them paid, applied and disposed of for the maintenance, support and benefit of his said son and daughters, and the survivors or survivor of them, as he had thereinbefore directed the said interest, dividends and produce to be paid, applied and disposed of; and upon further trust, in case all or any of them his said son and daughters should happen to marry with the consent and approbation of the trustees, or the survivors or survivor of them, or the executors or administrators of the survivor of them, then he empowered the trustees, and the survivors and survivor, and the executors or administrators of such survivor, previous to and in consideration of such marriage or marriages, to settle or pay, or agree to settle or pay any sum or sums of money, part of the said trust money, to, upon and for the portions, provisions and benefit of his son and daughters, respectively, and the respective person or persons with whom they should respectively marry, and the child or children of such marriage or marriages respectively, or any of them, in such manner and form as the trustees, or the survivor or survivors of them, or the executors or administrators of such survivor, should, from time to time, think proper; and upon further trust, in case his said son or daughters, or any or either of them, should marry without such consent as aforesaid, and should leave any child or children living at their respective deaths, that the trustees or the survivor or survivors of them, his executors or administrators, should pay and apply such parts and shares of the said [231] trust money as should then happen to be undisposed of, to and for the use and benefit of such child and children, as the trustees should think proper; and in case his said son and daughters should all of them depart this life without leaving any child or children, or leaving such child or children, and all of them should depart this life under the age of 21 years, then he declared that B. G. Dillingham, who was one of the trustees, should no longer continue a trustee of the trust money, but that the same should be and remain vested in the two other trustees, and the survivor of them, his executors and administrators, upon the trusts thereafter mentioned. The testator then declared trusts of the trust money in favour of certain of his relations and connexions, and their children.

The testator died on the 11th day of March 1802, leaving his three children named in his will his only next of kin him surviving.

His daughter, Mary, died on the 29th of September 1831; his daughter, Lydia, on the 13th of June 1836, and his son, Robert, on the 13th of March 1839. They were all of unsound mind.

The trustees did not apply the whole income of the trust fund for the benefit of the children; so that at Robert's death there was in their hands a considerable sum arisen from the surplus income: and, that sum having been claimed by the personal representative of Robert and his sisters, and also by the persons entitled under the ultimate trust in the testator's will, the bill in this cause was filed by the trustees, for the purpose of having the rights of the several claimants to [232] the sum in dispute ascertained and declared by the Court.

Mr. Jacob and Mr. Phillips appeared for the Plaintiffs.

Mr. Knight Bruce and Mr. Metcalfe, for the personal representative of the three children, said the will did not give to the trustees a mere simple power to apply the income of the trust fund for the benefit of the testator's children, but a power which it was the duty of the trustees to exercise: that they were directed to apply *all* the dividends for the benefit of the children, and not *such part* of the dividends as they might think proper: that the whole income was to be applied, and the only discretion given to the trustees was as to the *shares* in which it was to be applied. *Harding v. Glyn* (1 Atk. 469; and 5 Ves. 501; and 8 Ves. 571); *Brown v. Higgs* (4 Ves. 708); *Barber v. Barber* (3 Myl. & Craig, 688).

Mr. Sharpe, for one of the next of kin of Robert Partridge, cited *Webb v. Kelly* (*ante*, vol. ix. p. 469).

Mr. Girdlestone and Mr. Teed, for some of the parties claiming under the ultimate trust in the will, said that there was no gift of the income of the trust fund to the testator's children, beyond what the trustees might in their discretion think fit to apply for their benefit. [THE VICE-CHANCELLOR. Suppose that the trustees had declined to exercise any discretion at all.] Then this Court would have been applied to, to fix the amount which ought to be applied for the benefit of the chil-[233]-dren.

The testator's sole object was to provide for the personal benefit and support of his children; and he has left the amount of the provision to the discretion of the trustees. *Macdonald v. Bryce* (2 Keen, 276 and 517). There is no substantial difference between that case and the present.

Mr. Wigram and Mr. Collyer appeared for the other parties claiming under the ultimate trust.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The effect which ought to be given to the language used by this testator appears to me to be sufficiently plain.

In the first place, when the testator uses the words: "Upon trust to pay, apply and dispose of all the rest and residue of the said interest, dividends and produce of the said trust money for the maintenance, support and benefit of my son Robert, and my daughters Lydia and Mary, and the survivors and survivor of them:" he creates an express trust to apply the dividends for the benefit of his three children and the survivors and the survivor of them. He then goes on to prescribe the mode in which the income of the trust fund shall be applied for their benefit, and says: "In such shares and proportions and in such manner as they, my said trustees, or the survivors or survivor of them, his executors or administrators shall think most proper and advisable." Those words give to the trustees a discretionary power as to the distribution only of the income of the trust fund: but do not revoke or in any manner abridge the previous gift.

[234] In the course of the argument I asked what would have been done (assuming that there was no gift), if the trustees had refused to exercise the discretionary power given to them. The answer was that the Court would have interposed and exercised it for them. But how could the Court exercise the discretion if there was no gift?

My opinion is that there is, by this will, a gift of the income of the trust fund to the three children, with a power to the trustees to modify the distribution of it, and that whether they exercised that power or not the gift would remain.

I shall, therefore, declare that the fund arisen from the surplus dividends of the trust fund belonged to the testator's son Robert, as the survivor of the three children.

[235] WARDE v. FIRMIN. Nov. 6, 7, 9, 21, 1840.

[S. C. 10 L. J. Ch. 43; 5 Jur. 288.]

Deed. Construction. Hotchpot Clause. Appointment. Mistake.

Under a marriage settlement a sum of consols was held in trust for the husband for life, remainder, as to a certain portion of it, for the wife for life, remainder for such one or more of the children as the husband and wife should appoint, remainder for the children at 21; and, as to the rest of the consols, in trust, after the husband's death, for the children, absolutely, at 21. There were five children who attained 21. Their parents, conceiving that they had power to appoint the whole of the consols, made appointments at different times to two of them which more than exhausted that portion of the consols which was appointable. Each deed of appointment declared that the appointee should not be entitled to any further or other share in the trust fund under the settlement until he should have put in hotchpot the thereby appointed share; unless a contrary intention should be expressed in the instrument by which any further appointment should be made. Held, that though the appointable part of the consols was not sufficient to answer fully the second appointment, yet there was to be no apportionment, and that the second appointee as well as the first was prevented by the hotchpot clause from taking any part of his one-fifth of the unappointable consols, unless he would give up the whole of what he would get under the appointment; and that the unappointable consols belonged wholly to the three other children.

By an indenture, dated the 10th of May 1793, being the settlement made in contemplation of the marriage of Peter Firmin with Jane Master, certain sums of Bank

stock and of four per cent. and three per cent. stock, the lady's property, were assigned to trustees, in trust for the intended husband and wife, for their lives, and, after the decease of the survivor of them, in trust for all and every or such one or more of the children of the marriage, at such times and in such shares, &c., as the intended husband and wife should, during their joint lives, appoint, and, in default of such appointment, as the survivor of them should appoint, and, in default of such appointment, in trust for the children of the marriage, who, being sons, should attain 21, or, being [236] daughters, should attain that age or marry under it, equally to be divided amongst them: and Peter Firmin conveyed certain freehold hereditaments to the trustees, to the use of himself for life, and, after his decease, in trust to sell the same and to invest, in the usual securities, so much of the proceeds as would be sufficient to produce a clear annual income of £400, and to stand possessed of the securities in trust, out of the income thereof, to pay an annuity of £200 a year to Jane Master during her life, and, *as to the residue of the securities which should be so purchased and should be more than sufficient to pay the annuity*, in trust for all and every or such one or more of the children of the marriage, as, being sons, should attain 21, or, being daughters, should attain that age or be married under it, and to be vested interests in them at such ages or times respectively: and, *as to so much of the securities to be so purchased as aforesaid as should be necessary for answering the annuity of £200 a year*, in trust for such child or children of the marriage, in such manner, &c., as therein and hereinbefore mentioned concerning the fortune of Jane Master after the decease of her and her intended husband: and the trustees were empowered, with such consent as therein mentioned, to change the trust funds for other securities of a like nature: and it was provided that in case Peter Firmin should, at any time during the joint lives of himself and his intended wife, purchase, in the names of the trustees, so much stock in any of the public funds as would produce the annual sum of £400, to be held in trust for himself for life, and, after his decease, upon the trusts before mentioned concerning such part of the proceeds of the real estates directed to be sold as was directed to be laid out in the purchase of stock or other securities, then the trusts before mentioned concerning such real [237] estates should cease. And it was declared that the stocks or funds to be purchased by P. Firmin as aforesaid might be varied, from time to time, in such manner as was thereinbefore declared concerning the monies and property thereby settled.

After the marriage, Peter Firmin, in pursuance of the aforesaid provision in the settlement, purchased in the names of the trustees £13,333, 6s. 8d. three per cent. stock, being the amount of that stock required to produce the annual sum of £400; and consequently, one-half of that stock, that is, £6666, 13s. 4d., was required to answer Mrs. Firmin's annuity of £200 a year.

By a deed-poll, dated the 12th of November 1821, Mr. and Mrs. Firmin, in contemplation of the marriage of their daughter, Louisa, with G. S. Sadler, after referring to the settlement appointed, after the decease of the survivor of themselves and subject to their life interest therein, £4200 three per cents., part of the funds comprised in, or subject to the trusts of the settlement to Louisa, her executors, &c., *subject to the proviso that she should not be entitled to any further or other share in the trust funds under the settlement, until she should have put in hotchpot the thereby appointed share; unless a contrary intention should be expressed in the instrument or instruments whereby any further or other appointment or appointments should be made.*

By the settlement on the marriage of Mr. and Mrs. Sadler, dated the 13th of November 1821, and to which Mr. and Mrs. Firmin were parties, Mrs. Sadler assigned the £4200 three per cents. to trustees, upon the trusts thereby declared. This deed recited that certain sums [238] of stock therein mentioned (1) were then standing in the names of the trustees of Mr. and Mrs. Firmin's settlement, in trust to pay the dividends thereof to Mr. Firmin for life, and after his decease to Mrs. Firmin for her life, and after the decease of the survivor of them, in trust to transfer the capital to and between all and every, or such one or more of their children, at such times, &c., as they should appoint, and in default of such appointment, then as

(1) These sums were *the whole* of the stock comprised in Mr. and Mrs. Firmin's settlement. It will be observed that the above recital was incorrect.

the survivor of them should appoint, and in default of such appointment, in trust for such of their children as being sons should attain 21, or being daughters, should attain that age or marry under it.

By a deed-poll, dated the 24th of December 1821, after referring to the settlement of the 10th of May 1793, Mr. and Mrs. Firmin, in execution of the power thereby reserved to them, appointed, after the decease of the survivor of them and subject to their life interest, £4200 three per cents., part of the funds comprised in, or subject to the trusts of the settlement, to Harcourt Firmin, another of their children who had attained 21, his executors, &c. : subject to a proviso similar to that contained in the preceding deed-poll.

By an indenture of the 26th of December 1821, Harcourt Firmin settled, on his marriage, the £4200 stock appointed to him as before mentioned : and that indenture contained a recital, in the same terms as the recital before noticed, in Mrs. Sadler's settlement.

[239] The whole amount of three per cent. stock which Mr. and Mrs. Firmin had power to dispose of under their settlement was £7618, 1s. 6d., which was composed of that moiety of the £13,333, 6s. 8d. three per cents. which was required to pay Mrs. Firmin's annuity, and of another sum of the same stock which was part of her fortune : so that, by the foregoing deeds, she and her husband appointed a larger amount of three per cents. than they had power to dispose of.

Mr. Firmin died in December 1826.

By a deed-poll, dated the 18th of December 1827, Mrs. Firmin, after referring to her settlement, appointed in execution of the powers reserved to her thereby certain sums of Bank and four per cent. stock, part of the funds comprised in or subject to the trusts of that settlement to Robert Firmin, another of the children of the marriage who had attained 21, his executors, &c., in trust for his brother Harcourt.

By a deed-poll, dated the 10th of September 1829, after reciting that certain sums of stock therein mentioned (1) were then standing in the names of the trustees of Mr. and Mrs. Firmin's settlement, in trust, after her decease, *for the benefit of the children of the marriage as Mr. and Mrs. Firmin jointly, or the survivor alone should appoint*, and, in default of appointment, for such children equally at the times therein specified ; and after further reciting the then intended marriage of Robert Firmin, Mrs. Firmin, in exercise of the powers reserved to her by her settlement, appointed, after her decease but subject to her life-interest therein, two sums of three per cent. stock (making together £4200 of that [240] stock), part of the said trust funds to Robert Firmin, his executors, &c., subject to a proviso similar to that contained in the first-mentioned deed-poll.

By an indenture, dated the 1st of May 1830, after reciting, with respect to the trust funds as in the preceding deed, Mrs. Firmin, in execution of the powers reserved to her by her settlement, appointed certain sums of Bank and four per cent. stock, part of the trust funds, after her decease and subject to her life-interest therein to Mrs. Sadler, her executors, &c. ; and, by the same deed, Mrs. Firmin appointed certain other sums of like stock, other part of the trust funds, after her decease, and subject to her life interest therein to Robert Firmin, his executors, &c. ; and it was thereby provided that Robert Firmin or Mrs. Sadler, or either of them, should not be compelled to bring into hotchpot the several shares appointed to them thereby, and by virtue of the deeds of the 12th of November 1821, the 18th of December 1827, and the 10th of September 1829, or any of them ; but that they should not respectively be entitled to any further shares of the trust funds under the settlement, unless or until they should have put into hotchpot the shares thereby, and by the last-mentioned deeds respectively appointed ; unless a contrary intention should be expressed in the instrument or instruments whereby any further appointments should be made to them respectively.

By another deed, also dated the 1st of May 1830, after reciting with respect to the trust funds as in the two last-mentioned deeds, and that Mrs. Firmin, being desirous of making a provision for Sophia Firmin (another of her children by her late husband who had attained 21), had determined to appoint to Sophia Fir-[241]-

(1) See note, *ante*, p. 238.

min the several sums thereafter mentioned, she, in execution of the powers reserved to her by the settlement, appointed, after her decease, but subject to her life interest therein, the sum of £1902, 15s. three per cents., and also certain other sums of stock, part of the trust funds to Sophia Firmin, her executors, &c.; subject to a proviso similar to that contained in the first-mentioned deed-poll.

Georgiana, another child of Mr. and Mrs. Firmin, attained 21, and died in 1822.

Mrs. Firmin, from the decease of her husband until her own death, received *the whole* of the dividends of the three per cent. stock comprised in her settlement. She died in December 1836.

The bill was filed by the trustees of Mr. and Mrs. Firmin's settlement against their surviving children and the personal representatives of their deceased child Georgiana Firmin, and also against the trustees and *cestuis que trust* under the settlements which had been executed by the children as before mentioned.

The bill alleged that, from the recitals contained in Mr. and Mrs. Sadler's settlement, dated the 13th of November 1821, it appeared that, at the time of the execution thereof and of the deed-poll of the 12th of November in the same year, Mr. and Mrs. Firmin, and the other parties who executed the last-mentioned settlement, erroneously believed that the power of appointment amongst the children of Mr. and Mrs. Firmin, which, by the settlement on their marriage, was given to them and the survivor of them, extended to the whole [242] of the stocks, funds and securities comprised in that settlement; and that that part of the trusts of the same settlement whereby it was provided that the residue of the stocks, funds and securities which should be purchased with the monies to arise from the sale of the freehold hereditaments thereby conveyed, and which should be more than sufficient to satisfy the annuity of £200 therein mentioned should, after the decease of Mr. Firmin, be held in trust for the children of Mr. and Mrs. Firmin and not subject to any power of appointment by them or either of them, was entirely overlooked by the parties to Mr. and Mrs. Sadler's settlement, and that the sum of £14,284, 14s. 10d. three per cent. annuities was by error inserted in Mr. and Mrs. Sadler's settlement instead of the sum of £7618, 1s. 6d. like annuities, such last-mentioned sum being the amount of three per cent. stock to which, under the trusts of Mr. and Mrs. Firmin's settlement, the power of appointment given to them extended. The bill further stated that the several appointments which were made by Mr. and Mrs. Firmin and by Mrs. Firmin after her husband's death as before mentioned, had exhausted the whole of the stocks, funds and securities held by the Plaintiffs upon the trusts of Mr. and Mrs. Firmin's settlement, and left no part thereof to satisfy the trusts thereby declared of such of the same stocks, funds and securities as should be more than sufficient to satisfy and discharge the annuity of £200; that the Defendants who were interested under the appointments before mentioned had, since Mrs. Firmin's death, required the Plaintiffs to divide, pay and transfer the trust funds pursuant to and in conformity with such appointments; but that the Plaintiffs had declined so to do, they having been advised that, under the circumstances appearing [243] in the bill, they could not safely act in the premises except under the direction and indemnity of the Court.

The bill prayed that the trusts of Mr. and Mrs. Firmin's settlement might be carried into execution under the decree of the Court, and that the rights and interests of all the parties in the sums of stock comprised in that settlement might be ascertained and declared by the Court, and that those several sums might be applied accordingly.

The cause was heard on the 30th of June 1838; and, by the decree then made, the Master was directed to inquire and state whether Mr. and Mrs. Firmin or Mrs. Firmin, after her husband's death, had made any and what appointments of the trust funds comprised in their marriage settlement, and to make several other inquiries, with a view to enable the Court to decide as to the rights of the parties. The Master having made his report, the cause now came on to be heard for further directions.

The principal question in the cause was what effect ought to be given to the appointments which had been made to Mrs. Sadler, Harcourt Firmin, Robert Firmin and Sophia Firmin, having regard to the fact that Mr. and Mrs. Firmin had attempted to

appoint the whole of the three per cent. stock comprised in their settlement; whereas they had no power over the sum of £6666, 13s. 4d., part of that stock, that sum being settled in trust for their children, who, being sons, should attain 21, or, being daughters, should attain that age or marry; in consequence of which Georgiana Firmin (to whom no appointment had been made) had acquired, under the settlement, a vested interest in one-fifth part of the [244] £6666, 13s. 4d. three per cents., which on her death devolved to the Defendant, Gadsden, her personal representative.

Mr. Chandless and Mr. Faber appeared for the Plaintiffs.

Mr. Jacob and Mr. Piggott, for Harcourt Firmin and his wife, and Mr. Girdlestone and Mr. Evans, for their children, said that the appointment to Harcourt Firmin was not an appointment of £4200, part of the specific sum of three per cent. stock comprised in Mr. and Mrs. Firmin's marriage settlement; but an appointment, generally, of £200, part of the trust funds; that, unless the £4200 three per cents. was to be made good out of the trust funds generally, the whole of the three per cent. stock might have been sold out under the power in the settlement, to change securities, and the proceeds invested in some other stock; in which case there would have been no fund at all to answer the appointment at the death of Mrs. Firmin; and, indeed, as the funds then existed, there was not sufficient three per cent. stock to answer the appointments which had been made, supposing that they were taken to be appointments of portions of the specific sum of that stock comprised in the settlement; that the trust funds were of a fluctuating nature during the lives of Mr. and Mrs. Firmin; and it was, therefore, clear that the appointments were to be made good out of the trust funds generally, as they might be found at the deaths of Mr. and Mrs. Firmin.

The next question is what is the effect of the hotchpot clauses, that is, whether they apply to that portion of the trust funds which was subject to the power, or to that portion which was not subject to the power. We [245] confidently submit that every one who looks at those clauses must see that they apply to that portion only of the trust funds which was subject to the power: and that being so, Harcourt Firmin and those who claim under him are entitled not only to the whole of what was appointed to him, but also to one-fifth of the stock which was not subject to the power.

It will be perhaps contended that this is a case in which the appointees ought to be made to elect whether they will take under the appointments made to them respectively, or under the settlement as if no such appointments had been made, and *Robinson v. Bransby* (Madd. & Geld. 348) will be cited in support of that argument. That case, however, has no application to the present; for there the judgment of Sir John Leach, V.-C., was founded on the intention of the testator as distinguished from mistake; this, however, is not a case of intention but of mistake, as clearly appears from the recitals in several of the deeds set forth in the Master's report.

Mr. Stuart and Mr. Colville, for the trustees of Harcourt Firmin's marriage settlement.

Mr. Wigram, for Robert Firmin, said that it appeared to have been the intention of Mr. and Mrs. Firmin to equalize the funds amongst the appointees as nearly as might be; and, therefore, the appointable portion of the three per cents. ought to be divided amongst the appointees in proportion to the share appointed to each.

Mr. Simpson, with Mr. Wigram, cited *Robinson v. Bransby* and *Daubeny v. Cockburn* (1 Mer. 626).

[246] Mr. Hetherington, for the trustees of Robert Firmin's marriage settlement.

Mr. Sidebottom and Mr. Teed, for Mr. and Mrs. Sadler and their children, contended that the appointment made to Mrs. Sadler, in November 1821, was not meant to take effect out of the trust funds generally, but out of the specific sum of three per cent. stock which was comprised in Mr. and Mrs. Firmin's settlement; that that appointment was the first that was made, and consequently Mr. and Mrs. Sadler, and their children as claiming under them, were entitled to the full benefit of it, and were not liable to contribute to make good the subsequent appointments.

Mr. Koe, for the trustees of Mr. and Mrs. Sadler's marriage settlement.

Mr. Knight Bruce and Mr. Bellamy, for Sophia Firmin, contended that the appointable portion of the three per cent. stock ought to be divided amongst the different appointees in proportion to the shares of that stock appointed to them.

Mr. Cooper, for R. Gadsden, the executor of Georgiana Firmin, claimed one-fifth of that portion of the three per cent. stock which was not subject to the power.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The question is what is the effect of the several instruments which were executed by Mr. and Mrs. Firmin jointly, and by Mrs. Firmin alone after her husband's death.

The first is the appointment of the 12th of November 1821. It is very probable that there may have been a [247] mistake in the minds of the parties who executed the power of appointment at the time when they executed that deed of the 12th of November 1821; but if, in point of fact, they had such a power as would enable them to make the appointment which they then did, no question arises upon that deed. At the time when the deed of the 12th of November 1821 was executed, the father and mother had a joint power of appointment over so much of the three per cents. as would enable them to appoint a sum of £4200 to Mrs. Sadler. It is true that they might have conceived that their power did extend further than it really did: but the fact that they conceived that their power extended further does not furnish any reason why, if their power did extend so far as it was intended to take effect, that instrument should not take effect to its full extent: and it seems to me to be quite impossible to say that, because there was a mistake by the parties, as to the extent of their power, therefore the instrument shall not take effect, when, in point of law, it could take effect. If it is not to take effect to its full extent, is it to take effect partially, or is it to be wholly set aside? Constituted as the case is, there is no other alternative. My opinion is, after attending to all I have heard, that Mrs. Sadler is entitled, under the appointment of the 12th of November 1821, to the sum of £4200 three per cents.

It would be a very strange construction to say that the £4200 three per cents. is to be raised out of all the funds, generally, which were subject to the power, and not out of that portion of the three per cents. which, according to the true construction of the settlement of 1793, was subject to the joint power of appointment.

[248] There is one more observation which I have to make upon this part of the case. It appears, from the recitals in the deed of the 12th of November, that the appointment made by it was made in contemplation of Mrs. Sadler's marriage and of the settlement to be made on that occasion, that is, of the deed of the following day: but, if the reference in the deed of the 12th to the deed of the 13th is to have the effect of introducing the recitals in the latter deed into the former, still it could not in the least prevent the deed of the 12th November from operating in the way in which it stands. I might indulge in a supposition that, if the parties had been aware of what they were about, they might not have done exactly what they did. But if I find they had an intention to do that which, by virtue of the power, they actually could do, it appears to me that I am not justified in saying that it shall not take effect merely because, by that mode of reference, it appears they misconceived the actual extent of their power. Then, with respect to the effect which ought to be given to the hotchpot clause which is inserted in this instrument of appointment. Let us take the words as they stand: "Provided always, and it is the true intent and meaning of these presents and of the said Peter Firmin and Jane, his wife, that the said Louisa Firmin shall not be entitled to any further or other share or shares of or in the said trust monies, stocks, funds and securities under the said settlement, or the dividends, interest and income thereof, until she, the said Louisa Firmin, shall have put in hotchpot the said Bank annuities, part of the said trust monies, stocks, funds and securities so directed and appointed in her favour as aforesaid, unless a contrary intention shall be expressed in the instrument or instruments whereby any further appointment or appointments shall be made." To be sure, [249] as it stands, an intention with respect to her might have been expressed in some instrument of appointment which did not relate to her in the way of appointing to her; but I do not think much turns upon that: the question is whether the clause of hotchpot does not extend, in its terms, to all the funds: and my opinion, in the first place, upon the terms of the deed, is that it clearly does extend to the whole of the funds; and, if you look into the circumstances which are developed, and take into consideration the fact that the parties who executed this instrument did really suppose that the power extended to the whole of the three per cent. stock as well as to all the other trust

funds, there can be no doubt about the meaning of those words. I admit, if it was shewn on the face of this instrument that there was a clear knowledge, on the part of the parties who executed the power, that their power extended to some part only of the three per cents., and did not extend to the remainder, there might have been some difficulty in assigning to those words their natural meaning; but, as the instrument stands, and as we know the fact to be with respect to the conception of the parties as to the extent of their power, my opinion is that no question arises on these words, and that the express terms of the hotchpot clause do apply to any instrument by virtue of which Mrs. Sadler might subsequently take any share of the trust funds.

Next with respect to Harcourt Firmin. The parties having appointed £4200 of the three per cents., and having no power of appointing so much as a further sum of £4200 of that stock, did, nevertheless, take upon themselves to appoint that further sum, under the impression that they had the power so to do. The language of this instrument is so identically the same [250] as the language of the instrument of the 12th of November, that I am not at liberty to put any other construction upon it than this, namely, that it shall be good to the extent to which there was a fund to answer it; and, therefore, so much of the £7618, 1s. 6d. three per cents. as was not included in the appointment to Mrs. Sadler became duly appointed by means of this instrument to Harcourt Firmin.

Then the next question applies to Robert Firmin. As I understand the appointment to Robert, it is in precisely the same terms, as far as the appointment goes, as the preceding appointment which had been made in the year 1821: and his father being dead, his mother professes to appoint to him £4200 three per cents. in two separate sums. However, his mother, at the time, had no such power of appointment: for it is an appointment of a portion of a specific fund; and, if there was no specific fund which could answer the appointment, I am not at liberty to say that the party making the appointment meant to do any other thing than that which she really did. What I mean to say is that, so far as there was no fund on which the instrument could operate, the instrument must fail. If there be any fund on which the instrument could operate, it must take effect to that extent; but, as an instrument operating on the £4200, it cannot take effect.

Then the next two appointments were simultaneous on the 1st of May 1830; and one of those appointments was to Mrs. Sadler and Robert Firmin: and that appointment was only of certain sums of Bank and four per cent. stock, not interfering with any of the three per cents. And there is no question but that there might be a power exercised with respect to those [251] funds, because they were derived from the wife's fortune, and therefore that appointment to Mrs. Sadler and Mr. Robert Firmin will take effect, subject only to such operation as the hotchpot clauses in the previous appointment to them would have. [Mr. Sidebottom. The appointment to Robert Firmin and Mrs. Sadler annuls all the previous hotchpot clauses so far as those parties are concerned.] The appointment of the 1st of May 1830 to Mrs. Sadler and Mr. Robert Firmin leaves them in possession of the sums appointed to them, but it still leaves the hotchpot clause in full force against the fund which was not appointable, and prevents them from claiming any portion of it. It has not been contended that they are not entitled to the benefit of the prior appointments. What I mean is that they cannot take under those appointments and come on the unappointable fund as well.

Lastly, with respect to Miss Sophia Firmin. She can take only those sums of Bank and four per cent. and Reduced stock which are mentioned in the appointment to her, and cannot claim anything in respect of £1902, 15s. three per cents. which are mentioned in the appointment to her.

After the judgment was delivered a discussion arose as to the effect of it, with regard principally to the unappointable fund. In consequence of which His Honor ordered the cause to stand over until the 9th of November.

Nov. 9. Mr. Knight Bruce. The effect of your Honor's judgment, as I understand it, is that the appointments operate upon the appointable [252] funds only, and that the hotchpot clauses exclude the appointees from taking any part of the un-

appointable fund without bringing what was appointed to them into hotchpot; and, if they do not do so, then the whole of the unappointable fund will belong to R. Gadsden, as the personal representative of Georgiana Firmin, the only one of Mr. and Mrs. Firmin's children in whose favour no appointment was made.

Mr. Girdlestone. The effect of the judgment, as I understand it, is this. Mrs. Sadler takes the whole of the £4200 three per cents. appointed to her by the deed of November 1821. The consequence is that there will not be enough left of the appointable three per cents. to make up the £4200 appointed to Harcourt Firmin by the deed of December 1821; therefore, he will be entitled to have the deficiency made good to him out of the unappointable fund; for otherwise he will not get that which was the consideration for his giving up his fifth share of the unappointable fund.

Mr. Evans. Where a party is made to elect whether he will take under or against a will, the estate that he gives up does not go to the heir, but to the party who otherwise would have been disappointed. Suppose that Mrs. Sadler, for some reason or other, had elected to take her share of the unappointable fund, and to relinquish what was appointed to her; then there would have been sufficient of the appointable fund to answer Harcourt Firmin's appointment; and, as he is disappointed by her electing to take under the appointment to her, the necessary consequence is that what she gives up must be applied [253] to compensate Harcourt Firmin as far as he is disappointed.

THE VICE-CHANCELLOR. If there is not enough left of the appointable three per cents. to make good to Harcourt Firmin the whole of the sum appointed to him, he must abide by the loss. The effect of a hotchpot clause is to make the other objects of bounty share in the property, to the exclusion of the appointee on whom that clause operates.

Mr. Jacob. That is so where the clause applies to a fund the whole of which is subject to a power of appointment. But here there is a sum of £6666, 13s. 4d. three per cents., which is not subject to any power, and in which each of Mr. and Mrs. Firmin's five children acquired an absolute, vested interest. Now a hotchpot clause has a negative not a positive operation; it cannot have the effect of giving to any of the other children that one-fifth of the £6666, 13s. 4d. three per cents. which was absolutely vested in Mrs. Sadler; nor could her parents have intended that it should so operate; for they either never knew or had forgotten that there was any portion of the trust funds in which their children could take an absolute, vested interest; but they considered and dealt with the whole of the trust funds as being appointable by them. I submit that the effect of the hotchpot clause, so far as regards the first appointment to Mrs. Sadler, is that her one-fifth of the £6666, 13s. 4d. three per cents. must be taken by her in part of the £4200 of that stock appointed to her by the deed of November 1821, that is, she must take £1333 and a fraction out of the £6666, 13s. 4d., and [254] £2867 out of the £4200; and the remainder will be applied to make good the appointments to Harcourt Firmin and the other appointees of three per cents., who otherwise would have been disappointed. The hotchpot clause does not make any distinction between the two funds; but blends them together, and says that Mrs. Sadler shall not take out of the aggregate fund more than £4200 three per cents. That clause cannot be construed so as not only to make her give up her £1333, but also to make it divisible amongst her brothers and sisters, there being no words to produce that effect.

THE VICE-CHANCELLOR. I cannot tell what Mr. and Mrs. Firmin did or did not know. They have thought proper to use certain language, and I must take it as it stands. I have always understood the effect of a hotchpot clause to be this, namely, to prevent the party to whom it applies (in case he does not choose to bring into hotchpot what the deed gives him) from taking any further part of the trust fund, and to give to the other objects of the trust that portion of the fund which, but for the hotchpot clause, he would have taken. Mrs. Sadler, therefore, is excluded from taking any portion of the £6666, 13s. 4d.

Then with respect to Harcourt Firmin. The instruments of appointment having been made, not at the same time, but in succession, they must operate so far, and so far only, as there are funds to allow them to operate. Harcourt Firmin cannot

obtain the whole of the £4200 three per cents. appointed to him, because there is not enough left of the appointable portion of that stock to answer fully the appointment to him. Nevertheless, [255] he cannot say that he will take as much as he can get under the appointment, and yet not be bound by the hotchpot clause.

Nov. 21. The cause having been again ordered to stand over,

THE VICE-CHANCELLOR [Sir L. Shadwell], on this day, said: I cannot but think that it is not a satisfactory way of deciding on instruments to assume that something was the intention of the parties when they themselves did not understand what they were about, and have used language throughout which shews, when it is applied to the real state of the funds, that they were altogether acting in error; and my opinion is that, in such a case, there is no method of construing the instruments except by taking the words as we find them.

I do not very well see what the parties meant by putting in all these clauses of hotchpot to the very end, even at the time when they had wholly appointed the funds to which their power extended; but, nevertheless, I will suppose they had some meaning. Then what is the meaning? As the words stand, they seem to me to place the appointees in such a situation that they must either choose to take what is appointed to them by the instruments, or, if they choose to take any other share, then they must not take under the instruments.

I do not think there is any substantial difference between the case of Mrs. Sadler, to whom an appointment was made at a time when the state of the funds happened to be such that she might, by virtue of the appointment, have the whole of what was [256] appointed to her, and the case of those with respect to whom the appointments were made under such circumstances as that they could not get the whole of what was expressed to be appointed to them; because it is not in the option of the appointee to take a part of the thing appointed, and then say: "Because I cannot get the whole, I am not bound by the hotchpot clause." The party is not at liberty to take under the appointment without complying with the words which direct that, if he does take under the appointment (for that is the sense of it), he shall be excluded from taking any further share. Therefore, as, in point of fact, there was some fund with reference to which the hotchpot clause might operate (though the parties who made the appointments might not have been fully aware of it), yet I am bound by the words to say that those parties in whose favour appointments have been made, and who intend to take, by virtue of those appointments, what they can get out of the appointable fund, are excluded from participating in the unappointable fund.

The result is that Georgiana Firmin, who was the only one of the children to whom no appointment was made, and with respect to whom, therefore, no hotchpot clause is in force, takes the whole of the unappointable fund.

[257] FRENCH v. FRENCH. Nov. 13, 1840.

[See *In re Seyton*, 1887, 34 Ch. D. 515. Cf. *In re Davies's Policy Trusts* [1892], 1 Ch. 90.]

Will. Construction.

Testator gave £5000 to his sons, in trust for his daughter Mrs. W., so as not to be subject to the debts, acts or control of her husband; and he gave the like sum to his daughter Mrs. A., *in trust as aforesaid, for the use of herself and children.* Mrs. A. had two children living at the testator's death. Held, that they did not take either as joint-tenants or tenants in common with her; but that she was entitled to the whole income of the fund for her life for her separate use, with remainder to her children.

Mark Dyer French, the testator in the cause, by his will, dated the 16th of May 1838, after directing that his just debts and funeral expenses should be paid, and reciting that he had lately caused to be transferred unto his daughter Maria, who

had lately intermarried with Captain William Graham, the sum of £5000 three per cent. consols; to his daughter, Jane Camden, the like sum of £5000 stock; and to his son, the Rev. Mark Dyer French, the further sum of £5000 three per cent. consols, as and for their several portions out of his estate; gave and bequeathed unto his sons, Mark Dyer French and George French, in trust for his daughter, Mrs. Sarah Wilson, wife of John Wilson, Esq., the like sum of £5000, so as not to be subject to the debts, acts or control of her said husband; and he gave and bequeathed unto his daughter, Margaret Anderson, wife of Alexander Williams Anderson of the island of Trinidad, barrister-at-law, *in trust as aforesaid, for the use of herself and children*, the like sum of £5000 three per cent. consols; and to his son, George French, the further sum of £5000 three per cent. consols; the last-mentioned £15,000 to be paid and transferred at a convenient time after his decease, and as it might suit his executors thereafter named. And, as to the rest and residue of his stock in the same fund, he directed that the sum of £600 annually should be paid and allowed unto his wife, Mary French, for and during her natural life, and, at her decease, he directed that whatever stock was standing in his name, and the interest accumulating thereon, should be distributed to [258] his aforesaid children; and he gave and bequeathed to each of his grandchildren by his daughters, Mrs. Sarah Wilson and Mrs. Margaret Anderson, annually the sum of £25 each, to be paid to them or the survivor of them, towards their education, by his executors thereafter named; and, as to his real and personal property in the island of Tortola, he directed that the same should be sold, and that the money arising therefrom should be invested in the same fund; and he appointed the persons therein named his executors.

Mr. and Mrs. Anderson had two children living at the testator's death (both of whom were infants), and one born subsequently, who died shortly after its birth.

A petition was presented by Mr. and Mrs. Anderson, praying that the rights and interests of Mrs. Anderson and her children, present and future, under the bequest for their benefit, might be ascertained. The petition now came on to be heard.

The question was whether Mrs. Anderson was entitled to the £5000 stock for her separate use for life, with remainder to her children, or whether she and her children were entitled to it as joint-tenants or tenants in common.

Mr. Jacob and Mr. James Parker, in support of the petition, cited *Morse v. Morse* (*ante*, vol. ii. p. 485).

Mr. Knight Bruce, for the children, said that he was placed in a situation of some difficulty, as it would be better for the children, in some respects, to take after the death of their mother than jointly with her.

[259] THE VICE-CHANCELLOR [Sir L. Shadwell]. The testator first gives a legacy of £5000 stock to his sons, in trust for his daughter, Mrs. Wilson, so as not to be subject to the debts, acts or control of her husband; and then he gives a legacy to the same amount to his daughter, Mrs. Anderson, in trust as aforesaid, for the use of herself and children. The words, "*in trust as aforesaid*," clearly mean that the income of the fund should be paid to her for her separate use. Therefore the testator did not mean that the children should be let in to participate with their mother, but that she should take an interest in the fund, for her separate use for her life, with remainder to her children. The effect of that construction will be to let in all the children, whether now born or hereafter to be born; whereas, if I were to hold that a joint-tenancy was created, the after-born children would be excluded.

[260] MORRICE v. LANGHAM. Nov. 14, 16, 1840.

[Affirmed in substance, sub nom. *Sanford v. Morrice*; 11 Cl. & Fin. 667; 8 E. R. 1255 (with note).]

Deed. Construction. Shifting Clause. Appointment. Intermediate Rents.

T. settled his estates (subject to a general power of appointment in himself) on himself in tail, remainder to J. L. and his sons in strict settlement, remainder to L. C. for life, &c.; provided that if J. L., or any issue male of his body

should become entitled in possession to his father's family estates, then the uses before declared of T.'s estates, for the benefit of him or them who should so become entitled, and for the benefit of his or their issue male, should cease, and those estates should go over as if the person or persons so becoming entitled were dead without issue male. T., by his will, appointed his estates to J. H. L. (the eldest son of J. L.) and his sons in strict settlement, remainder to the heir of H. H. deceased; provided that if any tenant for life in possession under the will should become entitled, in possession, to J. L.'s family estates, his interest in the devised estates should cease, and those estates go over to the person next in remainder under the will, as if the tenant for life were dead. The testator then gave all the rest and residue of his real and personal estates to A. H. S., his executors, &c. J. L. became entitled in possession to his father's family estates in the testator's life. The testator died in 1824; upon which, J. H. L. entered upon his estates under the will. J. L. died in 1833, upon which J. H. L. became entitled in possession to the family estates. He had no son. The rents of T.'s estates, accruing between 1833 and J. H. L.'s death or his having a son, were claimed by A. H. S. as being appointed to him by the residuary clause; and L. C. and H. L. (the second son of J. L.) claimed them, adversely to each other, under the limitations in default of appointment, in T.'s settlement. The Court decided against A. H. S.'s claim, and, at the request of counsel, sent a case to law, as to the claims of L. C. and H. L., notwithstanding the legal interest in T.'s estates, was vested in trustees, and the Court had very little doubt upon the question.

By an indenture, dated the 12th of April 1804, and by a fine and recovery, Francis Tutte conveyed the manors of Goate and Belhurst, in Sussex, together with divers farms and other hereditaments in that county, to the use of such person and persons and for such estate and estates as he should by deed or will appoint, and, in default of appointment, to the use of himself in tail, with remainder to the use of James Langham, Esq., afterwards Sir James Langham, Bart., therein described as the second son of Sir James Langham of Cottesbrook [261] in the county of Northampton, Bart., deceased, for his life, with remainder to the use of trustees during the life of James Langham, in trust to preserve contingent remainders, with remainder to the use of the first and other sons of James Langham, successively in tail male, *with remainder to Langham Christie, Esq., for his life*, with divers remainders over; and in the indenture was contained a proviso in the words following: "Provided always, and it is hereby agreed and declared, by and between the parties to these presents, to be the true intent and meaning of them and of these presents, that, *in case the said James Langham, or any issue male of his body, shall become entitled to the possession or to the receipt of the rents and profits of the family estates late of the said Sir James Langham, deceased*, to the amount of £1000 per annum, over and above all outgoings and reprises, *then and in every such case the use, limitation and estate, uses, limitations and estates hereinbefore limited, expressed, declared and contained of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or to the receipt of the rents and profits of the family estates of the said Sir James Langham, or any of them, to the amount of £1000 per annum as aforesaid, and to or for the benefit of the issue male of such person or persons so becoming entitled, shall cease, determine and be absolutely null and void*, and then and in every such case, all and singular the said hereditaments and premises shall, immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, *and shall go over in such and the same manner, to all intents and purposes, as if such person or persons [262] so becoming entitled were actually dead without issue male.*"

Francis Tutte made his will, bearing date the 24th of June 1820, and thereby, in pursuance of the power reserved to him by the indenture of the 12th of April 1804, and of all other powers, &c., appointed all the said manors and other hereditaments to the use that Louisa Wainwright should receive, during her life, an annuity of £100, and, subject thereto, *to the use of Alexander Hale Strong, since deceased*, and the Plaintiffs, their heirs and assigns, upon certain trusts for raising the sum of £12,000, to be considered as part of the testator's personal estate, and, subject thereto, he

thereby directed and appointed that Strong and the Plaintiffs and the survivor of them, and the heirs and assigns of such survivor, should stand seised of (and he did thereby limit and appoint the same accordingly) all the said manors and other hereditaments, to the use of James Hay Langham, the eldest son of Sir James Langham of Cottesbrook Hall in the county of Northampton, Bart. (Sir James Langham being the same person as in the indenture was mentioned as James Langham, Esq.), and his assigns for his life, with remainder to the use of John Lupton and Willoughby Rackham, and their heirs, during the life of James Hay Langham, upon trust to preserve the contingent uses and estates thereafter limited, with remainder to the use of the first and other sons of James Hay Langham, successively, in tail male, with remainder to the use of the right heirs of *Herbert Hay, Esq., deceased*, for ever; and in the will were contained provisoes in the following words:—"Provided always, and it is my will and meaning that each person who, by virtue of any of the uses, limitations or provisions herein contained, shall, for [263] the time being, be tenant for life in possession of the said manors, hereditaments and premises, or of any part thereof, and shall, at the same time, become entitled to the settled estates of Sir James Langham of Cottesbrook Hall, in the said county of Northampton, Bart., so as to be in the actual receipt of the rents thereof, then, and in every such case and thenceforth, the estates and interests hereinbefore limited to every tenant for life respectively, of and in the said manors, hereditaments and premises hereby limited, as shall become so entitled in possession to, said settled estates of the said Sir James Langham, shall cease and determine; provided also, and it is my will and meaning that every person who, according to the uses, limitations or provisions herein contained, shall, for the time being, be tenant in tail in possession of the said manors, hereditaments and premises hereinbefore limited, and shall, at the same time, become entitled to the said settled estates of the said Sir James Langham, so as to be in the actual possession or in the actual receipt of the rents and profits thereof, then and in every such case and thenceforth the estate tail which every such person shall, by virtue of any of the trusts, limitations or provisions, be seised of or entitled to, of or in the said manors, hereditaments and premises hereby limited, shall cease and determine; and in either of the cases last before mentioned, the said manors, messuages, lands, tenements, hereditaments and premises hereby directed, limited and appointed as aforesaid, shall, immediately thereupon, go over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same by virtue of this my will, if the person so becoming entitled to the said settled estates of the said Sir James Langham, being tenant for life, was dead, or, being tenant in tail, was dead without issue male." The [264] testator then devised his copyhold and customary estates to Strong, his heirs and assigns, upon such trusts, and with, under and subject to such powers, provisoes and limitations, and to and for such intents and purposes as would nearest and best correspond with the uses and trusts thereinbefore limited of and concerning his manors and freehold hereditaments thereinbefore directed, appointed and limited. And, as to all the rest and residue of his real and personal estates of every nature and kind whatsoever, he gave and bequeathed the same to Strong and the Plaintiffs, and their and each of their heirs, executors, administrators or assigns, in equal third parts, according to the nature and quality of the same estates respectively, in manner following:—that is to say, as to one equal third part, unto Alexander Hale Strong, his heirs, executors, administrators or assigns for ever; as to one other equal third part thereof, unto the Plaintiff F. E. Morrice, his heirs, executors, administrators and assigns for ever; and, as to the remaining third part thereof, unto Alexander Hale Strong and the Plaintiffs, and to the survivors and survivor of them, his heirs, executors, administrators or assigns, upon certain trusts therein mentioned.

The testator died without issue on the 13th of January 1824; and, upon his decease, Sir James Hay Langham, the first tenant for life named in the will, entered into and had ever since continued in the possession or receipt of the rents and profits of the freehold and copyhold hereditaments appointed and devised as hereinbefore mentioned.

On the 14th of April 1833 Sir James Langham, in the indenture called James Langham, Esq., died, leaving Sir James Hay Langham, his eldest son him surviving, [265] who thereupon became entitled to his father's settled estates, mentioned in the will, of the clear annual value of several thousand pounds; and he accordingly entered

into the actual possession or receipt of the rents of those estates : and the bill, after stating as above, alleged that, thereupon, the estate and interest limited by the will to Sir James Hay Langham, of and in the freehold and copyhold estates comprised in and respectively appointed and devised by the will, did altogether cease and determine under and by virtue of the proviso in the will in that behalf contained. The bill further alleged that, at the time when Sir James Hay Langham became entitled to the said settled estates, he had not, nor had he at any time had any issue ; and that the Plaintiffs were advised that, upon Sir James Hay Langham becoming so entitled as aforesaid, they themselves, together with Strong or his representatives, became entitled, under the residuary devise in the will, as tenants in common in equal undivided third parts, according to their respective interests, to the freehold and copyhold estates so respectively appointed and devised as aforesaid by Francis Tutte, for an estate or interest during the life of Sir James Hay Langham, or until he should have a son, the Plaintiffs being advised that the residuary devise in Francis Tutte's will included and passed such interest in the real estates comprised in the indenture of the 12th of April 1804, and appointed by the testator as aforesaid, and also in the copyhold estates devised by his will as was not otherwise disposed of by the appointment and devise contained in the will ; more especially as the testator, at the time of making his will, had no freehold estate except the estates comprised in the indenture of the 12th of April 1804 ; that Strong died on the 2d of May 1824, having appointed three persons, of whom George Law [266] was the survivor, his executors : that in December 1824 the Plaintiffs made a mortgage in fee of the testator's freehold estates, for the purpose of raising the £12,000, and that sum still remained due on the mortgage ; that, under the circumstances aforesaid, the Plaintiffs were unable to recover possession of the estates at law ; but they being entitled, together with George Law, to such interest in those estates as before mentioned, had requested Sir James Hay Langham to account for the rents of the freehold and copyhold estates received by him since the death of his father, and to let the Plaintiffs into possession of two undivided third parts of the same ; but Sir James Hay Langham had refused so to do, pretending that, notwithstanding the circumstances before mentioned, he was entitled to a present interest in the estates by virtue of the will or some other legal instrument ; but the Plaintiffs charged the contrary, and that the estate for life limited to Sir James Hay Langham by the will had ceased and determined as before mentioned ; that Langham Christie pretended that he was, under the circumstances before mentioned, entitled to the aforesaid interest in the freehold estates and the rents and profits thereof ; but the Plaintiffs charged the contrary ; that Edward Ayshford Sanford claimed to be the heir at law of Herbert Hay, and to be entitled, as such, to the freehold and copyhold estates during the life of Sir James Hay Langham ; but which claim was wholly unfounded ; that Herbert Langham, who was the second son of Sir James Langham, mentioned in the indenture as James Langham, Esq., also claimed to be entitled to the freehold estates during the life of Sir James Hay Langham, under the indenture of the 12th of April 1804 ; although, as the Plaintiffs charged, all the limitations in that indenture contained, [267] to or in favour of the issue male of Sir James Langham, had been defeated by the effect of the proviso before set forth ; inasmuch as Sir James became entitled, in his lifetime, to the family estates mentioned in that proviso ; that John Lupton insisted that, under the limitations contained *in the will*, the first estate thereby limited, after the estate for life to Sir James Hay Langham, of and in the freehold estates, was then vested in him as having survived his co-trustee, Rackham.

The bill prayed that it might be declared that, upon Sir James Hay Langham becoming entitled to the settled estates upon the decease of his father, Sir James Langham, the Plaintiffs, together with Strong's representatives, became entitled, under the residuary devise or appointment in the testator's will, to the rents of the freehold and copyhold estates, thereby appointed and devised during Sir James Langham's life, or until he should have a son ; and that he might be decreed to deliver up the possession of those estates to the Plaintiffs and to George Law, and that an account might be taken of the rents and profits thereof come to the hands of Sir James Hay Langham since his father's death, and for a receiver.

Mr. Wigram and Mr. Sidebottom, for the Plaintiffs, said that the testator, when

he mentioned in his will the estates which were subject to the power, spoke of them as *his* estate; therefore, when he used in the residuary clause the expression all his real estates, he must have meant to include his estates subject to the power, of which he was virtually the owner, as well as his copyhold estates; and, moreover, that the testator, throughout his will, had manifested an intention that his estates subject to the power, and his copyhold [268] estates, should go and be enjoyed together; and consequently, the rents accrued in respect of the former as well as the latter estates, since Sir James Hay Langham had become entitled in possession to the settled or family estates at Cottesbrook, not being expressly disposed of by the will, passed by the residuary clause to the Plaintiffs and to George Law as representing Strong; that Herbert Langham could have no right to the rents in question, as he claimed under the deed, and by the shifting clause in it, Sir James Langham, when he became entitled to the Cottesbrook estates, forfeited the testator's estates, not only for himself, but for his issue male; that the heir of Herbert Hay was not entitled to the rents, as he was not to take any interest in the testator's estates until Sir James Hay Langham should die without issue male. *Stanley v. Stanley* (16 Ves. 491), *Churchill v. Dibben* (Lord Kenyon's Cases, vol. ii. part 2, p. 68; and *ante*, vol. ix. p. 447, note), *Dillon v. Dillon* (1 Ball. & Beatt. 77), *Standen v. Standen* (2 Ves. jun. 589), *Walker v. Mackie* (4 Russ. 76), *Hughes v. Turner* (3 Myl. & Keen, 666), *Margaret Podger's case* (9 Co. Rep. 104).

Mr. Law appeared for the Defendant George Law, who was in the same interest as the Plaintiffs.

Mr. Lutwyche, for Sir James Hay Langham, said that he submitted his interest to the judgment of the Court.

Mr. Jacob and Mr. James Parker, for Langham Christie. Mr. L. Christie claims under the deed everything that was not well appointed by the testator; and, therefore, he claims the rents accrued and to accrue in respect [269] of the estates subject to the power, from the death of Sir James Langham until Sir James Hay Langham dies or has a son, those rents being clearly undisposed of by the will.

The testator has divided his will into two distinct parts; one is the appointing part, and the other the devising part. The appointing part ends with the proviso; then follows the devising part, in which the residuary clause occurs. In the former part he constantly uses the words "direct and appoint;" but he never uses those words in the latter part. When a testator speaks of *his* estates, he always means the estates in which he has a devisable interest; and it is plain throughout the will that the testator understood the distinction between power and ownership. The rents in question, then, being unappointed, we look back to the deed in order to ascertain who is entitled in default of appointment, and there we find that Langham Christie is that person; and consequently he is entitled to the rents. *Hopkins v. Hopkins* (1 Atk. 581; and Butler's Notes to Co. Litt. 271 b.; Hargrave on the Thellusson Act, p. 48), *Carr v. Lord Erroll* (6 East, 58), *Doe v. Heneage* (4 T. R. 13), *Lewis v. Lewellyn* (Turn. & Russ. 104), *Napier v. Napier* (*ante*, vol. i. p. 28).

Mr. Hodgson and Mr. James Russell, for the Defendant Sanford, the right heir of Herbert Hay, contended that their client was entitled to the rents in question, as being, in the language of the shifting clause, "the person next in remainder;" that is, the next *vested* remainder-man under the limitations of the will; that those limitations were all of them limitations of equitable [270] estates: that, although Sir James Hay Langham's interest in the estates subject to the power had ceased, yet, according to Lord Kenyon's judgment in *Doe v. Heneage*, the interest of Lupton and Rackham, the trustees to preserve contingent remainders, remained undivested; and, in the events that had happened, they were trustees for the Defendant Sanford, as the only person having a vested remainder in the estates; and that when any one of the prior contingent remainders took effect, then the same trustees would be trustees for the person in whom that remainder should vest. *Carr v. Lord Erroll*, and *Stanley v. Stanley*.

Mr. Knight Bruce and Mr. Romilly, for Herbert Langham, the second son of Sir James Langham and the eldest brother of Sir James Hay Langham, said that their client claimed the rents in question as being undisposed of, and that his claim, like Mr. Langham Christie's, was under the deed of April 1804; that Mr. Hodgson had commented on *Doe v. Heneage*, *Carr v. Lord Erroll*, and *Stanley v. Stanley*; but had

not noticed *Hopkins v. Hopkins*, the slightest reference to which would shew that any claim on the part of the heirs of Herbert Hay was quite out of the question; that there was no limitation in the deed to the issue of Sir James Langham, *eo nomine*; but his sons were to take as purchasers; that the legitimate construction of the proviso in the deed was that it caused a cesser of the estate of that individual only who succeeded to the Cottesbrook estate; and that it did not import that if the estate of one individual ceased on his becoming entitled to the Cottesbrook property, the estate of another individual also should cease: that the words "issue male" had no bearing on the cesser of a tenancy for life, but applied to the cesser of a tenancy in tail; that [271] Sir James Hay Langham, having become entitled to the Cottesbrook estate, the case was the same as if his life-estate had been struck out; that the question was, in fact, a legal one, and, therefore, it ought to be submitted to a Court of law.

The following cases were referred to by Mr. Romilly as shewing that the rents were undisposed of: *Bennett v. Aburrow* (8 Ves. 609), *Lowes v. Hackward* (18 Ves. 168), and *Doe v. Bird* (11 East, 49).

Mr. Cockerell, for the Defendant Lupton.

Mr. Bacon, for William Youatt and Mary his wife, who had been brought before the Court by supplemental bill, said that Mrs. Youatt was the testator's heir, and claimed what if anything was undisposed of.

Mr. Wigram, in reply, said that neither the heir of Herbert Hay, nor the heir of the testator was entitled to the rents in question: *Carrick v. Errington* (2 P. W. 361), where Lord King, C., said that if an estate once went to a remote remainder-man, it could not afterwards go back to any person claiming under a prior limitation: that the Plaintiffs and the Defendant Law were unquestionably entitled to the undisposed-of rents of the copyhold estates, and that they were also entitled to the undisposed-of rents of the estate subject to the power, as the testator throughout his will had called those estates his estates.

Nov. 16. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case there were four questions raised. The first is that which Mr. Wigram has argued for the Plaintiffs, [272] and which will depend entirely upon the construction of Mr. Tutte's will, as contrasted with the nature of the estate which Mr. Wigram has contended was the subject of the devise: I mean with respect to the limitations that had been made of it by the deed of April 1804.

Supposing that the claim of the Plaintiffs is out of the way, then there are the three questions that have been raised on behalf of the right heir of Herbert Hay; on behalf of Mr. Langham Christie, and on behalf of Mr. Herbert Langham: and as to some of those questions, it seems to me that there is no doubt at all.

With respect, first of all, to the claim of the Plaintiffs. The estate in question was by deed and fine and recovery settled to such uses as Mr. Tutte should appoint generally, and in default of appointment to him in tail, and then with remainders over; but as I understand it, there was no remainder in fee to him. Then that being so, Mr. Tutte makes his will in the year 1820; and he makes it in this form: first, he desires that all his just debts, funeral and testamentary expenses may be paid and satisfied: secondly, in pursuance of the power and authority reserved to him by the indenture (which he describes), he directs, limits and appoints all that the manor, &c. (describing the parcels at considerable length), to the use and intent that Louisa Wainwright may receive an annuity, with remainder to the use of three gentlemen, their heirs and assigns, on the trusts following, that is, in trust to raise a sum of £12,000 in a given manner, and subject thereto to the use of James Hay Langham for his life, with remainder to trustees to preserve, with remainder to his first and other sons in tail male, with remainder to the right heirs of Herbert Hay. Then there are certain provisoes [273] upon which I shall comment presently; and after the provisoes there comes this devise: "I give and devise all and every my copyhold and customary messuages, cottages and hereditaments, with their and every of their rights, members and appurtenances unto the said Alexander Hale Strong, his heirs and assigns, according to the custom of the several manors whereof such copyhold or customary hereditaments are holden, nevertheless upon such trusts, and with, under and subject to such powers, provisoes and limitations, and to and for such intents and purposes as

will nearest and best correspond with the uses and trusts hereinbefore limited of and concerning my said manors and freehold hereditaments hereinbefore directed, appointed and limited." Then he disposes of his books: and then there comes the residuary clause: "And as to all the rest and residue of my goods and chattels, and real and personal estates, of every nature and kind soever, including in the latter the aforesaid sum of £12,000 or such part thereof as I shall not give and bequeath by some codicil or codicils to this my will, or some paper writing purporting to be a codicil, I give and bequeath the same" unto the said three gentlemen; and then he divides it between them in three parts.

It has been said that, inasmuch as in the events that have happened, a certain portion of interest in the estates which were the subject of the appointment has not gone according to the appointment, it has passed by the residuary devise; and it has been said that the expression "the rest and residue of my goods and chattels and real and personal estates" includes that interest. With respect to the copyholds, the fee-simple of which was devised to trustees upon such trusts as would most nearly correspond with the limitations of the [274] freehold estates, those copyholds being the testator's estate in the ordinary sense of the word, it is perfectly plain, I think, that, so far as the trusts which were declared of them by the will did not eventually exhaust the whole beneficial interest, the surplus of the beneficial interest would pass by the residuary devise.

But then it is said that the surplus of the freehold estates also has passed by the residuary devise. Now I must confess that, after reading the will and attending to the argument, it is quite clear to me that it did not: because the case of *Standen v. Standen*, and cases of that kind, appear to me to have nothing to do with the matter. The question is whether, on the face of the will, it appears that there was an intention in the testator to pass by devise every portion of the estate which was subject to his appointment. In my opinion it is quite impossible for anybody to look at this will without seeing that the testator has divided it into two parts, and that the second part is made wholly and exclusively to be applicable to the subject of the freehold estates over which he had the power. He begins the clause by saying: "And secondly, in pursuance of the power;" and he confines himself entirely to the execution of the power; and then he finally ceases to notice the estate which was subject to the power. When he comes to that clause in which he directs the trusts to which the copyholds are to be subject, and in which he refers to "my said manors and freehold hereditaments hereinbefore directed, appointed and limited," it is quite plain that he had completely exhausted his power, and appointed the whole fee-simple.

But then it is said that he has referred to the estates over which he had the power by the term "my" in the residuary clause: because, in the course of declaring [275] the trusts concerning the fee of the freehold hereditaments which were appointed to the trustees, he has used the expression "my manors, farms and lands called Goate." The answer to that is that, there, he is only describing the particular order in which the sum of £12,000 shall be raised; first of all, a certain portion of the estate is to be applied, and then another portion, and then in speaking of the parts, he speaks of them simply as "my manors, farms and lands called Goate, and my farm called Glynd," &c. But it is quite plain that, by the expression "my," he did not mean to appropriate to himself in fee-simple those estates, the fee-simple whereof he had before exhausted by the appointment which he had made. In my opinion, therefore, the true construction of the will is that, though the rents of the copyholds pass because they were the testator's, strictly speaking, the interest in the freeholds which eventually became unappointed did not pass by the residuary devise.

If, then, the claim of the Plaintiffs is out of the question, I must consider the three next claims, which are opposed to each other. The claim which has been made on the part of the heir of Herbert Hay is a claim which I can dispose of, because it is merely an equitable claim; for the effect of the appointment was to vest the whole legal estate in the trustees; and, therefore, any interest which the heir of Herbert Hay can claim is purely equitable. But then how does that stand? In some respects, it stands in common with the claims of the other claimants; but I have always understood the rule to be that, whether you speak of the residue of a fee-simple estate which is vested in a testator and which is not wholly devised, or

whether you speak of an estate [276] which is subject to limitations liable to be defeated by the exercise of a general power of appointment, if, in the one case, the testator does not devise the whole, what is not devised remains in him, and, in the other case, where the estate is subject to a set of limitations, only preceded by a general power of appointment, whatever is not exhausted by the exercise of the power remains subject to the limitations.

Then let us see how the matter actually stood at the time of the testator's death. By the deed of 1804 the limitations were (putting now the testator out of consideration) to Sir James Langham for life, with remainder to his first and other sons in tail male, with remainder to Langham Christie for life, and then with remainders over. Sir James Langham entered into possession of the Cottesbrook estate in the year 1812; and the claimants make no dispute about this, namely, that his estate would then have ceased. The testator died in 1820; and Sir James Langham died in 1833. Then James Hay, his son, was the person on whom the Cottesbrook estate devolved. Now, if the appointment had not been made, James Hay Langham would have been tenant in tail male of the testator's estates under the limitations in the deed of 1804; but, under the will of 1820 and by virtue of the appointment, he was made tenant for life; and the proviso in the will declared that if any person who, under the limitations of the will, should be tenant for life in possession of the manors and hereditaments, or of any part thereof, which were appointed by the will, should, at the same time, become entitled to the settled estates of Sir James Langham, so as to be in the actual receipt of the rents thereof, then and in such case the estates and interests thereinbefore limited to every such [277] tenant for life should cease and determine. That is a proviso respecting the tenant for life. Then the testator speaks of the case of the tenant in tail, and adds: "In either of the cases last before mentioned, the said manors, messuages, lands, tenements, hereditaments and premises hereby directed, limited and appointed as aforesaid, shall immediately thereupon go over to the person next in remainder under the limitations aforesaid, in the same manner as the said person so next in remainder would take the same by virtue of this my will, if the person so becoming entitled to the said settled estates of the said Sir James Langham, being tenant for life, was dead, or, being tenant in tail, was dead without issue male." There seems to be no doubt whatever that, immediately upon James Hay Langham coming into possession of the settled estates, his interest in the estates under the will ceased: and that, in fact, has raised the question. But then it is to be observed that, in the deed of 1804, the clause was: "That in case the said James Langham or any issue male of his body shall become entitled to the possession or to the receipt of the rents and profits of the family estates late of the said Sir James Langham, deceased, to the amount of £1000 per annum over and above all outgoing and reprises, then and in every such case, the use, limitation and estate, uses, limitations and estates hereinbefore expressed, declared and contained of and concerning the said hereditaments and premises whereof a fine and recovery are covenanted and intended to be levied and suffered as aforesaid, to or for the benefit of him or them who shall so become entitled to the possession or to the receipt of the rents and profits of the family estates late of the said Sir James Langham or any of them, to the amount of £1000 per annum as aforesaid, and to or for the benefit of the issue male of such person or persons so [278] becoming entitled, shall cease, determine and be absolutely null and void; and then and in every such case all and singular the said hereditaments and premises shall, immediately thereupon, from time to time, divest out of the person or persons so becoming entitled, and shall go over in such and the like manner, to all intents and purposes, as if such person or persons so becoming entitled were actually dead without issue male." On the part of the heir of Herbert Hay, under the will it is insisted that he is entitled; but then the argument for him is this, that the effect of the shifting clause is to destroy the life-estate of Sir James Hay Langham, to preserve the estate of the trustees to preserve contingent remainders, and, nevertheless, to give to the person who would take in remainder, provided there was no issue of Sir James Hay Langham, those rents and profits which, on the face of the trust to preserve contingent remainders, were to be for the benefit of Sir James Hay Langham; which appears to me to have the effect of making the heir of Herbert Hay take, immediately, as the next person in remainder,

notwithstanding the estate in the trustees to preserve contingent remainders for the benefit of the first and other sons of Sir James Hay Langham ; which I take to be contrary to law, and, moreover, to involve this sort of contradiction ; namely, that though the trustees were to take the rents and profits for the benefit of Sir James Hay Langham and his estate and interest is to cease, yet they are to hold them for the benefit of persons for whom they are in no sense trustees, any otherwise than as they might be trustees, in the first instance, to preserve the estate limited contingently to the first and other sons of Sir James Hay Langham, and so, if it were necessary, preserve the estate to the right heirs of Herbert Hay, but in no other manner whatever.

[279] It appears to me that it is quite impossible to argue the case on behalf of the heir of Herbert Hay, without running into a manifest inconsistency, and without, in effect, contradicting the principle of *Hopkins v. Hopkins* and other cases of that kind, which are unquestionable. It appears to me that the real effect of *Stanley v. Stanley*, *Doe v. Heneage* and *Carr v. Lord Erroll* is this, that the Courts are bound to construe the words of cesser as near as they possibly can, in their simple and ordinary sense, and my opinion is that there is no mode whatever of construing the words of cesser in the will of Mr. Tutte, which can have the effect of giving any interest to the right heirs of Herbert Hay.

The question then is this, whether, under the limitations in the deed of 1804, the person who is entitled to take is Mr. Herbert Langham or Mr. Langham Christie. Now, with respect to that, I think that the point is reasonably clear; and, if the parties wish it, I will state my opinion, leaving them then to take the opinion of a Court of law; or, if the parties prefer it, I will not give my opinion and send the question to a Court of law.

Mr. Knight Bruce said he wished that a case should be sent to a Court of law, unprejudiced by His Honor's opinion.

Mr. Jacob said that it was not the course of the Court to send a case to law, unless it wanted the assistance of a Court of law to enable it to decide on the point in dispute, and the question arose upon the limitation of a legal estate; neither of which circumstances existed in this case; for His Honor thought the point was reasonably clear, and all the limitations in the will were [280] limitations of equitable estates, the legal fee having been vested in the Plaintiffs and A. H. Strong at the commencement of the will.

THE VICE-CHANCELLOR. It is perfectly true that the question relates to an equitable interest; but nevertheless the right depends upon the true construction of the shifting clause in the deed of 1804; and though I have very little doubt as to the construction of it, still if Mr. Knight Bruce presses for a case to be sent to law, I do not see how I can refuse it.

The decree was drawn up in the following words: Declare the will of the Rev. Francis Tutte, the testator in the pleadings named, well proved, and that the same ought to be established and the trusts thereof performed. Declare that, according to the true construction of the testator's will, the rents and profits of the testator's copyhold estates, as from the 14th day of April 1833, the time when the Defendant, Sir James Hay Langham, became entitled to the settled estates of Sir James Langham of Cottesbrook Hall, so as to be in the actual receipt of the rents thereof, to the time of the decease of the said Sir James Hay Langham or until he should have male issue, passed by the residuary devise in the will to Alexander Hale Strong, deceased, and the Plaintiffs, Frederick Edward Morrice and Arnold Wainwright, in equal third parts, in manner and according to the directions and trusts of the will. And declare that the rents and profits of the freehold estates in question in these suits, accrued and to accrue during the same period or any part thereof, were not disposed of by the said will, and that the same belong to the person or persons who would have been entitled to such estates [281] under the indenture of the 12th day of April 1804 in the pleadings mentioned, in default of any appointment by the testator Francis Tutte, in exercise of the power therein contained. Order that a case be made for the opinions of the Barons of the Court of Exchequer, and that the questions in such case be: whether, under the limitations contained in the said indenture of the 12th day

of April 1804 and the proviso therein, supposing the appointment to have been made by the said Francis Tutte in exercise of the power therein contained, the Defendant, Herbert Langham, is now entitled to any and what estate in the freehold hereditaments comprised in the said indenture, and whether the said Defendant Langham Christie, is now entitled to any and what estate in the said freehold hereditaments, &c.(1)

NOTE.—The case directed by the decree in this cause to be made for the opinion of the Barons of the Exchequer was argued in April 1841.

The Barons certified that, under the limitations in the indenture of the 12th of April 1804, Herbert Langham, upon the death of Francis Tutte, did not become entitled to any estate in the hereditaments therein comprised, and that Langham Christie, on the death of Francis Tutte, became entitled to an estate for life in the said hereditaments; see 8 Mees. & Wels. 194.

[282] PIPER v. GITTENS. Nov. 18, 1840.

Practice. Dismissal. Costs.

On the 25th of July the Defendant served a notice of motion to dismiss, to be made on the 29th, the next seal. On the 27th Plaintiff replied, and tendered 20s. costs to Defendant, which the Defendant refused to accept until he had ascertained whether he ought to do so or not, and the whole of the 28th was allowed him for that purpose. At eight o'clock in the evening of the 28th Plaintiff instructed counsel to appear on the motion. At ten in the morning of the 29th Defendant said he would accept the costs. The Court held that he was too late, and ordered him to pay the costs of the motion, minus 20s.

On the 25th of July the Defendant served the Plaintiff with notice of a motion to be made on the 29th, which was the then next seal day, to dismiss the bill for want of prosecution. On the 27th the Plaintiff filed a replication; and, on the morning of the 28th, tendered to the Defendant's solicitor 20s. costs. The solicitor declined to accept the costs until he had ascertained whether he ought to accept them or not; and the whole of the 28th was allowed him for that purpose. Between eight and nine o'clock in the evening of that day the Plaintiff's solicitor, not having received any further communication from the Defendant's solicitor, delivered a brief to counsel to appear upon the motion. At ten o'clock in the morning of the 29th the Defendant's solicitor said he would accept the costs; but was then told that he was too late, as the Plaintiff's brief had been delivered to counsel on the preceding evening.

Mr. Lowndes, for the motion, said that the Defendant's solicitor was allowed *the whole* of the 28th to consider whether he would accept the costs or not; and, therefore, the Plaintiff's solicitor was too precipitate in delivering his brief to counsel on that day.

Mr. Knight Bruce, for the Plaintiff, said that the whole day meant only the business hours, and that the next day was the seal day.

THE VICE-CHANCELLOR said that if the Defendant's solicitor was to have the whole day to consider whether he would accept the costs or not, he ought to have given his decision on that day, between eight and nine o'clock at the latest: and he ordered the Defendant to pay the costs of the motion, minus 20s.

(1) An appeal is pending in the House of Lords against this decree. [See the case on appeal, 11 Cl. & Fin. 667.]

[283] BROWN v. DOUGLAS. Nov. 23, 25, 1840.

[S. C. 10 L. J. Ch. 14; 4 Jur. 1200. For subsequent proceedings, see 12 Sim. 6.]

Pleading. Multifariousness. Creditors' Suit. Executor. Parties.

A., B., C. and D. were co-partners. A. and B. died, and soon afterwards C. and D. became bankrupt. M., who was a creditor of the firm at the deaths of A. and B. and at the bankruptcy, filed a bill, on behalf of himself and all the other creditors of A. and B., against the executors (who, however, had not proved) and devisees of both A. and B. and the assignees of the bankrupts, for the purpose of having the real and personal assets of both A. and B. applied in payment of their joint and separate debts. Held, that the administration of the two estates might be comprised in one suit, and therefore a demurrer for multifariousness was overruled. An objection, however, made *ore tenus*, that no properly constituted personal representatives of A. and B. were parties, was allowed; but the Court did not give the Plaintiff the costs of the demurrer on the record, but merely allowed the demurrer *ore tenus* without costs.

In 1839 Douglas, Sedgwick, Weatherby and four other persons carried on the business of cotton spinners, in co-partnership, at Holywell in Flintshire, under the firm of Douglas, Smalley & Co.; and Douglas and Weatherby carried on the same business, in co-partnership, at Pendleton in Lancashire, under the firm of W. Douglas & Co. Sedgwick died on the 3d and Douglas on the 21st of October in that year. In April following the surviving partners became bankrupt. At the deaths of Sedgwick and Douglas, and at the time of the bankruptcy, a debt was due, from each of the two firms, to the Manchester Joint Stock Banking Company. The company proved, under the fiat, the debt due from Douglas, Smalley & Co.; but had received no dividend on that proof; and they had not proved, against Weatherby's separate estate, the debt due from W. Douglas & Co.

The bill was filed by the banking company, in the name of one of their public officers, against the executors of Douglas and of Sedgwick, the widow and son of the former, who were interested in his real estates under his will, the assignees of the bankrupts, and two other persons with whom Douglas's son, after [284] his father's death and before the issuing of the fiat, had deposited the title-deeds of his father's real estates as a security for a debt alleged to be due to those two persons from Douglas, Smalley & Co.: and, after stating as above, it alleged that the estate of the bankrupts distributable under the fiat would not be sufficient to pay the full amount of their debts; but, after all such joint estate should have been distributable under the fiat, and after Weatherby's separate estate should have been administered, a considerable part of the debts of the bankrupts and their late partners would be left unpaid: that Sedgwick had made a will and appointed J. Stanton executor thereof: that it had not been proved in the Ecclesiastical Court; but Stanton, as the executor named therein, had possessed himself of the testator's personal estate to a considerable amount, and ought to apply the same in payment of the testator's funeral expenses and debts in a due course of administration: that Douglas had made a will and thereby devised his real estates to his son, charged with an annuity to his widow, and appointed his widow and son and Weatherby his executors: that they or any of them had not proved the last-mentioned will in the proper or any Ecclesiastical Court; but had taken upon themselves the execution thereof, and possessed themselves of their testator's personal estate sufficient to pay his funeral and testamentary expenses and debts, or a considerable part thereof; and, without proving the will, were proceeding to convert such personal estate into money: that Douglas's son, as his heir or as his devisee, had entered into the possession of his real estates: that Douglas, at his death, was a trader within the meaning of the bankrupt laws, and, therefore, all his real estate was subject, in equity, to the payment of his simple contract debts. The bill prayed that it might be declared that the estates of Sedgwick [285] and Douglas, respectively, were liable in equity to the payment of

so much of their late partnership debts as were due at their respective deaths and still remained unpaid : that an account might be taken of what was due from them, respectively, and their partners, to the banking company and to their other joint and separate creditors, and also of their personal estates possessed by their respective executors, and of Douglas's real estates and the rents thereof received by his son ; and, if his personal estate should be insufficient to pay his debts, that his real estates might be sold and the proceeds applied to make up the deficiency ; that the title-deeds thereof might be delivered up and deposited in the Master's office for safe custody ; that it might be ascertained whether the holders of the deeds had any and what lien thereon or on Douglas's real estates, and that the priority and extent of such lien might be ascertained and declared : that it might be also declared that any charge or incumbrance on the said estates made by Douglas's son, since his father's death, was subject to the payment of his father's debts and the rights of his creditors in respect thereof : that his executors might be restrained from further intermeddling with his personal estate, and especially from selling his pictures, library, plate, &c. : that a receiver might be appointed of his real estates and of his and Sedgwick's personal estates, and that their personal estates and Douglas's real estates, so far as might be necessary, might be applied in payment of their respective funeral and testamentary expenses, and of their debts, as well joint as separate, in a due course of administration.

Douglas's widow and son demurred for want of equity and for multifariousness.

[286] Mr. Jacob and Mr. James Russell, in support of the demurrer. The Plaintiff is affecting to sue on behalf of all the creditors of Douglas, and also of all the creditors of Sedgwick. The estates of the two debtors are separate ; but it happens that one creditor, Brown, has a claim against both of them. There may be, however, and there are, no doubt, other creditors who have claims against only one of the estates. The accounts of one estate and the claims upon it may be simple and few in number ; but the accounts of the other and the claims upon it may be very complicated and numerous : and, if both the estates were to be administered in one suit, the claimants on the one would have to wait for the satisfaction of their demands, until the intricate accounts of the other estate were taken, and the numerous and complicated claims upon it were ascertained. *Turner v. Robinson* (1 Sim. & Stu. 313), *Marcos v. Pebrer* (*ante*, vol. iii. p. 466).

Secondly, there is no equity against the demurring Defendants. They have not proved their testator's will : and, supposing them to be executors *de son tort*, which they are not, still they cannot be sued by a creditor. They are debtors to the estate and may be sued by the personal representative, when there is one properly constituted ; but they cannot be sued by a creditor, and certainly not in a suit to which no personal representative of the deceased debtor is a party. *Simons v. Milman* (*ante*, vol. ii. p. 241).

Mr. Richard Bruce and Mr. Teed, for the Plaintiff, contended that the bill was rightly constructed according to the principles of the Court, as they were to be deduced from *Wilkinson v. Henderson* (1 Myl. & Keen, 582), *Stephenson v. Chiswell* (3 Ves. 566), *Gray v. Chiswell* (9 Ves. 118), *Winter v. Innes* (4 Myl. & Cr. 101 ; see 109), and *Campbell v. Mackay* (*ante*, vol. vii. p. 564 ; and 1 Myl. & Cr. 603). Secondly, that the objection that no personal representative of either of the deceased partners was before the Court was an objection for want of parties, not for want of equity ; and, if the demurrer was allowed on that ground, it must be allowed without costs as being a demurrer *ore tenus*. *Mortimer v. Fraser* (2 Myl. & Cr. 173).

Nov. 25. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case it appears that Sedgwick, Douglas, Weatherby and four other persons carried on a partnership together, and Douglas and Weatherby carried on a separate partnership by themselves ; and the partnership of the seven and the partnership of the two became indebted to that company which the Plaintiff, Brown, represents. Then Sedgwick died ; and Douglas died very shortly afterwards. After their deaths a fiat in bankruptcy issued against the remaining five partners of the first-mentioned partnership, comprehending, therefore, Weatherby, who was the partner with Douglas in the partnership of the two. In this state of circumstances the bill has been filed by a gentleman who represents a banking company, to which the partnerships were indebted at the deaths of

Sedgwick and Douglas, seeking relief against the personal estate of Sedgwick and against the real and personal assets of Douglas; and to that bill the assignees of the bankrupts are made parties. A demurrer has been filed by two of the parties interested in the real [288] estate of Douglas, and who are also named as his executors; and the demurrer assigns, for the reasons upon the record, want of equity and multifariousness; and there was also a reason assigned, *ore tenus*, at the Bar, namely, that there was a defect of parties.

The principal objection that was made to the bill was that it was multifarious; but, in my opinion, that objection cannot be sustained. I have fully considered the subject since the case was argued, and it appears to me to have been completely settled by the case of *Gray v. Chiswell* that, where a partnership becomes indebted, the rule is that the joint estate must first be applied in payment of the joint debts, and then that the surplus of the separate estate of each partner, which may remain after payment of the separate debts of that partner, is contributable to supply the deficiency of the joint estate to pay the joint debts. In principle, the very point which is made by this demurrer was decided by Sir John Leach in the case of *Wilkinson v. Henderson*. There Shepherd & Hartley had been partners together, and were indebted. Shepherd died, and the bill was filed by a joint creditor, on behalf of himself and all the other joint creditors of Shepherd & Hartley against Hartley, the surviving partner, and the representative of Shepherd, for the purpose of having the partnership debts paid out of Shepherd's estate; and it was held by Sir John Leach that the bill was right in point of form. That decision seems to me to be precisely in point; and, therefore, my opinion is that the Plaintiff in this case, though he sues on behalf of himself and all other the creditors of the two deceased co-partners (which means the joint as well as the separate creditors), is entitled to that more ample relief which he has sought by his prayer against both the separate estates and the joint [289] estates.(1) The result is that I am bound to disallow the grounds of demurrer which are assigned upon the record.

Then the demurrer *ore tenus* is for want of parties. It is perfectly manifest that this bill has been defectively constructed, because it is obvious that the suit cannot proceed without a representative both of Sedgwick and of Douglas. What is represented is that the persons who are named as executors in the will of Douglas have not nor have any of them proved the will; an averment which is quite consistent with the fact that administration, *cum testamento annexo*, may have been granted of his personal estate.

I have looked at the case of *Mortimer v. Fraser*, and also at the cases which Mr. Fry, the registrar, supplied the Lord Chancellor with when the matter was before him; and it appears to me that there is no general rule to be extracted from those cases. The Lord Chancellor appears to have approved of what was done by the Court below in hearing the demurrer in *Mortimer v. Fraser*, where the demurrer on the record was overruled; but the demurrer, as it is called, *ore tenus*, was allowed; and in that case the demurrer on the record was overruled with costs, and the demurrer, *ore tenus*, was allowed without costs. I apprehend that the phraseology is not quite correct, because, in fact, there is but one demurrer. Certain reasons are assigned on the record in support of the demurrer; and other reasons are assigned at the Bar; but still it is but one demurrer. It does not appear, from the report of *Mortimer v. Fraser*, what was the precise form of the bill.

[290] With respect to this present bill, I am very much disposed to think that, after it had passed from the hands of counsel, some finishing touches were given to it by parties who thought they knew either more of the case or more of the law than the counsel did; and the effect is that the bill, so far from being improved, has been made palpably defective.

I think that the defect, which has been taken advantage of by assigning the reason in support of the demurrer at the Bar, namely, the want of parties, is so perfectly obvious that I ought to do this, namely, to allow the demurrer on the ground stated at the Bar, giving no costs. For as, if the demurrer had been overruled for the reasons which are assigned on the record, I should have overruled it with costs;

(1) No relief was prayed against the joint estates.

so I should have allowed a demurrer for want of parties with costs. Therefore, the fair way is merely to allow the demurrer for want of parties without costs; but I shall give the Plaintiff liberty to amend generally.

The order was drawn up as follows:—The matter of the demurrer put in by the Defendants Ann Douglas and J. H. Douglas, to the Plaintiff's bill, coming on this day to be argued before this Court in the presence of counsel learned for the Plaintiff and for the said Defendants, and the said demurrer being opened, upon debate of the matter and hearing what was alleged by the said counsel on both sides, this Court held the said demurrer to be good and sufficient, and doth therefore order that the same do stand and be allowed for want of parties, but without costs; and it is ordered that the Plaintiff be at liberty to amend his bill, as he may be advised, on payment of 20s. costs to the said Defendants, and undertaking to amend the same within six weeks from this time.

[291] KEKEWICH v. LANGSTON. Nov. 27, 30, Dec. 4, 1840.

Deed. Construction. Settlement. Maintenance.

By a marriage settlement, sums of stock, the wife's property, were settled in trust for the husband during the joint lives of himself and his wife; with remainder to the survivor for life; and it was declared that if the husband should survive and marry again, and there should be issue of the marriage then living, his life interest in a moiety of the funds should cease, and that moiety should *be transferred to the same persons, and be applied to the like purposes and in the like manner*, as it would be transferable and applicable to *if the husband were dead*. Then followed trusts of the funds for the children as the husband and wife should jointly appoint, and as the survivor should appoint; and, in default of any appointment, for all the children (*except an eldest or only son, who for the time being should become entitled, in possession or remainder, to the husband's real estates under a deed of even date*), the shares to be vested in the children at the usual periods, *but not to be transferred until the death of the surviving parent*. And it was declared that, *after the death of both parents*, the trustees should apply so much, as they should think fit, of the income of each child's share, until its share should become transferable, for its maintenance, and should accumulate the surplus: and the trustees were empowered, after the death of both parents, to advance the children out of the capital of their shares, notwithstanding they should be under 21. The wife died. There was issue of the marriage four sons and three daughters, all infants. The husband appointed part of the funds to his eldest son, and then married again. The Court refused to direct (without a reference as to the husband's ability) the income of the moiety of the funds which the husband forfeited by marrying again, to be applied for the children's maintenance, there being, in consequence of the exception of an eldest or only son, &c., a suspension of the trust for the benefit of the children, during the father's lifetime.

By the settlement on the marriage of Mr. and Mrs. Kekewich, dated the 31st of March 1820, sums of stock to a large amount, the lady's property, were settled in trust for Mr. Kekewich during the joint lives of himself and his wife, and for the survivor of them, for his or her life; and it was declared that, in case Mr. Kekewich should survive his wife, and, after her decease, should intermarry with any other woman, then and in such case, and also in case there should be any children or child of [292] Mr. and Mrs. Kekewich, or the issue of any such children or child living at the time of the marriage again of Mr. Kekewich, then, from and immediately after his so marrying again, his life-estate in one moiety of the dividends of the trust funds should absolutely cease and determine, and, then and from thenceforth, *one moiety of the trust funds and also one moiety of the dividends thereof, should be paid and transferred to such and the same persons, and be applied to such and the like purposes, and in such and the like manner, as the same would have been payable, transferable or applicable to, in case*

Mr. Kekewich had been actually dead, anything therein contained to the contrary thereof notwithstanding: and it was further declared that, from and after the decease of the survivor of Mr. and Mrs. Kekewich, the trustees should stand possessed of the trust funds, upon trust for all and every or such one or more of the children of Mr. and Mrs. Kekewich, and for all and every or such one or more exclusively of the other or others of any issue (born in the lifetime of Mr. and Mr. Kekewich, or in the lifetime of the survivor of them) of any such child or children, with such provision for their respective maintenance and education, and at such age, day or time, or respective ages, days or times (not happening after 21 years to be computed from the decease of the survivor of Mr. and Mrs. Kekewich), and, if more than one, in such shares and proportions, and subject to such conditions, restrictions and limitations over (such limitations over to be to or for the benefit of some one or more of the children or issue) as Mr. and Mrs. Kekewich should jointly appoint, and, in default of such appointment, then as the survivor of them should appoint, and that, in default of any such appointment, then the trust funds should be upon trust for all and every of their children (*except an eldest or only son who, for [293] the time being, should be entitled, by virtue of a certain indenture of settlement of even date therewith, to the manors and other hereditaments therein described or referred to, for an estate tail in possession or in remainder immediately expectant upon the determination of the several life-estates thereby created*) equally to be divided among them, share and share alike; and, if there should be but one such child (other than and except as aforesaid), then for such only child, the share of every son to be vested at 21, and the share of every daughter to be vested at that age or on marriage, but not to be paid or transferred until the death of the surviving parent: provided that if there should be more than one child who should become entitled to a share in the trust funds, and any of them, being a son or sons, should die or become an eldest or only son for the time being entitled as aforesaid, or, being a daughter or daughters, should die before the share or shares thereby intended for him, her or them respectively should so become vested as aforesaid, then (if no direction or appointment should be made by their parents, or the survivor of them, to the contrary), as well the original share thereby intended for every such younger son so dying or becoming an eldest or an only son and so entitled as aforesaid, and for every such daughter so dying as aforesaid, as also the share or shares which, by virtue of the present clause, should have survived or accrued to him, her or them respectively, or so much thereof as should not have been previously applied for his, her or their preferment or advancement in the world by virtue of the power therein-after for that purpose contained, should from time to time accrue to the survivors and survivor and others, and other of such children (not being an eldest or only son for the time being entitled as aforesaid), and, as far as circumstances would admit, should vest in and be paid to him, [294] her or them (if more than one) in equal shares, at such time or times, and in such manner as was thereinbefore declared concerning his, her or their original shares of the trust premises and the interest, dividends and annual produce thereof. And it was also declared that, *after the decease of Mr. and Mrs. Kekewich*, the trustees should stand possessed of the trust funds, or of the unappointed parts thereof, upon trust to pay and apply the interest and dividends of the respective shares therein of the said children, for and towards their maintenance and education until their respective shares should become payable or transferable, or to pay and apply so much of such interest and dividends as the trustees should, *in their discretion, think fit*: and, in case the whole of the interest and dividends of any child's share should not be applied for his or her maintenance and education, then *the surplus thereof should, from time to time be laid out, when the same should amount to a competent sum, on real or Parliamentary or Government security, at interest, in the names of the trustees who should be possessed thereof upon the same trusts, and with, under and subject to the same powers, provisions and declarations as were therein contained concerning the share from which such surplus of interest or dividends should arise, or as near thereto as the circumstances of the case would permit*: and the trustees were empowered, at any time or times *after the decease of the survivor of Mr. and Mrs. Kekewich* (or in their lifetimes, or in the lifetime of the survivor of them, if they or such survivor should so direct), to levy and raise out of the trust funds, or out of the unappointed parts thereof, any part (not exceeding one-half) of the share or shares therein of any son or

sons of the marriage, notwithstanding he or they should not have then attained 21, and to pay and apply the money so to be raised for the preferment or advancement in the [295] world, or otherwise to or for the benefit of such son or sons: and it was further declared that, in case there should be no children or child of the marriage (except an only son so entitled as aforesaid), or being such, if all of them should die before they acquired vested interests in the trust funds, then the whole of those funds, or the unappointed or unadvanced parts thereof, should be upon trust for such only son of the marriage: and in case there should be no child of the marriage, or, being such, if all such of them as should be sons should die under 21, and all such of them as should be daughters, under that age without having been married, and also in case Mrs. Kekewich should survive her husband, the trust funds or the unappointed or unadvanced parts thereof should be in trust for Mrs. Kekewich, for her own absolute use and benefit; but, in case there should be no such child or children, or there should be such failure of children as last aforesaid, and Mrs. Kekewich should die in her husband's lifetime, then it should be lawful for Mrs. Kekewich (but subject and without prejudice to her husband's life-estate in the dividends of the trust funds) to appoint the trust funds, by her will, to such person or persons, &c., as she should think fit; and, in default of any such last-mentioned appointment, then one moiety of the trust funds, or of the unappointed or ineffectually appointed parts thereof, should be in trust for Mr. Kekewich, for his own absolute use and benefit, and the other undivided moiety, in trust for such person or persons of Mrs. Kekewich's blood and kindred living at her decease, as by virtue of the Statute of Distributions would have become entitled to her personal estate in case she had died intestate and unmarried.

There was issue of Mr. and Mrs. Kekewich four sons and three daughters, all of whom were still infants. The [296] eldest son was entitled by virtue of the settlement referred to in the indenture before set forth to the manors and other hereditaments therein described, for an estate tail in remainder immediately expectant on the determination of the several life-estates thereby limited. Mrs. Kekewich died in September 1826. No appointment was made by virtue of the powers in the settlement, except that, on the 3d of June 1840, Mr. Kekewich appointed a portion of the trust funds to his eldest son, subject to his own life interest therein; and on the 9th of the same month he married again.

The bill was filed by the children of Mr. Kekewich's first marriage: and the question was whether, as Mr. Kekewich on his second marriage forfeited his life interest in a moiety of the income of the trust funds, such moiety became applicable (as his answer submitted) as if he were dead, and, consequently, the forfeited moiety of the income of the trust funds comprised in the appointment ought to be applied for the maintenance and education of his eldest son, and the forfeited moiety of the income of the rest of the trust funds ought to be applied for the maintenance and education of his younger children.

Mr. Knight Bruce and Mr. S. P. White, for the Plaintiffs. The question is whether the trust for the maintenance of the younger children of the marriage is a trust for the benefit of the father. We submit that it is not a trust of that description. It is true that there may be a trust which, though it is *in words* for the maintenance of the children, yet is, in fact, a trust for the father. *Stocken v. Stocken* (ante, vol. iv. p. 152; and 4 Myl. & Cr. 95). In this case, however, it is im-[297]-possible that the trust for the maintenance of the children should have been intended for the benefit of the father; for it is not to take effect until the father and mother are both dead, and so much only of the income of the trust funds as the trustees in their discretion shall think fit is to be applied for the maintenance of the children, and the surplus is to be accumulated. At all events, there must be a reference to the Master to inquire as to the ability of the father to maintain his children, and to that we do not object.

Mr. S. P. White referred to *Andrews v. Partington* (2 Cox, 223) and to *Meacher v. Young* (2 Myl. & Keen, 490), and said that in the latter of those cases a sum of stock was settled in trust for the separate use of the wife for life, with remainder in trust for the sons of the marriage at 21, and for the daughters at that age or on marriage, and, until their shares should become payable, in trust to apply the dividends of the

stock for their maintenance and education; so that the trust for maintenance took effect immediately on the death of the wife, whether the husband was living or not: that the clause in the settlement in this case, which provided that, if Mr. Kekewich should marry again, his life-estate in one moiety of the dividends of the trust funds should cease, and one moiety of the funds should be transferred to the same persons and be applied to the like purposes, and in the like manner as it would have been transferable or applicable to in case he were dead, had not (as the counsel for Mr. Kekewich would contend it had) the effect of accelerating the trust for maintenance as well as the other trusts of the settlement; but that the meaning of the words: "In case the said Samuel Trehawke [298] Kekewich had been actually dead," was that one moiety of the trust funds should go over to the same persons as if his life-estate had ceased.

Mr. Coleridge appeared for the trustees.

Mr. Jacob and Mr. James Parker, for Mr. Kekewich. Where a provision for the maintenance of children is made by a third person, as it was in *Andrews v. Partington*, the father is not entitled to the benefit of it; but, where it is made by a deed to which the father is a party, then it is a matter of contract with him, and he is entitled to the benefit of it, whether he is of ability to maintain his children or not. Is it reasonable to suppose that it was the intention of Mr. Kekewich or of any of the other parties to the settlement that, if Mr. Kekewich should be deprived of the income of a moiety of the trust funds, he should still have to maintain his children as if he were in the receipt of the whole of the income? The effect of the clause on which the question arises is to accelerate the trust for the children with all its appendages, that is, the provisions for their maintenance and advancement. By that clause the father's marrying again is made equivalent to his death; and, therefore, though, in the subsequent clauses, his death only is spoken of, yet it is nothing more than a compendious mode of expressing his second marriage as well as his death. *Stocken v. Stocken*, *Meacher v. Young*, *Mundy v. Earl Howe* (4 Bro. C. C. 223). This last case is on all fours with the present; and we submit that the Court ought to declare that the father is entitled to have the whole or a competent part of the income of [299] the forfeited moiety of the trust funds applied for the maintenance and education of his children; and that there should be a reference to the Master to inquire what is proper to be allowed for those purposes; but no reference as to the ability of the father to maintain and educate his children.

Mr. Knight Bruce, in reply. In *Mundy v. Earl Howe* no life interest was given to the father of the infants; and, in *Stocken v. Stocken* and in *Meacher v. Young*, though there was a trust for the father, yet the provision for the children preceded it, and that trust was not to take effect except in the event of there being no son who should attain 21, and no daughter who should attain that age or marry. Those cases, therefore, are clearly distinguishable from the present; for it is manifest that in those cases the provisions for the maintenance of the children were intended to take effect in the father's lifetime, and, consequently, to be for his benefit. In *Stocken v. Stocken* Lord Cottenham's judgment proceeds on this ground, namely, that the order in which the trusts of the settlement were declared shewed that the authors of the settlement had in contemplation children of the mother left in the minority, and the father surviving. His Lordship adds: "And there is an express trust that, after the mother's death, the trustees should apply the rents towards their respective maintenance and education contemplating the father being alive. It comes, therefore, precisely within the principle of *Mundy v. Earl Howe*, which was acted upon in the recent case of *Meacher v. Young*. The father is, undoubtedly, bound to maintain and educate his children: but it is competent for a father to contract that certain property shall be applied to those purposes. He did so contract [300] in those two cases; and in this case he makes a similar contract. I have no doubt, therefore, that the true construction of that provision is that the father is, as against the debt, viz., the amount of rents and profits due from him, to be allowed a sufficient sum for maintenance and education." (See 4 Myl. & Cr. 97 and 98.) This shews that the question, in cases of this nature, is whether the trust for maintenance is for the benefit of the father or for the benefit of the children. I submit that, in this case, the trust is plainly intended for the benefit of the children; and, consequently,

Mr. Kekewich is not entitled to any allowance for his children's maintenance, unless the Master shall find that he is not of ability to maintain them.

THE VICE-CHANCELLOR. Before I decide the question in this case I will read over the settlement; for I always feel more satisfied about the construction of part of an instrument when I have read the whole of it.

Nov. 30. THE VICE-CHANCELLOR [Sir L. Shadwell]. Since this case was argued I have read through the settlement on the marriage of Mr. and Mrs. Kekewich, and I cannot but think that, according to the true construction of the instrument, the trust to accumulate the dividends of that moiety of the trust funds which, in the event that has happened, was to go as if Mr. Kekewich was dead, has taken effect; because there is great difficulty in giving any other construction to the settlement. The clause on which the question arises directs that, in case Mr. Kekewich should survive his wife and intermarry with any other woman, and in case there should be any [301] issue of the first marriage living at the time of the second marriage, "then his life-estate in one moiety or half part of the said interest or dividends shall absolutely cease and determine, and then and from thenceforth one moiety or half part of the said trust monies, stocks, funds and premises, and also one moiety or half part of the interest, dividends and annual proceeds thereof shall be paid and transferred to such and the same persons, and be applied to such and the like purposes, and in such and the like manner as the same would have been payable, transferable or applicable to, in case the said Samuel Trehawke Kekewich had been actually dead, anything herein contained to the contrary thereof notwithstanding." Then, with respect to the entirety of the stocks and funds in default of there being any appointment by the husband and wife or the survivor, the trust is for all and every of the children of the marriage, other than and except an eldest or only son, who, for the time being, by virtue of a certain indenture of settlement of even date therewith, should be entitled to the manors and other hereditaments therein described, for an estate tail in possession or in remainder, immediately expectant upon the determination of the several life-estates thereby created: and then there follows the clause of maintenance, by which it is declared that after the decease of the survivor of the husband and wife the trustees shall stand and be possessed of the trust monies, upon trust to pay and apply the interest and dividends of the children's respective shares thereof for and towards their maintenance and education, until their shares shall become payable or transferable, or to pay and apply so much of such interest and dividends as they shall think fit; and that in case the whole income of any child's share shall not be applied for his or her maintenance and education, then the surplus thereof [302] shall, from time to time, be laid out to accumulate. Next follows the advancement clause, which is, that it shall be lawful for the trustees, after the decease of the survivor of Mr. and Mrs. Kekewich, "to levy and raise out of the said trust monies, stocks, funds and premises, or out of the unappointed parts thereof, any part not exceeding one-half of the share or shares therein of any son or sons of the said S. T. Kekewich and Agatha Maria Sophia, his intended wife, notwithstanding he or they shall not then have attained the age of 21 years, and to pay and apply the money so to be raised for the preferment and advancement in the world or otherwise to or for the benefit of such son or sons."

Now it appears to me that the whole must be considered together: and, if you find that there is a set of circumstances provided for, which comprehends the case of the father being actually alive, so that it is uncertain whether the eldest son will be the person who, under the provisions of the settlement referred to, will become entitled to the manors and other hereditaments therein described, (1) it necessarily follows that there must be a suspension of the trust for the benefit of the children, until the event shall happen whereby it shall be determined whether the eldest son ought to be a participator or not. The maintenance clause and the advancement

(1) The limitations of the settlement of even date with the settlement on which the question arose were not set forth in the pleadings: it appeared only that the estates therein comprised were Mr. Kekewich's family estates, and that he had charged them with £10,927 in favour of his younger children.

clause must be taken together; and it is clear that it was intended to exclude the eldest son in the event of his becoming entitled to the manors and [303] other hereditaments referred to. During the life of the father it cannot be determined whether he will become entitled or not; and it is quite plain that the event that was to determine whether he would become entitled or not was the death of the father.

My opinion, therefore, is that all that can be done at present is to direct that the moiety of the trust funds shall accumulate during the life of the father. Of course, if the father should not be of ability to maintain his children, then there must be a reference, in order that, some maintenance being absolutely necessary, it may be provided for the children out of the trust funds.

After the judgment had been delivered, Mr. Jacob said that the ground of His Honor's decision had not been touched on in the course of the argument, but was entirely new. Upon which the Vice-Chancellor allowed the cause to stand over until the 4th of December for further argument.

Dec. 4. Mr. Jacob and Mr. James Parker. The question, which of the younger children will become entitled to the trust funds and in what shares, is quite independent of the time of Mr. Kekewich's death. The eldest son being entitled to an estate tail in remainder in the real estates comprised in the settlement of even date never can become entitled to any share of the trust funds in default of appointment. He is not one of the class in whose favour the trust is declared; therefore, he is excluded *ab origine*. But, if any younger son should attain 21, he would become entitled [304] to a share of those funds; and would not lose it, although he might afterwards become entitled to an estate tail in the real estates, either in possession or in remainder immediately expectant upon the determination of the then subsisting life-estates. *Windham v. Graham* (1 Russ. 331). The present younger children are presumptively entitled to shares of the trust funds: they may lose them either by dying under 21 or by becoming entitled to a remainder in tail in the real estates before their shares vest. Those two events are to be considered as precisely alike for the present purpose. The trust for maintenance which has been brought into operation by Mr. Kekewich's second marriage is of no use after the children attain 21: but is applicable, solely, to the children being, as they now are, *presumptively* entitled to shares of the trust funds. It gives maintenance out of their presumptive shares: therefore, it contemplates their losing their shares, or rather, never becoming absolutely entitled to any, by their becoming tenants in tail in remainder of the real estates, as well as by their dying under 21. Consequently a child, who may afterwards lose his share by becoming tenant in tail in remainder of the real estates, is as much entitled to maintenance as he would be if he could lose his share by dying under 21.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not think that those clauses in the settlement which apply to the entirety of the trust funds are expressed in such a manner as to make them applicable to that moiety of the income of the trust funds, which is made to go over on Mr. Kekewich's second marriage. At all events, there is so much difficulty in determining [305] who are the parties entitled, in consequence of this clause which directs that the moiety shall go over, that nothing can be done as to it at present.

The decree referred it to the Master to inquire and state whether Mr. Kekewich was in circumstances and of ability, having regard to his situation and circumstance and the state of his family, to maintain and educate the Plaintiffs according to their station and prospects; and, if the Master should find that he was not, then to inquire and state the ages of the Plaintiffs and the nature and amount of their fortunes, and to consider what was proper to be allowed to their father for their maintenance and education from his second marriage and for the time to come.

[305] GLASSCOTT v. THE GOVERNOR AND COMPANY OF THE COPPER-MINERS OF ENGLAND. Dec. 3, 9, 1840.

[S. C. 10 L. J. Ch. 30 ; 5 Jur. 264.]

Discovery. Pleading. Parties. Injunction. Practice.

A Defendant at law may file a bill of discovery not only to sustain his defence to the action but to rebut the evidence in support of it.

The rule that officers of a corporation may be made Co-defendants to a bill against the corporation, applies to a bill for discovery as well as to a bill for relief ; and members of the corporation may be joined with the officers.

If officers of a corporation are made Co-defendants to a bill for a discovery and an injunction to stay an action brought by the corporation, the injunction will be dissolved on the coming in of the answer of the corporation, although the officers have not answered.

The company, which was a body corporate, having brought an action against the Plaintiffs for the recovery of a sum of money alleged to be due under a contract entered into between the parties in August 1839, the Plaintiffs filed the bill in this cause for a discovery only. The matters alleged in the bill, and of which a discovery was sought, tended not to support a case intended to be [306] made by the Plaintiffs by way of defence to the action ; but to defeat the case necessary to be made by the company in order to sustain their action. The governor, deputy-chairman, one of the directors, and the secretary of the company, were made Co-defendants to the bill, and they and the company were charged with having in their custody, books, accounts and other documents relating to the matters in the bill, and by which, if produced, the truth of the matters stated in the bill would appear. All the Defendants except the company joined in demurring to the bill.

Mr. Jacob and Mr. Loftus Wigram, in support of the demurrer. On the face of this bill there is no case entitling the Plaintiffs to a discovery. They do not allege that they have any defence to the action for which they require the discovery. The object of the bill is simply to discover the case of the company at law. The rule of this Court is clear : a party may have a discovery of his own case or title, but not of his adversary's case or title. What use is there in asking us to disclose what our evidence is at law ? The allegations of the bill amount to this, namely, that there was no such contract as that of August 1839. The answer is that, if we do not prove our case at law, we shall be non-suited. If the bill cannot be supported against the company, it clearly cannot be supported against the demurring Defendants.

Secondly. If the bill can be sustained against the company, it cannot be sustained against the other Defendants. For a Plaintiff cannot make an officer of a corporation a Co-defendant to a bill which seeks for discovery only, although he may make him a party to a bill which seeks for *relief* against the corporation : and, [307] even in the case of a bill for relief, Lord Eldon treats the practice as an anomaly, and as established not on principle but by authority. *Fenton v. Hughes* (7 Ves. 287 ; see *ante*, vol. ix. pp. 22 and 23) ; *Dummer v. The Corporation of Chippenham* (14 Ves. 245 ; see 252) ; *Le Terrier v. The Margravine of Anspach* (15 Ves. 159 ; see 164).

Thirdly. Supposing that an officer of a corporation may be made a Co-defendant with the corporation to a bill of discovery, the anomaly cannot be extended further. In this case, however, not only the secretary, but three *members* of the company are made Co-defendants. Neither their answers nor the answer of the secretary can be read against the company at the trial of the action. The fact is that the object of the Plaintiffs in filing this bill was to enable them to determine whether they should call the secretary and the three members of the company as witnesses at the trial of the action, or not : their object was to gain assistance in the conduct of their action at law, not in the conduct of their suit in this Court.

Fourthly. No person can be made a Defendant to a bill of discovery, unless he is a party to the record at law. *Irving v. Thompson* (*ante*, vol. ix. p. 17).

Mr. G. Richards and Mr. Heathfield, in support of the bill. The demurrer, is a joint demurrer of all the four Co-defendants, including the secretary; and, if it is bad as to him (which it clearly is) it is bad as to all the other demurring parties.

[308] The contract on which the action is founded was a contract for the sale of some copper-ore to the Plaintiffs. It does not appear from the contract whether the company were the vendors of the ore or not. Are we not entitled to have a discovery as to whether they were the vendors or not? Again; the bill avers that the contract was fictitious, and, in fact, never existed: are we not entitled to have a discovery as to that matter? At all events, we must be entitled to have the accounts produced, which are charged to be in the custody of the Defendants: and, if we are entitled to any part of the discovery, the demurrer must be overruled.

It was said that an officer of a corporation cannot be made a Co-defendant with the corporation to a bill for discovery, but only to a bill for relief. Now, the reason for making the officer a Co-defendant is that the corporation do not answer on oath, and, therefore, the Plaintiffs may not be enabled to obtain from them the required discovery. The object then of seeking the discovery being to enable the party to make out his case, what difference can it make whether the discovery is required with regard to relief in equity, or with regard to a proceeding at law? In the one case, the party seeks the discovery in order to enable him to make out his case in equity; in the other case, he seeks it in order to make out his case at law. The reason for granting the discovery applies to the one case as much as it does to the other. Besides, there are several cases which shew that the distinction on which the counsel for the Defendants rely cannot be maintained. In *Wyeh v. Meal* (3 P. W. 310) the bill was for discovery only: and a de-[309]-murrer by an officer of the East India Company, who had been made a Co-defendant with the Company, was overruled. *Anon.* (1 Vern. 117). In that case also the bill was a bill for discovery only; and it was ordered that the clerk of the company, and such principal members of it as the Plaintiff should think fit, should answer on oath. In *Dummer v. The Corporation of Chippenham*, Lord Eldon says: "The ground of the demurrer on the record is," &c., &c. (See 14 Ves. 251, 252 and 253.) So that your Honor sees that Lord Eldon makes no distinction between a bill for discovery and a bill for relief. In *Moodalay v. Morton* (1 Bro. C. C. 469) also, the bill was simply for discovery. Lord Redesdale says: "Unless a Defendant has some interest in the subject, he may be examined as a witness; and, therefore, cannot in general be compelled to answer a bill for a discovery; for such a bill can only be to gain evidence, and the answer of the Defendant cannot be read against any other person, not even against another Defendant to the same bill. . . . There seems to be an exception to the rule in the case of a corporation; for, as a corporation can answer no otherwise than under their common seal, and, therefore, though they answer falsely, there is no remedy against them for perjury; it has been usual where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary to make their secretary or bookkeeper, or other officer a party: and a demurrer because the bill shewed no claim of interest in the Defendant, has been in such case overruled." (Treat. Plead. 4th edit. 188, 189; 3d edit. 152, 153.) There Lord Redesdale makes no distinction between a bill for relief and a bill for discovery only. It is clear, therefore, that the demurrer is bad so far as the secretary is concerned; [310] and, if it is bad as to him, it is bad as to all the other demurring parties. We contend, however, that the charge in the bill that the Defendants, that is, all the Defendants, have in their custody books, accounts, &c., whereby, if produced, the truth of the matters alleged by the bill would appear, is sufficient to support the bill as against all the demurring parties.

Mr. Jacob, in reply. Where a demurrer is by several parties, it may be good as to one of the parties and bad as to another of them. *The Mayor and Corporation of London v. Levy* (8 Ves. 398). [THE VICE-CHANCELLOR. That is where the demurrer is joint and several.]

The case of *Dummer v. The Corporation of Chippenham* was a case of fraud and corruption, and certain individual corporators, who had taken an active part in doing the acts which the bill complained of, were made Co-defendants. That is quite different from calling upon them to answer for the purpose of discovery. In *Moodalay*

v. *Morton*, the distinction between the company and their secretary was not suggested. It was a very extraordinary case; for it was a bill filed for a discovery and a commission to examine witnesses in aid of a non-existing action. That case was brought under the consideration of Sir John Leach, V.-C., in *Angell v. Angell* (1 Sim. & Stu. 83; see pp. 90 and 91). His Honor does not express any opinion upon the point for which it was cited by the counsel for the Plaintiffs; but gives what seems to be the correct exposition of the bill in that case; and concludes his observations with saying that the case, being a case of specialty and exception, rather disproved than affirmed the general propositions for which it had been cited in the case before him.

[311] The distinction between a bill for discovery and a bill for relief was not so well established formerly, as it now is and has been for several years past. Where the bill is for relief, the whole matter remains under the cognizance of this Court; and this Court will have the answer of the secretary or other officer of the corporation opened to it; but, where the bill is for discovery only, the Court has nothing to do with it after it has enforced the answer. Will this Court then enforce answers from several Defendants, not to assist the Plaintiff in conducting his case in this Court, but in conducting his defence at law? The answer of a married woman cannot be read against her husband, nor can it be read against herself, either during or after the coverture. The Court however requires her to put in a full answer; as it may be of great use in enabling the Plaintiff to frame his interrogatories and to know where he may procure evidence: but a married woman cannot be made a party to a bill of discovery against her husband.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the bill represents a variety of circumstances, many of which I do not see that there is any use in stating, except that they tend to make intelligible the terms of that which is really the subject of dispute, namely, the contract of August 1839; the language of which one could not even guess at the meaning of, unless there were a statement contained in the bill as to what was done both prior and subsequent to that agreement. Then it represented that the company of copper miners of England have brought an action against the Plaintiffs in respect of the contract of August 1839; and the bill contains averments that that contract is fictitious, and that there was no such contract, and so on: and then it represents that [312] the demurring parties are officers of the company. Then there is a statement as to all the Defendants, that they have the books and papers in their possession.

Then these four gentlemen, who have various characters as officers of the company, have put in one general demurrer.

Now it strikes me that the Plaintiffs at law may have evidence to support their case, which it may be necessary to rebut by other evidence: and I do not think that this is a bill merely for the purpose of making the Plaintiffs at law admit that they have no case, but it is a bill which, if they do not admit that they have no case, seeks to make the present demurring Defendants produce documents by means of which it may be shewn that though the Plaintiffs at law may have some evidence in support of their case, yet, when the evidence for them is weighed against the evidence for the Defendants at law, the balance will be turned against them.

Then the question is whether such a bill can be sustained? In my opinion, there is abundance of authority for sustaining such a bill. It is very remarkable that the second edition of Lord Redesdale's Treatise, which was published in the year 1787, contains word for word, the same passage as we find in the fourth edition which was published in his lifetime and with his sanction, and which therefore does clearly shew that his Lordship did, after the lapse of 40 years, entertain the opinion which he published in the year 1787. Lord Redesdale was a great observer of what took place in this Court; and we can hardly suppose that he forgot the cases in which he himself had been engaged as counsel, [313] as he was in *Moodalay v. Morton*, which was heard in 1785. Now, though it may be perfectly true that the observation made by Sir John Leach, in the case of *Angell v. Angell*, may have contained very good reasons why the demurrer should have been allowed, so far as it was a bill for a commission, still His Honor's opinion, supposing it to be right, would be no authority against the proposition which is involved in the decision of that case, namely, that a bill for discovery only may be filed against a corporation and its officers. And it appears to

me that any observations which were made upon the collateral point concerning the commission have nothing at all to do with the question whether a bill of discovery only may be filed against a company and its officers.

Then the language of Lord Redesdale, in both the editions to which I have referred, is in the most general form: "It has been usual," says his Lordship, "where a discovery of entries in the books of the corporation, or of any act done by the corporation, has been necessary to make their secretary or bookkeeper or other officer a party." And if you may make any other officer than a secretary or a bookkeeper a party, which this language plainly imports, it seems to follow that you may make not only the secretary, but the governor, and the deputy-governor, &c., and any other person a party with respect to whom there is an averment that he has, or that he and others have in their custody books and papers which relate to the matters in the bill mentioned, and whereby the truth of those matters would appear. And I cannot but think, notwithstanding all that has been said on this subject, that I am actually bound by the authority which I find, which I must take to have been considered as the law for the length of time from 1787 to [314] 1827, and which I myself have always understood to be the law of the Court.

The result is that this demurrer must be overruled.

Demurrer overruled.

Dec. 9. The company having filed their answer obtained an order *nisi* for dissolving the injunction; and

Mr. Loftus Wigram now moved to make that order absolute. He cited *Joseph v. Doubleday* (1 V. & B. 497).

Mr. Heathfield, for the Plaintiffs. Your Honor has decided that the officers of the company have been rightly made Co-defendants to the bill. They have not yet put in their answers; and before the time which they have obtained for that purpose expires the action will be tried. Consequently, it will be useless to hold that the officers may be made Co-defendants unless you decide that the injunction is to continue until they have answered the bill.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that as the company had put in their answer, it was quite a matter of course to make the order for dissolving the injunction absolute.

[315] HORNCastle v. CHARLESWORTH. *Dec. 3, 1840.*

[S. C. 10 L. J. Ch. 35; 4 Jur. 1179.]

Partition. Copyholds.

A bill in equity will not lie for a partition of copyholds.

The question in this case, which was raised by a demurrer, was whether a Court of Equity could decree a partition of copyholds between tenants in common in fee without the licence of the lord of the manor.

Mr. Hodgson and Mr. Kenyon Parker. Joint-tenants and tenants in common were not compellable to make partition until the 31st Hen. 8, c. 1, and 32 Hen. 8, c. 32, which first gave the remedy by writ of partition. It was held, however, that those statutes did not include copyholds, as the remedy by writ was not applicable to them. Co. Litt. 187 a., note 71, Harg. and Butler's edition. Coke's Complete Copyholder, sect. 54.

In order to shew what has been the course of the decision on the point, we refer to *Scott v. Fawcett* (1 Dick. 299); *Hall v. Freeth* (1 Madd. Prin. & Prac. 332, note, 3d edit.); *Whitchurch v. Holworthy* (*Ibid.*); *Burrell v. Dodd* (3 Bos. & Pull. 378); *Oakeley v. Smith* (1 Eden, 261).

Mr. Jacob and Mr. Elmsley. Although the lands of which a partition is sought are called copyholds in the bill, they are customary freeholds, as they appear from

the admittances not to be held at the will of the lord.⁽¹⁾ The writ of partition is abolished by 3 & 4 Wm. 4, c. 27, sect. 36, and so also [316] is the proceeding by plaint in the lord's court, which, as appears by the earlier cases, was the only mode of effecting a partition of copyholds. The Legislature, however, when it passed that Act, meant not to abolish partition entirely, but to leave untouched the equitable jurisdiction in cases of partition, not considering it as dependent on the jurisdiction either at common law or by statute. [THE VICE-CHANCELLOR. The Act simply abolishes legal partition: there is no allusion in it to equitable partition.] On a writ of partition the judgment is for the parties to hold in severalty: therefore, a legal title would be given without the lord's concurrence: but a Court of Equity decrees a partition to be effected by surrenders in the lord's court. [THE VICE-CHANCELLOR. The lord, on the admittance of a copyholder, is entitled to the accustomed fine; but who can say what is the accustomed fine on admittance to a tenement which never before existed?] The jurisdiction of this Court with respect to partition is not only exercised in a different manner, but is more extensive than it is at common law. The Court deals with complicated interests in a manner that a Court of Common Law cannot. It can decree money to be paid for owelty of partition: and, if one of two coparceners aliens, the alienee cannot have partition at common law; but may have it in this Court. *Dodson v. Dodson* (Allnatt on Partit. 94; and 2 Watk. on Copyholds, p. 153, note, Coventry's edit.); *Swan v. Swan* (8 Pri. 518); *Baring v. Nash* (1 V. & B. 551; see 555); Vin. Ab. tit. Partit, pl. 36; *Gaskell v. Gaskell* (*ante*, vol. vi. p. 643).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have always considered the question that has been [317] raised by a demurrer in this case to be settled. I well remember that the question was decided by Sir William Grant in *Shewen v. Kirwan* in 1811 (not reported): since which time I have never met with a person who had a doubt about it. There formerly was a floating opinion that a partition of copyholds might be decreed, but it soon subsisted. Where freeholds and copyholds are held together in common, as in *Dodson v. Dodson*, there may be a partition, in one sense, by giving all the copyholds to one and all the freeholds and, if necessary, money for equality of partition to the other. But since that decision by Sir William Grant, to which I have referred, I have never heard it so much as hinted that this Court had jurisdiction to make a partition of copyholds alone.

This Court has never extended its jurisdiction to any new subject, but, when dealing with an old subject, has dealt with it in its own way: and if this Court, on a bill being filed for a petition, finds persons variously entitled in undivided shares to partial interests, it will take care that no injury shall be done by directing that, by the form of the conveyance, the parties shall have the same interests in the divided shares as they before had in the undivided shares. So that the jurisdiction exercised by this Court in cases of partition is, in effect, an improvement on the jurisdiction as it existed at law: but this Court has never assumed a jurisdiction over copyholds.

My opinion is that the filing of the bill in this case is a pure experiment: and, therefore, the demurrer must be allowed with costs.

[318] HERIZ v. RIERA. Dec. 15, 17, 1840.

[S. C. 10 L. J. Ch. 47; 5 Jur. 20.]

Plea. Pleading. Foreign Law.

A. and B. were Spanish subjects, resident in Spain. A. having entered into a mercantile contract with the Spanish Government, agreed with B. to allow him a share of the profits. Some years afterwards B. died, and A. went first to France, and afterwards came to England. After he had left Spain, he frequently wrote to the Plaintiffs (who were resident in France, but had taken out administration to B.

(1) It seems that customary freeholds are not within the Acts of Hen. 8; see *Burrell v. Dodd*, *ubi sup.*

in this country), promising to settle with them for B.'s share of the profits of the contract; but not having done so, they filed a bill against him to enforce the agreement. A. pleaded that the agreement was illegal and void by the laws of Spain, as, at the time it was entered into, B. held an office of trust and confidence under the Spanish Government: and the plea averred that the entering into the agreement was a crime against the laws of Spain, subjecting the parties to pains and penalties and a criminal prosecution. It was objected, first, that the plea was double, as the first part applied to the discovery and relief, and the latter part to the discovery only: secondly, that the particular law of Spain, by which the agreement was nullified, ought to have been set forth: thirdly, that B. was dead, and, therefore, no longer subject to pains and penalties; and, fourthly, that A., after he had left Spain, had recognised the agreement and promised to perform it. The Court, however, allowed the plea.

The bill stated that the Defendant (who was described as formerly of Madrid, but then of the Clarendon Hotel, Bond Street) on or about the 11th of June 1827 entered into a contract with the Spanish Government for providing tobacco for the Royal manufactories of Spain for five years, from June 1828, at the prices mentioned: that the capital intended to be employed in the execution of the contract was estimated at £60,000 sterling: that the Defendant, soon after he had entered into the contract, came to an agreement with Don Pio de Elizalde, late of Madrid, deceased, that Elizalde should participate in the profits of the contract, to the extent of one-fifteenth, with a nominal capital of £4000 sterling; but it was agreed between the parties that, although Elizalde was to participate in the profits of the contract to the extent of one-fifteenth, yet [319] that, in consideration of some important services which he had previously rendered to the Defendant, the Defendant would not call upon him for more than one-half of such nominal capital; and that, in the event of the contract not turning out profitable, the Defendant would not call upon Elizalde to contribute more than one-thirtieth of the loss that should be sustained thereby: that, accordingly, the Defendant wrote and sent to Elizalde a letter, dated the 20th of June 1828, which was set forth in the bill, and which contained the terms of the agreement. The bill then stated that Elizalde accepted the proposal contained in the letter, and signified to the Defendant his assent thereto: that the Defendant continued to supply the Royal manufactories of Spain with tobacco under the contract, from June 1828 until June 1833, by which he realized very large profits, to one-fifteenth of which Elizalde was entitled under the agreement; but the Defendant never paid, either to Elizalde or to his representatives, anything on account thereof; and all accounts in respect thereof, between the Defendant and Elizalde's estate, still remained open and unsettled, and several thousand pounds were due to Elizalde's estate in respect of the matters aforesaid: that Elizalde died in October 1836, intestate, and that, soon after his death, the Plaintiffs, his sisters (who were described as of St. Jean de Luz in the kingdom of France), procured letters of administration to his estate from the Prerogative Court of the Archbishop of Canterbury. The bill then set forth three letters written, in the years 1836, 1837 and 1838, by the Defendant (who was then in Paris, and shortly afterwards came to reside in England), to the Plaintiffs, in which the Defendant promised to account for and pay to them, as soon as he should be able, the share of the profits of the contract to which Elizalde's estate [320] was entitled. The charging part of the bill contained two letters from the Defendant to Elizalde, one dated in 1831 and the other in 1832: in the former the Defendant stated that he had made a partition of funds in the tobacco undertaking, and had credited Elizalde with his share, and that, as soon as he should have realized some credits, which he expected to obtain without delay, he would advise Elizalde of another partition: and, in the latter, he stated that Elizalde might dispose of 200,000 reals, in lieu of 180,000, as per first advice, and that he trusted he should be able to give Elizalde, without great delay, another advice of a similar nature. The bill then charged that the Defendant had invested part of his profits in the funds of this country, and various other matters, with a view to obtain a discovery of them: and it prayed for an account and payment of what was due from the Defendant to Elizalde's estate, in respect of the profits of the contract.

The Defendant put in the following plea: "This Defendant, by protestation, &c., doth plead in bar to the said bill, and for plea saith that, at and prior to the date and making of the alleged agreement in the said bill alleged to have been come to, by this Defendant, with Don Pio de Elizalde in the said bill mentioned, he, the said Don Pio de Elizalde, was a public officer and agent of the Spanish Government in the said bill mentioned, and then holding, as such public officer and agent, an office or offices of trust and confidence under the said Government, to wit, the office of *Tresuero General del Rieno*, which, being translated into the English language, means Chief Treasurer of the Kingdom, and likewise the office of *Consejero de Estado*, which, being translated into the English language, means Councillor of State: and that, by reason thereof, by the laws then, [321] and at that time, and still in force, in the kingdom of Spain, the said alleged agreement was and is null and void, and the parties to any such agreement as the said alleged agreement in the said bill mentioned would have been and were and still would be and are, by reason of the premises aforesaid, by the laws of the said kingdom of Spain, liable to pains and penalties and criminal prosecutions for making and entering into such alleged agreement: And this Defendant doth aver that the said alleged agreement, if any, was made and entered into in the said kingdom of Spain, and that, at and prior to the date and making of the said alleged agreement, this Defendant and the said Don Pio de Elizalde were respectively subjects of and residing and domiciled in the said kingdom of Spain, and under the allegiance of the said Spanish Government; and the said Don Pio de Elizalde being, as aforesaid, a public officer and agent of the said Spanish Government, and holding, as such, an office or offices of trust and confidence under the same Government as aforesaid, the said alleged agreement was and is, by reason thereof, by the said laws then and still in force in the said kingdom of Spain, *ipso facto* null and void, and the making and entering into such alleged agreement was and is, by reason of the premises aforesaid, a crime against the laws of the said kingdom of Spain, subjecting the parties thereto to pains and penalties, and a criminal prosecution for the same: and, therefore, this Defendant humbly demands the judgment of this honourable Court, whether," &c.

Mr. Wakefield, Mr. Jacob and Mr. Rogers, in support of the plea, said that the Courts of this kingdom would not enforce an agreement between parties who were subjects of and resident in a foreign country, [322] which, as the plea averred, was null and void by the laws of that country, and subjected the parties to pains and penalties, and to a criminal prosecution. *Armstrong v. Armstrong* (3 Myl. & Keen, 45); *Thomson v. Thomson* (7 Ves. 470, 473); *De la Vega v. Fianina* (1 Barn. & Adol. 284); 3 Burge on Colonial Law, 757, 759 and 760: Story on the Conflict of Laws, 200; *Tulleyrand v. Boulanger* (3 Ves. 447).

Mr. Knight Bruce and Mr. Koe, in support of the bill. The plea that has been put in in this case is, in fact, two distinct pleas formed into one. It is a plea to the discovery, on the ground that it would subject the Defendant to pains and penalties; and to the discovery and relief, on the ground that the contract is illegal. A Plaintiff may be entitled to relief, although he may not be entitled to compel an answer to a single allegation in his bill; for he may prove his case without the oath of the Defendant. In *Brownsword v. Edwards* (2 Vez. 246) Lord Hardwicke, C., says: "Some collateral arguments have been used, that it is not in every case the party shall protect himself against relief in this Court, upon an allegation that it will subject him to a supposed crime. It is true it never creates a defence against relief in this Court; therefore, in case of usury or forgery, if a proof can be made of it, the Court will let the cause go on still to a hearing, but will not force the party, by his own oath, to subject himself to punishment for it. In a bill to inquire into the reality of deeds on suggestion of forgery, the Court has entertained jurisdiction of the cause; though it does not oblige the party to [323] a discovery, but directs an issue to try whether forged." It is manifest therefore that a plea to the discovery, on the ground that it would subject the Defendant to pains and penalties, is quite distinct from a plea to relief. The plea avers that the contract is invalid, and, besides, that the entering into it subjects the parties to pains and penalties: so that it does not aver that the invalidity of the contract creates its criminality, or that its criminality creates its invalidity. Criminality and invalidity are by no means one and the same thing; nor, indeed, is the one the necessary consequence of the other. An act may be invalid

and yet not criminal: or it may be criminal and yet not invalid. *Fieri non debet; sed factum valet*, is a maxim acknowledged by our law. A marriage may be valid, although some of the regulations prescribed by law may not have been complied with. If then, as we contend, criminality and invalidity are not necessarily connected with or deducible from each other, the plea must fail for duplicity.

Secondly. The plea is too loose and vague. It ought to have set forth the particular law of Spain which renders the contract invalid. Is it fair that the Plaintiff should be sent to search all the laws of Spain, in order to find out which of those laws it is that the plea alludes to? Suppose that the Defendant had pleaded that, by the laws of this kingdom, the contract was void: that general mode of pleading would not have been good. The particular Act of Parliament which makes the contract void must be referred to. A private Act of Parliament is as much the law of this country as a public Act is; but, nevertheless, it must be specially pleaded. The Judges of this country are bound to know its laws; but they are not bound to know the laws of a foreign country.

[324] Thirdly. Elizalde is dead; and, consequently, he cannot be subject to a criminal prosecution, or to pains and penalties.

Fourthly. There is no averment connecting the agreement stated in the letter of June 1828 with the agreement stated at the outset of the bill: there is nothing to shew that they are identical: consequently, it is left uncertain to which of the two agreements the plea is addressed.

Fifthly. The bill contains a variety of recognitions of the agreement and promises to perform it, both written and verbal, which were made by the Defendant, in France and England, as well as in Spain, and before as well as since Elizalde's death: and the bill is as much founded on those recognitions and promises as it is upon the original agreement. The plea, however, nowhere avers that the Plaintiffs have no *present* right to sue. Suppose that parties enter into an agreement which is illegal, and one of them gains a large sum of money, and, the money having been realized, promises to pay to the other party the share to which he would have been entitled if the agreement had been valid: is it at all clear that, by the law of Spain or by the law of this country, that promise could not be enforced? *Barnes v. Hedley* (2 Taunt. 184). In this case there is nothing to shew that the original agreement, though invalid by the laws of Spain, may not form a good consideration for the subsequently recognized contract, when the parties were not resident in that country.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The bill, in effect, represents but one agreement.

[325] The whole agreement made was that there should be a participation, in the profits of the contract with the Spanish Government, by the party whom the Plaintiffs represent, to the extent of one-fifteenth. The letter of June 1828, which was relied on by the counsel in support of the bill, did not create a new agreement, but was merely an acknowledgment of the prior verbal contract. It is evidence of that contract but nothing more. I have read all the subsequent letters; but my opinion is that they do not shew any promise to account, independently of any obligation which might arise out of the original agreement. The consequence is that the bill does not represent, as it has been said to do, that there were two agreements.

The plea, which is to the whole bill, alleges that, for the reason which it assigns, the agreement in question was null and void by the laws of Spain: and then it makes an averment in support of the plea that the making and entering into such agreement was a crime against the laws of Spain, subjecting the parties to it to pains and penalties and to a criminal prosecution. I see nothing in that averment to vitiate the plea. And, if the fact should turn out as the plea represents, then there must be an end of the Plaintiffs' case.

Plea allowed with costs. The costs of the suit reserved; the Plaintiffs having undertaken to reply. (See *Fry v. Richardson*, *ante*, vol. x. p. 475.)

[327] PRESTON v. THE GRAND COLLIER DOCK COMPANY AND OTHERS.(1)
Dec. 7, 8, 10, 21, 1840.

[S. C. sub nom. *Preston v. Guyon*, 10 L. J. Ch. 73 ; 5 Jur. 146.]

Pleading. Parties. Joint Stock Company. Fraud. Liability of Shareholders.

A bill by a member of a numerous incorporated company, *on behalf of himself and all the other members* except the Defendants, praying that a transaction, in which the Defendants had been the actors, but which had been sanctioned *unanimously* at a meeting of the company, might be declared fraudulent and void, was sustained, although some of the members on whose behalf the bill was filed had been present and voted at the meeting.

Pending a bill in Parliament for forming a dock company, certain subscribers to the undertaking subscribed for 9000 additional shares, in order to make up the amount of capital required by the Standing Orders of the House of Lords, before the bill could pass that House. Afterwards, but before the bill was passed, those persons signed a declaration that they held the additional shares in trust for the company. After the bill had passed, a meeting of the company resolved unanimously that the trust should be annulled and the shares be transferred to the secretary for the use of the company : no transfer, however, was made. The directors having made calls, it was held that the subscribers for the additional shares were bound, as trustees, to pay the calls in respect of those shares.

The Plaintiff, D. Preston, was an original subscriber for 20 shares in the company. The bill was filed by him on behalf of himself and all other the subscribers [328] to and members of the company except the Defendants. The Defendants were the company, John Guyon, William Gunston, William John Richardson, Henry Luard, Joseph Horatio Ritchie, James Heygate, Charles Duncan, Samuel Saunderson Hall, John Walter Hulme, Sir William Heygate, Bart., John Smith, Susan Gordon, widow, and Rowland Nevett Bennett.

Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate, Duncan, Hall and Hulme were the persons who subscribed for 9000 of the additional shares in the company (but none of which were registered), towards making up the amount of capital required by the Standing Orders of the House of Lords, to be subscribed before the bill for forming the company could be brought into that House. All those nine persons, except Hall, were directors of the company : and Hall had been a director. Sir W. Heygate was the only other director. Smith was the secretary of the company. Susan Gordon and Bennett were the personal representatives of Adam Gordon, deceased, who was the party to the Parliamentary deed of the first part, and with whom the covenants contained in that deed were entered into.

The bill set forth, as in *Mangles v. The Grand Collier Dock Company*, the Parliamentary deed, the deed of management, the making of the additional subscriptions, the purpose for which those subscriptions were made, the Act of Parliament, the memorandum of the 4th of July 1837, and the resolution passed at the meeting of the company on the 27th of June 1839. It stated also that Guyon, Gunston, Luard, Richardson, Ritchie and Hall, and fourteen other members of the company (who were named), voted, either in person or [329] by proxy at that meeting, and that the resolution was carried unanimously. The bill further stated *that it was alleged*, by or on behalf of the Defendants, that Gunston, Hall, Richardson, Ritchie, Luard, Guyon, Duncan and James Heygate affixed their names or initials to the memorandum of the 4th July 1837 ; and that Hulme affixed his name or initials to a memorandum in all respects similar to it, which was dated the 5th of the same month : *that the alleged* memorandum of the 4th of July 1837, and the resolution to annul the trust thereby alleged to be created, and the direction to transfer the additional shares to Smith the secretary, were not warranted by the Act of Parliament, and were made, by collusion

(1) See *Mangles v. The Grand Collier Dock Company*, reported *ante*, vol. x. p. 519.

between the parties who had subscribed for the additional shares and such of the directors as were present at the meeting of the 27th of June 1839, for the fraudulent purpose of relieving Gunston, Richardson, Ritchie, Luard, James Heygate, Guyon, Duncan and Hall, from their liability to pay the deposit of £1 per share on their additional shares, and the calls then contemplated to be made upon the subscribers to and proprietors of the undertaking: that the said memorandum and resolution tended to defraud and deprive the other shareholders of the benefit of the subscriptions for the additional shares, and of the deposit of £1 per share, and the calls which might be made upon the subscribers to and proprietors of shares in the undertaking or company: that, pursuant to such resolution, an entry was made in the register book or share ledger of the company, purporting that the additional shares of the last-named parties had been transferred to and then stood in the name of John Smith, in trust for the company; but no actual transfer of such shares was then made to Smith: that some fraudulent agreement was made between Hulme [330] and the directors, in respect of the additional shares subscribed for by him, and that pursuant thereto an entry was made in the register book or share ledger of the company that Hulme held his additional shares in trust for the company: that a meeting of the directors was held on the 22d of July 1839, at which time only 605 shares had been duly registered; and it was then resolved that a call of £5 per share should be made on the registered proprietors, and paid on or before the 21st of August then next: that the Plaintiff paid that call on his shares on *or about* the 21st of August, and that it had been paid on all or nearly all the rest of the 605 shares: that at another meeting of the directors, held on the 28th of October 1839, a further call of £2 per share was resolved upon, and that call also had been paid by the Plaintiff and all or nearly all the other holders of the 605 shares: that the Plaintiff was ignorant of the frauds aforesaid until long after he had paid the calls; and that he and all the other shareholders except the Defendants paid those calls in the full faith and confidence that all the shares subscribed for, in and by the Parliamentary deed, were *bonâ fide* subscribed for, and that the calls either had been or would be paid on them; but he had since discovered that neither those calls nor the required deposit of £1 per share had been paid on the 9000 additional shares subscribed for by the Defendants: that, unless those payments on the last-mentioned shares were enforced, it would be impossible to carry the objects for which the company was formed into effect: that the Plaintiff had requested the company and the other Defendants who were directors of the company to compel the payment of the deposit and calls on the additional shares, and to have those shares duly entered and registered in the names of the persons by whom [331] the same were originally subscribed for in the Parliamentary deed, and had requested such persons to consent to those shares being so entered and registered, and to take the usual certificates thereof, and to expunge the resolutions which had been come to in respect thereof; and also had requested Susan Gordon and Bennett to enforce the covenants entered into by the Defendants, the subscribers for the additional shares, in and by the Parliamentary deed, with Adam Gordon, his executors or administrators; but they had refused to comply with such requests: that the Defendants, the directors, in order to give effect to the frauds before complained of, and to secure the indemnity of themselves and Hall, against the same and the consequences thereof, threatened to declare or join in declaring the additional shares to be forfeited: that, if the Defendants, the subscribers for the additional shares, did, as they pretended, execute the Parliamentary deed and subscribe for those shares, as a mere matter of form, and in order to satisfy the Standing Orders of the House of Lords, they ought to be held to such subscriptions, as, otherwise, *the same would be a fraud on the House of Lords and on the other shareholders*: that the before-mentioned memorandums and resolutions relating to the additional shares were also fraudulent; and, if those shares were to be considered as held in trust for the company, it would be impossible to carry the objects for which the company was formed into effect, and all the meetings of the company which had been held, and all the business done thereat, would be invalid, inasmuch as no such meeting had been attended by 10 or more members (either in person or by proxy), holding 1000 shares, exclusive of the additional shares: that the subscribers for the additional shares had, in and ever since 1837, combined and colluded together for the purpose of practising and effect-[332]-ing the several

fraudulent transactions aforesaid, and that those transactions were planned and transacted with the privity and assistance of Sir W. Heygate; and that the subscribers for the additional shares had a common and joint interest in practising and maintaining the fraud, and jointly and severally claimed some interest in or title to such shares; and they and Sir W. Heygate knew of and joined in the attempt to exonerate the subscribers for them from all liability in respect thereof, and from payment of the deposit and calls thereon: that the Defendants pretended that the Plaintiff had not paid the call of £2 per share on his shares, and, therefore, under the provisions of the Act of Parliament, his shares had been forfeited, and, consequently, he no longer had any interest in the undertaking: but the Plaintiff charged that, on the 3d of June 1840, he paid the amount of the call to the bankers of the company as directed by the advertisement for the call, together with interest at £5 per cent. from the day on which the call was first payable, and, on the following day, he gave notice of such payment to the company; but the company, although they had received the sum so paid, had not offered to return it to the Plaintiff, as, he submitted, they ought to have done if his shares had become forfeited before the payment was made; and that, after such payment, the company could not legally proceed to declare his shares to be forfeited: that the Defendants pretended that, before the payment was made, the directors had passed a resolution declaring the Plaintiff's shares to be forfeited; but the Plaintiff charged that, if any such resolution had been made, no notice of it had been given to him, nor had it been confirmed at a general meeting of the shareholders; both of which acts were required to be done by the Act of Parliament before a share could [333] become forfeited; and, therefore, he was and ought to stand as the proprietor of 20 shares: that the members of the company, who were not parties to the bill, were upwards of 100 in number, and many of them were unknown to the Plaintiff, and it was impossible for him to make all of them parties thereto.

The bill prayed that it might be declared that Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate, Duncan, Hall and Hulme were *bonâ fide*, or that, under the circumstances aforesaid, they ought to be considered and treated as *bonâ fide* subscribers to the undertaking in respect of all the shares for which they respectively subscribed the Parliamentary deed, and to be bound thereby; and that they ought to perform the covenants and agreements thereby entered into by them; and that the memorandums of the 4th and 5th of July 1837,(1) and all the acts, deeds, resolutions and entries by which it had been attempted to give effect to those memorandums, or the trust thereby attempted to be created, might be declared to be illegal, fraudulent and void; and that the shares to which those memorandums related might (if any transfer thereof had been made) be retransferred into the names of the last-named Defendants, in the proportions in which such shares were subscribed for by them respectively in the Parliamentary deed; and that the same Defendants might be decreed to pay to the company the deposit of £1 per share and the amount of the two calls of £5 and £2 per share on their additional shares respectively, with inte-[334]-rest at £5 per cent. from the time when the same ought to have been paid; and that the company and the directors thereof might be decreed to treat the additional shares as *bonâ fide* belonging to the same Defendants, in the proportion of 1000 shares each, according to their original subscriptions for the same; and might be decreed to enforce against them the payment of the said deposit and calls and of all future calls; and that the company and the directors might be restrained from making any other calls on the proprietors until the Defendants should have paid the amount of the deposit and calls already made on their additional shares; and that the covenants of the Parliamentary deed might be put in force against the same Defendants; and that the company and the directors might be restrained from declaring the additional shares to be forfeited; and that all the Defendants, except the company and Susan Gordon, Bennett and Smith, might be decreed to indemnify the company, and, in particular, the Plaintiff and the other persons on whose behalf the bill was filed, from all loss or damage arising from

(1) These were memorandums signed by the purchasers of the additional shares, declaring that those shares were to be held in trust for the company. The memorandum of the 4th of July was signed by all of them, except Hulme, and the memorandum of the 5th was signed by him alone.

the matters or transactions aforesaid; and that Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate, Duncan, Hall, Hulme and Sir William Heygate might be decreed to pay the costs of the suit; and that the company and the directors might be restrained from taking any further steps to declare or procure the forfeiture of the Plaintiff's shares, on the ground of the non-payment of either of the calls which had been made, or on account of any other matter or thing then passed or happened.

Guyon, Gunston, Richardson, Luard, Ritchie, James Heygate and Duncan demurred to the bill for want of equity, and because all the members or proprietors of [335] or subscribers to the company ought to have been made parties to the bill.

Hall demurred, separately, on the same grounds.

Mr. Jacob, Mr. James Russell and Mr. Heathfield, in support of the first demurrer. The matters which are made the subject of complaint in the bill are not cognizable by the Court of Chancery. The Court of King's Bench alone has jurisdiction to decide questions relating to the affairs of a corporation.

Guyon, Gunston, Richardson, Hall, Duncan and Ritchie were members of the committee appointed by the deed of management; and, by that deed, the committee was authorized to adopt all measures which it might consider necessary or expedient for obtaining the Act of Parliament: therefore the members had a right, as against the company, to make the subscriptions which are alleged, or rather pretended, to be colourable.

The resolution for annulling the trust as to the additional shares was passed at a meeting of the company held on the 27th of June 1839; and that resolution is alleged, in general terms, to be fraudulent; but there is no statement of any species of fraud consisting of misrepresentation or suppression. Did the members present (who voted unanimously), conspire to defraud one another? It is also alleged that the memorandums and resolution tended to deprive the other shareholders of the benefit of the deposit and calls on the additional shares. But neither the deeds nor the Act of Parliament require that any deposit should be paid; nor was any [336] call made upon the shareholders in June 1839. The first call was in July of that year. Consequently, when the demurring Defendants transferred their additional shares to the secretary, they were under no liability whatever in respect of those shares; and it is nowhere alleged that they had executed the Parliamentary deed in respect of them.⁽¹⁾ The Defendants having purchased their additional shares in trust for the company, it was right for them to take the sense of the company at large as to the disposal of them; and the company resolved, unanimously, that the shares should be transferred to the secretary. Why is not such a transfer to indemnify these parties just as effectually as a transfer to any other individual? How can such a transaction be justly called fraudulent? The truth is that the Plaintiff, who was absent from the meeting, disapproves of what took place at it; and, if this bill is sustained, every vote of a corporate body which any member disapproves of may be made the subject of a suit.

Next, the bill is erroneously framed; for it is filed by the Plaintiff on behalf of himself and all the other members of the company except the Defendants; not on behalf of the Plaintiff and all the other members except the Defendants, who should come in and seek relief by and contribute to the expenses of the suit: and therefore it is necessary that all the members who are not expressly named as parties should have a common interest. Now the bill states that, besides the demurring Defendants, 14 other members of the company (two of whom were then directors) were present at the [337] meeting of the 27th of June 1839, at which the alleged fraud was consummated; and it states also that the resolution which was passed at that meeting was carried unanimously; so that the Plaintiff who, it is true, did not attend that meeting is suing, on behalf of two directors and 12 other members of the company, to be relieved from a fraud in which they were concerned; or, in other words, the object of this bill is to relieve fraudulent parties from the consequences of their own fraud. There is no averment that they were deceived or the victims of the fraud. The bill therefore, in that respect, is entirely erroneous: for the

(1) There was no *express* allegation to that effect; but the bill *assumed* that the subscribers had executed the Parliamentary deed in respect of the additional shares.

Plaintiff is suing on behalf of persons with whom he has no common right or interest, for none of the members who concurred in the resolution could sustain this bill. Lastly, the concluding part of the prayer relates exclusively to the Plaintiff's own private concerns, in which the other shareholders not only have no common interest with him, but have an interest adverse to his: consequently, all the other members of the company ought to have been made parties to the suit. *Long v. Yonge* (ante, vol. ii. p. 369); *Van Sandau v. Moore* (1 Russ. 441); *Jones v. Garcia del Rio* (Turn. & Russ. 297).

Mr. Craig, for the Defendant Hall, said that the Plaintiff by his bill had asked relief, as to which he had not got the proper parties before the Court; and that it was nowhere alleged that the parties who took the additional shares had executed the Parliamentary deed in respect of those shares.

Mr. Knight Bruce, Mr. Wakefield and Mr. Lovat, in support of the bill. It has been said that all the members of the company [338] ought to have been made parties to the record: but a sufficient reason is assigned for not making them all parties; for the bill charges that the several members and subscribers to the company, not parties thereto, are very numerous, being upwards of 100 in number, and are, many of them, unknown to the Plaintiff; and that it is impossible for the Plaintiff to make them all parties.

It has been said also that the other members of the company have not a common interest in the subject-matter of the suit; but the bill prays that it may be declared that the Defendants Guyon, Gunston, &c., were *bonâ fide*, or that, under the circumstances aforesaid, they ought to be considered and treated as *bonâ fide* subscribers to the undertaking, in respect of all the shares for which they respectively subscribed the Parliamentary deed, and bound thereby, and that they ought to perform and fulfil the covenants and agreements thereby respectively entered into by them; and that the memorandums of the 4th and 5th of July 1837, and all the acts, deeds, resolutions and entries by which it was attempted to give effect to them or to the trusts thereby attempted to be created, may be declared to be illegal, fraudulent and void, &c. There is, therefore, an object in which all the members have a common interest, namely, to add to the liabilities of the shareholders and to increase the funds of the company. *Cockburn v. Thompson* (16 Ves. 321); *Adair v. The New River Company* (11 Ves. 429). The ground on which *Long v. Yonge* and *Van Sandau v. Moore* were decided was that a dissolution of the partnership was prayed. In the latter of those cases the Lord Chancellor says: "The bill proceeds on two grounds," &c. (1 Russ. 463.) In *Hichens v. Congreve* (4 Russ. 575, 576; S. C. ante, vol. iv. p. 420) the [339] Lord Chancellor says: "Here is a fund in which all the shareholders are interested. Fifteen thousand pounds have been improperly taken out of it; a fraud has been committed on them all. Is it necessary that all should come into a Court of Justice for the purpose of joining in a suit with a view to obtain redress? It is possible that the number of shareholders may be 6000; for the capital of the company is fixed, by the Act of Parliament, at £300,000, divided into shares of £50 each; and justice never could be obtained if any very great number of Plaintiffs were put on the record. It is said that there is nothing on the face of the bill which shews that the shareholders are so numerous that they could not all be joined as parties without inconvenience. I think it does appear sufficiently that, if all were joined, the number of complainants would be inconveniently great. First, because the shares are 6000 in number, and, secondly, because it appears, by the Act of Parliament, that there were then upwards of 200 shareholders. It is clear, therefore, that justice would be unattainable if all the shareholders were required to be parties to the suit." The question here is whether the funds of the company are to receive a certain sum of money: of what avail is it then to say that some of the shareholders have acceded to the transaction which the bill complains of and seeks to set aside as being fraudulent? If any of the Defendants who are sought to be made liable by this suit have an equity to compel any of the other shareholders to make good what they may be called on to contribute, that must be made the subject of another suit. The Plaintiff on this record represents the general right; and his suing on behalf of all the other shareholders is merely a mode of expressing that he sues in the general right. The case of *Bromley v. Smith* (ante, vol. i. p. 8) is

[340] strictly analogous to the present. There a few of the inhabitants of a parish filed a bill on behalf of themselves and the rest of the parishioners for relief against acts which were alleged to be injurious to their common right. The Defendants stated in their answers that the majority of the parishioners were averse to the institution of the suit, and approved of the acts complained of in the bill. But Sir John Leach, V.-C., said that, where a matter was necessarily injurious to the common right, the majority of the persons interested could neither excuse the wrong nor deprive all other parties of their remedy by suit. Besides, this is a case of fraud, and it was decided in *Seddon v. Connell* that, where a bill is filed for relief in respect of a fraud alleged to have been committed by several persons, it is not necessary that all the persons who were parties to the fraud should be made parties to the record. (*Ante*, vol. x. p. 79.)

Another objection that was made to the bill was that part of the relief sought by it related to the Plaintiff's own private concerns, in which the other members of the company had no interest, that is to say, that it prayed for an injunction to restrain the company and the directors from taking any further steps to declare the forfeiture of the Plaintiff's 20 shares. But the attempted forfeiture of those shares is a matter inseparably blended with the general fraud and, consequently, the Plaintiff has a right to introduce it into a suit relating to that general fraud. Is it to be endured that the Defendants should conspire to defeat the Plaintiff's title? He is, to a great extent, a trustee of the suit for the benefit of all the shareholders: and it is not only the right but the duty of a trustee to pre-[341]-vent his legal title from being fraudulently affected, so as to prejudice his *cestuis que trust*.

The bill contains specific charges of fraud and collusion: of fraud committed not only upon the Legislature, but also upon every person who has embarked his money in the undertaking. The main object of the bill is to redress that fraud, and to have the additional shares treated as belonging to the parties to whom they were represented to belong.

Mr. Wakefield cited *Campbell v. Mackay* (1 Myl. & Craig, 603; and *ante*, vol. vii. p. 564).

Mr. Jacob, in reply. *Bromley v. Smith* has no bearing on the present case. The bill was not filed by or on behalf of parties seeking to be relieved from their own acts, or from acts in which they had concurred. All that was stated in that case was that some of the persons on whose behalf the bill was filed approved of the acts complained of, and were averse to the institution of the suit. Here the bill is filed to be relieved from a fraud, on behalf of certain persons who were guilty of that fraud. If all the members except one had concurred in the fraud, could that one have filed a bill on behalf of himself and the other members, to be relieved from the fraud?

Besides, no case can be produced in which a Court of Equity has relieved an incorporated company against its own acts. Acts done at the general meetings of the company are the acts of the company, and must necessarily be conclusive upon every member of it.

[342] THE VICE-CHANCELLOR. I do not see that the bill anywhere states that any of the gentlemen who subscribed for the additional shares subscribed the Parliamentary deed in respect of those shares.(1) I make that observation, because it strikes me that the Act of Parliament speaks of subscription generally, and not of any particular mode of subscription. Therefore, anything which, in fact, would be a subscription, would come within the words of the Act of Parliament.(2)

Is there anything in the Act which prohibits a person from being a shareholder, and holding his share in trust for another person?

Mr. Jacob. No, sir.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Before I decide this point I shall certainly read over, very particularly, the Act of Parliament as well as every one of the allegations in the bill; because it strikes me that the real object of the bill is to give a sort of validity to that rule of the House of Lords for the enforcement of

(1) The fact was assumed as before mentioned.

(2) See the section alluded to, *ante*, vol. x. p. 522.

which, as I understand it at present, the Act of Parliament has made no provision. It seems to me that it was contemplated by the framer of this bill, that, whereas the House of Lords requires that before the bill in Parliament should pass their Lordships' House, three-fourths at least of the number of the shares should be subscribed for, it would be a sort of fraud on that rule if the subscriptions for the three-fourths of the shares were made [343] in such a manner as would not, permanently and for all purposes whatever, make those who had become subscribers for those shares holders of them, so that they could not get rid of them; but must, at all events, be made liable to pay the amount of their subscriptions. Now it is a very remarkable thing that there should be such a rule in the House of Lords, and that there should be no such rule in the House of Commons. Possibly there may be no such rule in the House of Commons, because the Members of that House may consider that the rule would be inoperative, unless clauses were introduced into the Act of Parliament to give it operation; and, therefore, it may be that, though their Lordships may think it right there should be such a rule in their House, the House of Commons may think it is not right that there should be such a rule in their House: and the House of Commons may have thought that the object which is aimed at, by their Lordships' rule, might be effectually secured by introducing clauses into the Act of Parliament. But the Act has passed without any such clause: so that it appears that the Legislature, collectively, did not think it right there should be any such clause in the bill as might give such an effect to the rule of the House of Lords as that which the framer of this bill supposed ought to be given to it. And it is with reference to that consideration that I think I must, very particularly, examine this Act of Parliament, and see how far that which has been done has been legally done: because, if it has been legally done within the purview of the Act of Parliament, although to a certain extent the object of the House of Lords has not been carried into effect, this only would follow, namely, that the object of their Lordships' rule had not been attained, because their [344] Lordships had not so framed the Act as to give effect to their rule.

Dec. 21. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case there are two demurrers; one by Mr. Samuel Saunderson Hall, and the other by seven of those nine persons who were parties to transactions which are termed fraudulent in the bill.

Now the cases of the demurring parties differ in this respect, that Mr. Hall is said not to be a director, and, therefore, the same relief cannot be administered as against him as can be against the seven. But it appears to me that, as to the seven, in respect of their being directors, relief certainly can be administered; I mean that relief which is asked, that they may be restrained from taking any further or other steps to declare or procure the forfeiture of the Plaintiff's 20 shares.

It appears that there was a deposit of £1 paid; and a call was subsequently made by the directors for £5 per share; and that was paid. Then another call was made in October 1839 for £2 per share; and that call was paid to the bankers of the company: and though it is true that, under the Act of Parliament, in case a call on a share had not been paid the directors might proceed to declare the share to be forfeited; yet in a case where, before any declaration of forfeiture is made, the whole amount of what was due in respect of the call has been paid, and where, as this bill states, no offer has been made to repay the amount, this Court would not allow the directors to proceed to declare the share forfeited; because it is contrary to common equity [345] and to plain sense and justice that the parties should receive and keep in their possession the amount of the call, and, after that, proceed to declare the share to be forfeited. I think, therefore, that, if there was nothing else in the case, the demurrer of the seven Defendants must be overruled.

But, inasmuch as the case of Mr. Hall stands distinguished from the case of the other Defendants who have demurred, I have got to consider, with respect to him, what will also apply to them, namely, the general equity of the case.

I must preface what I have to say on that subject by observing that the word *fraud* is a term which, in fairness, is hardly applicable to the transactions in question: and I must also observe that there is a little difficulty, upon the face of this bill, in

determining the fact whether there were such memorandums as are mentioned of the 4th and 5th of July 1837. It is stated, in the first instance, that it is alleged that there were such papers; which is no allegation of their existence. Then it is alleged that the Defendants pretend that there were such papers; and the contrary of that pretence is charged to be true. I observe, however, that the bill states that the memorandums were fraudulent, and that they were made and entered into for a fraudulent purpose. Now they could not have been fraudulent or have been made and entered into for any purpose, unless they had been made. They must have existed to have had any character at all: and, moreover, the bill prays that the two memorandums, dated respectively the 4th and 5th of July 1837, and all the acts, &c., by which it had been attempted to give effect to them or to the trusts thereby attempted to be created, might be declared [346] to be illegal, fraudulent and void; which they cannot be unless they exist.

I take it then as a fact which is represented on this bill, with sufficient plainness, that, for the purpose of enabling the bill for forming the company to pass through the House of Lords, the nine gentlemen did procure further subscriptions to the amount of 9000 shares; of which each of those nine gentlemen took 1000 shares. Whether they subscribed the Parliamentary deed or not is quite immaterial. They became the subscribers for the shares; and admitting that they did take the shares in trust for the company, what then? they were the owners of the shares; and, if they were trustees for the company, they were liable still, by the very provisions of the Act, to all those operations which were to be performed, by virtue of the Act, by those who held shares; and though they might, like all other trustees, have a right to be reimbursed by their *cestuis que trust* all expenses they incurred in the execution of their trusteeship, they were primarily liable. It is quite impossible to read this Act of Parliament without seeing that it was the intention of the Legislature that those who became shareholders should, all of them, pay rateably.

Then what was done? The parties do not seem to me to have managed their case in the way in which it ought to have been. As I understand the case, even at this day, there has been no transfer of those shares by those nine subscribers. The consequence of which is that, let them state what they please with respect to an acknowledgment of the trust, and with respect to an intention to exonerate them from any liability as trustees, under the provisions of the Act they were clearly [347] liable, when calls were made by the directors on other shareholders, to have calls made upon them. For this Court never would allow the directors of a company so to proceed as to require some shareholders to pay a deposit and calls, and not to require others to make similar payments. It is quite obvious to me that no fraud was intended; and that the thing really meant was a benefit to all the subscribers, namely, that the subscribers should get the Act of Parliament they wished for. But, nevertheless, as that purpose was accomplished by these nine gentlemen becoming shareholders of 1000 shares each, my opinion is that there has been an error which this Court will set right, namely, that, when the directors thought proper to make the calls as they did, they stopped short of that which was their duty, and that they ought to have gone on to direct the same sums to be paid upon each of those shares as had been directed to be paid upon the other shares which were held by those who were called the registered shareholders. Therefore it is evident that, in whatever manner it is to be done, this Court will rectify the error that has been made, and will take care that all the shareholders shall be put upon the same footing with respect to the liability to pay calls.

My opinion, therefore, is that there is a plain equity for the Plaintiff to be relieved; and on that ground the demurrers must be overruled.

My opinion also is that the bill could not have been constructed otherwise than as it is; and that the objection made for want of parties is answered upon the face of the bill. For the bill avers that there are upwards of 100 other members of the company, and that it would be impossible to make all of them parties. Therefore, [348] according to the decisions which have been made on the point, that objection cannot prevail: and the consequence is that, on both grounds, the demurrers must be overruled.

[348] LISTER v. PAYN. Dec. 1, 1840.

Ship. Lien. Set-off. Captain.

A ship at sea was mortgaged by the owner to the Plaintiff. The ship having become unseaworthy, it was condemned and sold in a foreign port. The purchaser drew, upon a person in England, a bill of exchange for the proceeds, and indorsed and delivered it to the captain. The captain claimed a lien upon, or a right of set-off against, the amount of the bill, for disbursements which he had made on account of the ship, and threatened to bring an action against the acceptor for the money due on the bill. The Court granted an injunction to restrain the action.

A mortgage of a ship is good as between the mortgagor and mortgagee, although the particulars of the mortgage are not endorsed on the certificate of registry, as required by 3 & 4 Will. 4, c. 55.

On the 10th of March 1837 James Waddle, a merchant in London, mortgaged a ship, of which he was owner, to a joint stock bank at Liverpool, for securing £6000 due from him to the bank. On the same day the mortgage was duly registered; but the ship being then at sea, the particulars of the mortgage were not endorsed on the certificate of her registry, nor was such endorsement made afterwards; although the ship returned to England in August 1838. (See 3 & 4 Will. 4, c. 55 (for the registering of British vessels), sect. 34. See also sects. 32, 33, 35, 36, 42 and 43.) Waddle, after the ship's return, sent her on a voyage to Calcutta, where she arrived safely; and afterwards, having obtained a cargo, she set sail for England. On her homeward voyage she encountered severe weather, and sustained considerable damage; in consequence of which she put into the Mauritius, where she was con-[349]-demned as unseaworthy, and sold; and her cargo was sent home in another vessel. The net proceeds of the sale of the ship amounted to £957: and the purchasers drew upon the Defendant Dunbar, who was resident in England, a bill of exchange for that sum, and endorsed and delivered it to the Defendant Payn, the captain.

On the 23d of November 1839 a fiat in bankruptcy issued against Waddle, under which he was declared a bankrupt.

Payn arrived in England in March 1840; and, being about to bring an action against Dunbar for the amount of the bill of exchange, the bill in this cause was filed by the bank, in the name of one of their public officers, against him, Dunbar and Waddle's assignees, for an injunction to restrain an action. Payn, by his answer, claimed a *lien*, on the amount of the bill of exchange, for disbursements which he had made on account of the ship at and during her voyage to Calcutta.

A motion was now made for the injunction.

Mr. Knight Bruce and Mr. Rolt, in support of the motion, said that, notwithstanding the particulars of the mortgage were not endorsed on the certificate of the ship's registry, yet the mortgage was good as between the mortgagor and the mortgagee; for the 35th sect. of 3 & 4 W. 4, c. 55, enacted that so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, should have been entered in the book of registry as therein-before directed, the said bill of sale or other instrument [350] should be valid and effectual to pass the property thereby intended to be transferred, as against all persons and to all intents and purposes, except such subsequent purchasers and mortgagees who should first procure the indorsement to be made on the certificate of registry: that the lien claimed by Payn was for ordinary disbursements on account of the ship: but the captain of a vessel had no lien on it even for necessary repairs, although, if the repairs were made abroad, he might hypothecate the vessel for the expense incurred; *Hussey v. Christie* (13 Ves. 594; and 9 East, 426); much less had he any lien for ordinary disbursements on account of the vessel.

Mr. Jacob and Mr. Anderdon, for the Defendant Payn, said that although the captain of a vessel might have no lien on it for ordinary disbursements, yet, if it was sold, he had a right to set off the amount of such disbursements against the proceeds of the sale: that a solicitor had no lien for his bill of costs upon his client's freehold

estate; but, if the estate was sold and the purchase-money was received by the solicitor, he would have a right to set off the amount of his bill against it; that although the particulars of the mortgage could not be endorsed on the certificate of registry at the time when the mortgage was made, owing to the ship being then at sea, yet the endorsement might have been made on her return to this country in August 1838: that no notice of the mortgage was given to Payn or any other person; and, as there was no endorsement on the registry, Waddle appeared, to all the world, to be the sole owner of the ship, and, consequently, it remained in his order and disposition at the time of his bankruptcy: that the captain of a ship was the agent [351] of the owner; and an agent was responsible to no one but his employer. *Stephens v. Badcock* (3 Barn. & Adol. 354).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The substantial question in this case is whether the bill of exchange is sufficiently identified to enable this Court to say that, for the purposes of the present application, it represents the ship that was sold.

The facts of the case are certainly stated somewhat differently in the bill and in the answer: but, although there is some variation between them, I think that enough appears to justify me in saying that the bill does fairly represent the ship; and that this Court ought to interfere so as to prevent the money due on the bill from getting into the hands of Mr. Payn.

I shall, therefore, grant the injunction, and give liberty to Mr. Dunbar to pay the principal and interest due on the bill into Court.

[352] *In re WAINSWRIGHT. Ex parte SLADE. Dec. 9, 13, 1842.*

[S. C. reversed, 1 Ph. 258; 41 E. R. 630; 13 Sim. 260.]

Construction of 3 & 4 Will. 4, c. 74. Fines and Recoveries. Protector of a Settlement.

The Court of Chancery is not the protector of a settlement where the tenant for life is a married woman whose husband has been convicted of felony, and the life-estate is not settled to her separate use.

The question in this case was whether the Court of Chancery was the protector of a settlement where the tenant for life was a married woman whose husband had been convicted of felony, and the life-estate was not settled to her separate use. See 3d & 4th Will. 4, c. 74 (for the abolition of fines and recoveries), sects. 22, 24, 33 and 91.

THE VICE-CHANCELLOR [Sir L. Shadwell], after having taken time to consider the question, said: I have read through the Act very carefully; and I think that in this particular case, where the husband alone has been convicted of felony, the 33d section does not constitute the Court of Chancery the protector.

I see nothing whereby I can escape from the conclusion that, in order to constitute the Court of Chancery the protector, both the husband and wife must be convicted of felony.

Mr. Walford appeared in support of the petition.

[353] *BROOM v. SUMMERS. Dec. 9, 1840.*

[S. C. 10 L. J. Ch. 71; 5 Jur. 240. Cf. *General Assembly of Free Church of Scotland v. Lord Overtoun* [1904], A. C. 515.]

Dissenters. Trust. Chapel. Meeting-House.

A lease of a meeting-house was granted in trust for a congregation of Protestant Dissenters, who then met in a house belonging to J. A. in the town of S. The congregation was then in connection with the Secession Church of Scotland, and, consequently, professed the same doctrines and adopted the same form of worship, government and discipline as that church. Some years afterwards, the minister

and a large majority of the congregation separated from that connection and joined another religious body, which professed the same doctrines and used the same form of worship, but not the same form of government and discipline as the Secession Church; they, however, retained possession of the meeting-house. Held that, on their separation, they ceased to be objects of the trust; and, therefore, were not entitled to keep possession of the meeting-house.

The bill stated that in June 1808 a congregation of Protestant Dissenters of the Presbyterian persuasion, who had been in the habit of assembling together for the purpose of performing their religious worship in a house at North Sunderland, in Northumberland, belonging to one John Anderson, agreed with Anderson to take a lease from him of a small piece of ground in North Sunderland, for the purpose of building a chapel thereon for the purpose of their worship: that, accordingly, an indenture, dated the 22d of June 1808, was made between Anderson of the one part, and James Young, John Crow, John Summers, Ralph Lamb, John Watson, John Robinson and James M'Dougle (*in trust for themselves and the rest of the congregation of Protestant Dissenters of the Presbyterian persuasion who then occasionally met, in a house belonging to Anderson at Sunderland aforesaid, for public worship*) of the other part, and thereby Anderson demised to the parties of the second part a piece of ground at the west end of Sunderland, for 99 years, upon trust that the lessees should hold the same in trust for themselves and the rest of the said congregation of Protestant Dissenters; and that the premises should, during the term, be used as a meeting-house or place of worship for the said congregation of Protestant Dissenters, and for no other [354] use. The bill further stated that money was raised, partly by a loan and partly by a subscription amongst the members of the congregation, aided by the contributions of some persons who were not members, for the purpose of building the chapel; and that, accordingly, a chapel was built on the piece of ground: that it was usual with congregations of Protestant Dissenters of the Presbyterian persuasion to join themselves to some presbytery; and that, some time during the building of the chapel, the congregation joined the Associate Presbytery of Coldstream; and that, a few years afterwards, they joined the United Associate Presbytery of Coldstream and Berwick: that, in 1815, the congregation determined on building a dwelling-house for their minister, and for that purpose they agreed with one Wake to take of him a lease of a piece of ground in North Sunderland; and, accordingly, an indenture, dated the 25th of October 1815, was made by Wake of the one part, and James Young, James M'Dougle, and Roderick Treasurer (*in trust for themselves and the rest of the congregation of Protestant Dissenters of the Presbyterian persuasion who then assembled for public worship in a meeting-house situate in Sunderland, which had been then lately built upon a piece of ground granted by Anderson, by the lease of the 22d of June 1808*) of the other part; and thereby Wake demised to the parties of the second part a piece of ground, situate at the north-east end of Sunderland, for the purpose of building a house upon it for the use and occupation of the minister for the time being of the said congregation of Protestant Dissenters, for the term of 91 years, in trust for themselves and the rest of the said congregation of Protestant Dissenters, and in order that the premises should be used as a dwelling-house for the minister for the time being of the said congregation of Pro-[355]-testant Dissenters: that, by means of money raised as before mentioned, a dwelling-house was built on the last-mentioned piece of ground for the minister for the time being of the said congregation: that, in July 1833, the Plaintiff was elected by the congregation, and had ever since been *and still was* the minister of the said congregation; and, in April 1834, he was ordained minister thereof, and, as such minister, he thereupon became and had ever since been *and still was entitled to the exclusive use of the chapel* for the purpose of doing duty and performing religious worship therein for the said congregation; and that he also thereupon became and had ever since been *and still was entitled as such minister to reside in the dwelling-house*. The bill then stated that, in 1835, the Plaintiff and some of his flock were desirous that the treasurer of the congregation and the collectors of the pew rents should give an account of the money received by them on account of the chapel; and the congregation accordingly called upon them to give such account, but they refused so to do; whereupon they were

suspended from communion with the congregation, for conduct inconsistent with the rules of the society: that the treasurer and collectors applied to the Presbytery of Coldstream and Berwick, who received some allegations reflecting on the Plaintiff and summoned him to their bar and reprimanded him; whereupon he appealed to the Synod, who expressed their disapprobation of the proceedings of the Presbytery, found the Plaintiff's protest to be well-founded, and appointed the record in the minutes of the Presbytery to be deleted: that the Presbytery having acted towards the Plaintiff in manner aforesaid, he and the congregation became desirous of joining themselves to another Presbytery; and, accordingly, at a congregational meeting regularly called, it was agreed by the Plaintiff and [356] 330 of the members and seat-holders of the congregation (which then consisted of 412 members and seat-holders), that the Plaintiff and the congregation should leave the said Presbytery and Synod and join themselves to another Protestant Dissenting Presbytery, as they were entitled to do; and, accordingly, the Plaintiff and such of his congregation as then remained with him, being in number 330 and making four-fifths of the congregation, left the Presbytery of Coldstream and Berwick, and joined the Presbytery of the North-West of Northumberland: that that Presbytery *held precisely the same religious principles and doctrines, used precisely the same mode and form of worship, had precisely the same form of government, and administered precisely the same discipline, in every respect, as the Presbytery of Coldstream and Berwick*, and that the Plaintiff and his congregation, or such four-fifths thereof as joined the Presbytery of the North-West of Northumberland, continued to hold after they joined the last-mentioned Presbytery, and had ever since held and did then hold *precisely the same religious principles and doctrines, and continued to use precisely the same mode and form of worship, and to have precisely the same form of government, and to administer precisely the same discipline in every respect, as they did when they were united to the Presbytery of Coldstream and Berwick*: that the Plaintiff could not be removed from his office of minister of the chapel, except by the congregation or the Presbytery of the North-West of Northumberland; but no attempt had been made to remove him by either of those bodies: that he had always done his duty in every respect as minister, and was entitled to continue to do duty in the chapel and to reside in the dwelling-house: that the treasurer and collectors and about 80 of their friends altogether left the said congregation, and, [357] about two years since, hired a place of worship in North Sunderland; and they, or the Presbytery of Coldstream and Berwick, appointed a minister to do duty for them therein: that the terms for years granted by the deeds of June 1808 and October 1815 were then vested in the Defendants Summers and M'Dougle, as trustees for the congregation, of which the Plaintiff was such minister as aforesaid, and for no other use or purpose; that M'Dougle was not a member or seat-holder of that congregation, and Summers had seceded therefrom, and joined the congregation meeting in the other place of worship; that they, having the legal interests in the chapel and dwelling-house vested in them, resolved to turn the Plaintiff out of possession thereof, and in Easter term 1840 brought two actions of ejectment against him for that purpose; that he had no defence to the actions at law, and that he could only be relieved therefrom, in a Court of Equity, by having the Defendants removed from their situation of trustees of the leases, and new trustees thereof appointed. The bill accordingly prayed for the removal of the Defendants and the appointment of new trustees, and for an injunction to restrain the prosecution of the ejectments.

It appeared from the answer that the congregation became connected with the Secession Church of Scotland in September 1807. The answer admitted that the Presbytery of the North-West of Northumberland held precisely the same principles and doctrines, and used the same mode and form of religious worship, as the Presbytery of Coldstream and Berwick, but denied that it had the same form of government; for that the Presbytery of Coldstream and Berwick belonged to and had the same form of government as the [358] Secession Church of Scotland, which was by kirk sessions, presbyteries and synods. Whereas the Presbytery of the North-West of Northumberland had no connexion whatever with any synod or regularly constituted church, but was merely a voluntary society recognizing no superior, and free from the control of any system of church government properly so called. The answer added that the Defendants could not set forth whether the Presbytery of the North-

West of Northumberland administered the same discipline as the Presbytery of Coldstream and Berwick, or whether it exercised any discipline.

Mr. Jacob and Mr. Purvis, for the Plaintiff, now shewed cause against dissolving the injunction. It is a matter wholly immaterial and purely voluntary, whether a congregation of Presbyterians belongs to one presbytery or to another. The congregation for whose benefit the leases were granted is described in the deeds, not as connected with any particular presbytery, or as subject to any particular visitatorial power; but as a congregation of Protestant Dissenters of the Presbyterian persuasion. The congregation which now attends the chapel answers that description in every particular. It has changed neither its doctrines nor its form of worship, but only its presbytery, which is a matter wholly immaterial to the object of the trust. The congregation and not the Presbytery are the *cestuis que trust*; and the change of the Presbytery does not alter the identity of the congregation.

Mr. Purvis said that the answer admitted that a very large majority of the congregation adhered to the Plaintiff; and that its doctrines, principles and form of [359] worship were the same as those of the Coldstream and Berwick Presbytery. [THE VICE-CHANCELLOR. The answer does not admit that the congregation has the same church government and discipline (which are matters of great importance with Presbyterians) as it had when it was connected with the Presbytery of Coldstream and Berwick.]

Mr. Knight Bruce and Mr. S. Atkinson appeared for the Defendants; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The only question is whether, upon the answer of the Defendants, it can be taken that those persons who have seceded from the ecclesiastical jurisdiction exercised over the congregation as it existed at the time when the lease of the chapel, or rather of the piece of ground on which it was built, was granted, can be said to be *the* congregation.

The answer states that the form of church government adopted by the Church of which the Presbytery of Coldstream and Berwick is a member is by kirk sessions, presbyteries and synods; that the kirk sessions consist of the minister and certain members of the congregation called elders, who have jurisdiction in spiritual matters only over the congregation, and manage its internal affairs: that the Presbytery is composed of the ministers of a district together with an elder from each session, and exercises jurisdiction over the district from which the members are selected; and that the synod (to which an appeal lies from the presbyteries) is formed by an assembly of all the presbyteries of the Secession Church, and its jurisdiction extends over the whole of them. And it seems quite clear, on the face of the [360] answer, that, at the time when the lease was granted, the congregation therein referred to was governed by session discipline.

No question is raised about doctrine.

It appears that Mr. Broom and several other persons belonging to his congregation have severed themselves from that mode of church government; and I cannot think that he and those persons who take part with him do compose the congregation which was had in view at the time when the lease was granted.

The language of that instrument is very remarkable. It is made between Mr. Anderson and certain other persons, in trust for themselves and the rest of the congregation of Protestant Dissenters of the Presbyterian persuasion who then occasionally met at a particular house; and it appears from the answer that that congregation of Protestant Dissenters of the Presbyterian persuasion was (to use the words of the answer) then congregated into the Secession Church. Now Mr. Broom and the persons who adhere to him have altogether seceded from that church; and consequently they do not answer the description of the congregation for whose benefit the lease was granted.

There being then no trust subsisting as to that lease, of which Mr. Broom and his adherents are the objects, the order for dissolving the injunction must be made absolute.

[361] KENT v. BURGESS. WINKWORTH v. BURGESS. WINKWORTH v. BURGESS.
Dec. 12, 1840.

[S. C. 10 L. J. Ch. 100 ; 5 Jur. 166. See *Roskell v. Whitworth*, 1870, L. R. 5 Ch. 464.]

Marriage Abroad. Practice. Issue. Reference. Ward of Court. Settlement.

A marriage between a British subject domiciled in England, and a female ward of Court, was celebrated in the presence of the British consul and in the English church at Antwerp, by a clergyman of the Church of England who had been appointed chaplain to the church and was paid by the British Government. Held, that the marriage was invalid, as certain ceremonies prescribed by the law of Belgium had not been observed.

The Court, on an interlocutory application, will direct a reference or issue to ascertain a fact on which the title of the parties depends.

Whether the parties ought to be bound by the finding, at the hearing of the cause.
Qu.

A. married a female ward of Court without consent of the Court, and had been guilty of great contumacy in other respects. The Court directed the ward's fortune to be settled so as to exclude A. from taking any interest in it.

Richard Kent, late of Ramsgate, in Kent, by his will, dated the 6th of August 1828, gave the residue of his personal estate and of the produce of his real estates, which he directed to be sold, to trustees in trust to apply the income for the maintenance and education of the Plaintiff, Marianna Kent (an illegitimate child, whom he described as his adopted daughter, who then lived with him and who was born at Ghent in Flanders on the 19th of October 1820), until she should attain 21 or marry with the consent of his trustees, and on her attaining that age or being married, to assign the capital to her; but, in case she should die under 21 or be previously married without such consent as aforesaid, to stand possessed of the property in trust for his three nephews for their lives, and after their deaths, for their children absolutely.

[362] In January 1837 the testator made a codicil, by which he left his residuary estate to the Plaintiff, and in case of death before she attained 21, to two of his grand-nephews. The codicil, however, was not duly attested.

The testator died in January 1837.

In March following the Plaintiff filed the bill in *Kent v. Burgess*, praying that the trusts of the will might be performed under the direction of the Court, that an allowance might be made for her maintenance and education, and that some person might be appointed her guardian. In August 1837 the Court appointed the trustees of the will to be the guardians of the Plaintiff, and made them an allowance for her maintenance and education. In February 1838 the Plaintiff eloped with Stephen Winkworth from the house of one of her guardians at Ramsgate; but was shortly afterwards brought back. Winkworth was committed to the Fleet, under an order in the cause obtained by the guardians; but was shortly afterwards released, on his signing an undertaking not to have any further communication with the Plaintiff. However, in May 1838, he prevailed on the Plaintiff to elope with him again, and to accompany him to Antwerp in Belgium; and in July following a marriage ceremony, according to the rites of the Church of England, was performed between them at the English church at Antwerp by the chaplain of the church (a clergyman of the Church of England in full orders), and in the presence of the British consul there. A few days before that marriage, the cause of *Kent v. Burgess* was heard for further directions. In August 1838 the Plaintiff, by the name and description of "Marianna Winkworth, the wife of [363] Stephen Winkworth," filed a bill of revivor and supplement, by her next friend, stating that she had intermarried with, and was then the wife of the Defendant, S. Winkworth, and praying (amongst other things) that it might be referred to the Master to approve of a proper settlement on her in respect of the property bequeathed to her by the testator. In February 1839 the Plaintiff presented

a petition in the two causes, stating her elopement and marriage; that she was then cohabiting with Winkworth as her husband at Boulogne in France; that she was pregnant, and that she entertained doubts as to the validity of the marriage, and praying that a second marriage might be solemnized between her and Winkworth, and that the trustees might be at liberty to consent to it. In March 1839 the petition was heard, and Winkworth appearing by his counsel and undertaking to execute such settlement as the Court might direct, it was ordered that the trustees should be at liberty to consent to the proposed marriage; but the order was to be without prejudice to any question in the causes.

The trustees having given their consent, the parties were married at Barking, in Essex, in April 1839; and in May following they were again married, with the consent of the trustees, at a church in Southwark. In June 1839 an order was made on the petition of the Plaintiff, by which it was referred to the Master to inquire and state whether a valid marriage had been had between the parties, and, if so, when and where it took place.

Winkworth was taken into custody under an order pronounced shortly after the second elopement; but soon afterwards was discharged, on giving security to appear [364] in Court personally whenever the Lord Chancellor should order him to do so.

In November 1839 the Plaintiff, by her next friend, filed another bill of revivor and supplement, by her last-mentioned name and description, stating the third marriage, and praying (amongst other things) for a reference to the Master to approve of a proper settlement of her property.

In July 1840 the Master, in obedience to the order of June 1839, reported that he saw no reason to doubt that either of the two last marriages, in the absence of the other of them was valid, provided the marriage at Antwerp was void; wherefore he had proceeded to examine the circumstances attending that marriage. The Master then found, from the documents and evidence that had been laid before him, that Winkworth was a natural-born British subject; that the Plaintiff was born at Ghent, in Flanders, on the 19th of October 1820, and was the illegitimate child of the testator, (1) and was adopted, maintained and educated by him until his death, and that afterwards she was maintained out of his property until her second elopement; that the Code Civil was the law in force in Belgium; and that no marriage contracted in that country could be valid by reason of there having been a religious ceremony only; but that a civil ceremony and a variety of other formalities, all of which had been omitted, were requisite; moreover, that neither of the parties was of the age required by the Belgic law to enable them to [365] contract matrimony without the consent of their parents or guardians; and, consequently, that the Antwerp marriage was invalid, *according to the lex loci*. The Master, however, was of opinion that that marriage was valid *according to the subsisting English law*; because it would have been a good English marriage before the passing of the 26th Geo. 2, c. 33 (the late marriage Act); and that Act was repealed by the 4th Geo. 4, c. 76 (the present marriage Act), the enactments of which were expressly confined, by sect. 33, to marriages in England.

The Master then found, at the request of the Plaintiff's solicitor, that there was no ambassador from the British Court accredited at Antwerp, nor any British factory there; and that the clergyman who solemnised the marriage had been appointed to officiate in the English church at Antwerp, by the British Secretary of State for Foreign Affairs, on the recommendation of the Bishop of London.

Before either of the supplemental suits was heard, three petitions in the original supplemental suits came on to be heard.

One was presented by the trustees of the will, and prayed, amongst other things, that the report might be confirmed, so far only as the Court should think fit; and, especially, if the Court should think fit, that it might be confirmed so far only as it found that a valid marriage had taken place between the Plaintiff and Winkworth; and that it might be referred to the Master to approve of a proper settlement on the Plaintiff and her issue. Another was presented by the Plaintiff, and prayed for the

(1) It was admitted, in the progress of the argument, that both the testator and the Plaintiff's mother were British subjects.

confirmation of the report so far [366] as it found the Barking marriage valid, and for a reference to the Master to approve of a proper settlement. The remaining petition was presented by one of the Defendants, and prayed for the confirmation of the report so far as it found the Antwerp marriage valid.

Mr. G. Richards and Mr. Loftus Wigram, for the trustees. Our clients do not wish to take any part in discussing the question whether the Master was right or not in finding that the Antwerp marriage was valid. If the Court shall think that the Master was right in that respect, the consequence will be that, as that marriage was had without the consent of the trustees, part of the property to which the Plaintiff would have been entitled, if she had married with the consent of the trustees, will go over. All that the trustees ask is that a proper settlement may be made of the Plaintiff's property, whatever it may be.

Mr. Wigram, for some of the Defendants who were entitled under the gift over in the will. The Court is now asked to decide, on petition, which (if any) of the three marriages is valid, there being supplemental bills filed for that purpose: and I submit that the Court can not regularly decide that question, which is a most important one, before the supplemental suits are heard.

THE VICE-CHANCELLOR. The best way will be for me to hear the Plaintiff's petition opened. I shall then understand more of the case and be better able to deal with the question that has been raised.

Mr. Knight Bruce and Mr. Jacob, for the Plaintiff. The Defendants, for whom Mr. Wigram appears, [367] were parties to the order under which the report to which the petitions relate was made. They have never appealed from that order; they might have gone in before the Master under it. But they now object to the Court's dealing with the report made upon a reference to which they were parties.

By the codicil all testator's residuary estate is given to the Plaintiff, whether she marries with consent or not; but, as that codicil was not duly attested, it does not alter the disposition in the will, so far as the produce of the real estate is concerned; and, therefore, it is important to know whether the Antwerp marriage, which was had without the consent of the trustees, was valid or not; for if it was valid, so much of the residuary estate as consists of the produce of real estate is gone over under the will. If the Antwerp marriage was invalid, then the Barking marriage, which all parties admit was had with consent, was valid, and the Plaintiff is entitled to have the whole of the testator's residuary estate, consisting of personalty and the produce of the realty, put in settlement.

The conclusion which the Master has come to respecting the Antwerp marriage is a very singular one; for he is of opinion that a marriage may be had according to the *lex loci*, and yet good according to the law of another country. If, indeed, there had been either a British ambassador or a British factory at Antwerp, and the marriage had been celebrated either in the chapel or in the house of the ambassador, or in the factory, then by 4 Geo. 4, c. 91, the marriage would have been good, though not solemnised according to the *lex loci*; (1) [368] but the Master has found that there is no British ambassador accredited at Antwerp, nor any British factory established there. Consequently the marriage, in order to be good, ought to have been celebrated according to the Belgian law. The error into which the Master has fallen has arisen from his supposing that the marriage Act of Geo. 2 had anything to do with marriages solemnized abroad. The truth is that both that Act and the Act of Geo. 4 exclude foreign countries from their operation: and, consequently, the validity of a marriage celebrated between subjects in a foreign country has been subject to the same consideration since the passing of those Acts as it was before; that is, whether it was had according to the law which regulates marriages in that country. Of whatever country the parties who wish to contract marriage are natives, they must effect the relation of husband and wife according to the law of the country in which they happen to be at the time; otherwise it is no marriage at all. *Scrimshire v. Scrimshire* (2 Haggard's Consist Rep. 395); *Middleton v. Janverin* (*Ibid.* 437); *Lacon v. Higgins* (3 Starkie's N. P. C. 178); *Swift v. Kelly* (3 Moore's Privy Coun. Cases, 257). It is true that the marriage was solemnized in the presence of the British consul at

(1) See also 4 Geo. 4, c. 67; and 3 & 4 Will 4, c. 45.

Antwerp; but consuls have not the same character or the same privileges as ambassadors have. They are appointed merely for the protection of trade.

Lastly, Miss Kent was illegitimate, and was born at Ghent, consequently she was a Belgian subject at the time of the marriage; for an illegitimate child cannot claim the country of its parents. There was, therefore, [369] a stronger reason than has existed in any former case for the parties complying with the law of the country in which they were married.

Mr. West, for the Defendant, Stephen Winkworth. By the law of Belgium, foreigners cannot intermarry until they have resided six months in that country. Now it appears, from our affidavits, that the parties had not resided in Belgium for anything like that length of time when they intermarried. Mr. Winkworth, too, was under 25 at the time; and therefore, according to the same law, he was incapable of contracting marriage without the consent of his parents. Besides, the civil ceremony was omitted, and other formalities prescribed by the Belgic law were not observed; and, although it is true that, in cases where there is an insuperable difficulty in complying with the *lex loci*, that law may be dispensed with, yet no such difficulty existed in this case; more especially as there was a British ambassador at Bruxelles, which is only a short distance from Antwerp; so that if the parties had gone only a few miles further they might have contracted a marriage which would have been indisputably good according to the laws of England. *Dalrymple v. Dalrymple* (2 Hagg. Cons. Rep. 62), *Scrimshire v. Scrimshire*; *Middleton v. Janverin*; *Herbert v. Herbert* (*Ibid.* 272). In this last case it was not even suggested that the marriage was good by the law of England as it existed before the Act of Geo. 2 was passed: but it was established to be a valid marriage because it was celebrated according to the law of Sicily where it took place.

[370] Besides, the Plaintiff was a Belgian and not a British subject; for she was an illegitimate child, and born at Ghent: and being under age, she could not have gained a settlement in this country. *Whitechapel v. Stepney* (Carthew, 433; S. C. Burr. Sett. Cases, 487).

With respect to the settlement which ought to be made, I beg to refer your Honour to what was said by Lord Eldon, C., in *Bathurst v. Murray* (8 Ves. 74). That was a case of very gross contempt. The young lady was only 16. She was entitled to a very large fortune; and there was great inequality of condition between her and her husband; the latter being the son of a miller and a silversmith's apprentice: and yet Lord Eldon disapproved of a settlement by which the whole of the lady's fortune was settled on her and her children and relations, and said that the husband ought to have £150 a year during the coverture, with a power to the wife to increase it to £300 a year by her will.

Mr. Wigram and Mr. Baily, for some of the parties entitled under the gift over in the will, insisted that the Plaintiff was a British subject, as it had been admitted that her mother was an Englishwoman (Story, Conflict. of Laws, p. 44): and that as the question as to the validity of the marriages was the question upon the decision of which the Plaintiff's title to the testator's residuary property depended, it could not be decided on an interlocutory proceeding, or before the supplemental causes were heard. [THE VICE-CHANCELLOR. The order of June 1839, by which the Master was directed to inquire into and report as to the validity [371] of the several marriages, was made under these circumstances. An infant's bill had been filed; and then a bill of revivor and supplement was filed, in which the infant described herself as the wife of Stephen Winkworth. Obviously, therefore, it was necessary to know whether she did sustain that character or not. Independently of any question about property, the Court must know whether the infant has the character in which she professes to sue. Thus, in Mr. Bowes's case (2 J. & W. 541), where that gentleman thought proper to file a bill stating himself to be Earl of Strathmore, Lord Eldon said that it was absolutely necessary before the case proceeded to have that fact ascertained; and, accordingly, his Lordship directed that proceedings should be taken in the House of Lords for the purpose of determining that question. Besides, there was another reason which induced me to direct the reference, and that was that where the Court sees that there is a question which must be determined sooner or later, it has thought it right to direct an interlocutory proceeding in the first instance, which will have the

effect of determining the question. That was the course adopted by Lord Eldon in *Golden v. Ulyate* (not reported). The circumstances of that case were as follows: the Plaintiff claimed to be the next of kin of an intestate, and filed a bill for an account of the intestate's estate. The Defendant insisted that the Plaintiff was illegitimate. Upon a motion being made for a receiver, in 1809, his Lordship directed an issue to try the question of legitimacy, although it was strongly urged that the Court was acting irregularly, and ought not to direct such a question to be tried until the hearing. But Lord Eldon said that the question must be tried sooner or later, and [372] that he would not wait until the hearing, but would direct the issue in the first instance. (See *Fullagar v. Clark*, 18 Ves. 481.) In *Gompertz v. Ansdell* (4 Myl. & Cr. 449), Lord Cottenham, C., on an interlocutory application, directed an issue to be tried for the purpose of ascertaining whether a person named Henry Gulling Isaac, through whom some of the Defendants claimed, was born in wedlock or not. Upon the trial of the issue the jury found a verdict the effect of which was that H. G. Isaac was not born in wedlock. The parties, however, went into evidence in the cause in support of their title; and, when the cause came on to be heard, the Lord Chancellor held that they had a right so to do, and that the verdict was not conclusive: and his Lordship directed another issue to be tried for the purpose of determining the fact in dispute. On the trial of that issue, the jury found in favour of the legitimacy of H. G. Isaac. A motion was afterwards made for a new trial, which his Lordship granted. (1) [THE VICE-CHANCELLOR. I have no doubt that it was right in *Gompertz v. Ansdell* to direct at the hearing that the issue granted on the interlocutory application should be tried over again. But in *Golden v. Ulyate* Lord Eldon, in 1811, refused a motion for a new trial: and, when the cause was heard in 1820, the Defendant asked for another issue but his Lordship refused to grant it: so [373] that he abided himself, and made the parties abide by the verdict found on the trial of an issue directed on an interlocutory application. (See 11 Sim. 377.) If the order of June 1839 was wrong, why was it not appealed from?] We think that it was proper to direct the inquiry, but not to bind the rights of the parties by the Master's finding: for, at the hearing, we shall be clearly entitled to have the question again inquired into, and to bring forward evidence in addition to that which appears on the Master's report.

The Antwerp marriage was solemnized by a minister of the Church of England, in a chapel, and in the presence of the British consul: therefore, the 4th Geo. 4, c. 91, not only is not (what the counsel on the other side have assumed it to be) a legislative declaration that the marriage in question was invalid; but is a legislative declaration to the contrary: for it declares that marriages so solemnized not only are but always have been valid. It is, therefore, incorrect to say that marriages had in a foreign country were invalid, unless they were celebrated according to the law of that country; the Legislature itself having expressly declared the contrary. The Act commences with reciting that it was expedient to relieve the minds of His Majesty's subjects from any doubt concerning the validity of marriages of a certain character; and then it proceeds to declare the doubt to be unfounded. *Ruding v. Smith* (2 Hagg. Cons. Rep. 386; see the judgment). We submit that the Court cannot, in this stage of the cause and without much more information than it now possesses, decide that the marriage in question is not good; and that a [374] further inquiry should be directed in order to ascertain whether it is not one of those marriages which Lord Stowell, in his judgment in *Ruding v. Smith*, and the Legislature in the Act of Parliament last referred to, shew may be valid though not celebrated according to the law of the country. [THE VICE-CHANCELLOR. I do not see anything in the Master's report which tends to shew the character which the church at Antwerp bore.] The clergyman who performed the marriage ceremony was appointed and paid by the Government of this country; and so was the consul. [THE VICE-CHANCELLOR. Lord Stowell founds his judgment in *Ruding v. Smith* upon the

(1) In *Gompertz v. Ansdell*, the ground on which Lord Cottenham directed the issue to be tried a second time 'appears to have been that the case had been so varied by the evidence in the cause that the Court could not say that there had been a finding by a jury on the case as it then existed. See 4 Myl. & Cr. 456.

following grounds, namely, on the distinct British character of the parties ; on their independence of the Dutch law in their own British transactions, and on the insuperable difficulties of obtaining any marriage according to the Dutch law.]

Mr. Menteth, for other parties whose interest it was to contend that the Antwerp marriage was valid. British subjects who wish to contract marriage in a foreign country must conform to the law of that country, except in particular cases ; and I submit that this is one of the excepted cases. For, first, by the Code Civil, persons who marry without the consent of their parents or guardians must have attained the age of 25. Now, at the time when the Antwerp marriage was had, Mr. Winkworth was in his 24th year : therefore, he was not able to avail himself of the *lex loci*. Secondly, by the law of Belgium, foreigners cannot intermarry unless they have resided six months in that country. The parties arrived in Belgium in May and were married in July ; consequently they had not resided anything like the time required to enable them to avail themselves of the [375] law of Belgium (1 Burge Colon. Law, 199 ; 2 Hagg. Consist. Rep. 389, *et seq.*) : *Harford v. Morris* (*Ibid.* 423). The decision in *Scrimshire v. Scrimshire* and *Middleton v. Janverin* rested on a ground which does not exist in the present case : for in those cases the marriages were bad according to the *lex loci* to which the parties had resorted.

Next, the marriage having taken place in the presence of the British consul resident at Antwerp, it is good according to 4 Geo. 4, c. 91 ; for the consul was a British minister within the words of that Act. (See *Viveash v. Becker*, 3 M. & Sel. 284.) [THE VICE-CHANCELLOR. The words used in the Act are : " To the Court of which he is accredited." Those words apply not to a consul, but to an ambassador ; and the Master has found that there was no British ambassador at Antwerp.] The 4 Geo. 4, c. 91, is a remedial Act, and therefore ought to be construed liberally. Lastly, if the marriage is not good according to that Act, it is good according to the common law as it existed prior to the passing of the 26 Geo. 2, c. 33.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case is now brought forward in such a manner as to induce me to suppose that, if I were to direct any further inquiry, it would not be productive of any important result. I think that the report must be adopted so far as it finds that the Antwerp marriage was celebrated contrary to the *lex loci* ; and so far as it finds that a valid marriage took place in England, after the 4th of March 1839, the time at which the trustees gave their consent.

[376] My opinion is that this case is not within the 4th Geo. 4, c. 91 ; for that statute provides for the case of a marriage solemnized, by a minister of the Church of England, in the chapel or house of any British ambassador or minister residing within the country, to the Court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory. But, as there is no factory or ambassador at Antwerp, the case cannot come within that statute. Every one who reads the judgment of Lord Stowell in the case of *Ruding v. Smith* must perceive that that learned Judge came to the conclusion that the marriage in that case was good, because difficulties, which he denominates insuperable, existed in effecting a marriage according to the Dutch law. In this case, however, there were no insuperable difficulties which prevented a marriage from being had according to the Belgian law ; and, therefore, there are no circumstances of exception here which operate to take the marriage out of the general rule, which requires that marriages abroad, in order to be valid, must be celebrated according to the *lex loci*. And, that being so, the report must be confirmed so far as it finds that the marriage at Antwerp was invalid, and that the subsequent marriage in England was good.

The case is in that state at present, that there seems to me to be no impropriety in making a decision to that extent.

It stands thus : The testator died in 1837. Shortly afterwards the infant's bill was filed, and then the elopement and first marriage took place ; and then a bill of revivor and supplement was filed, on the 1st of August [377] 1838, in which the infant described herself as being the wife of S. Winkworth. Then came the order of June 1839, which was made in both the causes ; and, on the 13th of November 1839, the young lady filed another bill of revivor and supplement, in which she again described herself as the wife of Stephen Winkworth. The Master then made his

report in all the three causes; and it becomes necessary to examine how far the character of wife was sustained by the lady when she filed the bills of revivor and supplement.

Now, it certainly was held by Lord Eldon in *Golden v. Ulyate* (a case which I mentioned before, and in which I was counsel) that when the Court sees that there is a question which must be decided sooner or later, it may, on an interlocutory application, direct either an issue or an inquiry for the purpose of determining that question; and in this case I do think it necessary, for the purpose of going on with these causes, that the Court should know in what character the lady stands.

It has been said that my opinion on this point differs from that which the Lord Chancellor expressed in a recent case. But if so, I am borne out by the authority of Lord Eldon, upon which I have often acted in this Court; and I am not aware that any decision of mine upon the point has been ever appealed from. I think that an end ought to be put to the question as soon as possible.

With respect to the construction of the codicil, I may now declare that the Plaintiff is entitled to the clear residue of the personal estate, subject to the gift over in case of her decease before 21: and it must be referred [378] to the Master to approve of a proper settlement of her property.

As her husband has been guilty of very great contumacy, the settlement ought to be so framed as to exclude him from taking any benefit under it. The property, therefore, must be settled on the Plaintiff for her life, with remainder to her issue, and, in default of issue, as she shall by will appoint. As she is illegitimate she can have no next of kin: and, therefore, no ultimate limitation can be made which will have the effect of preventing the husband from taking as administrator to his wife; but, in default of appointment, the property must be limited to her absolutely.

[378] COCHRANE v. ROBINSON. Dec. 15, 1840.

[S. C. 10 L. J. Ch. 109; 5 Jur. 4.]

Executor. Indemnity. Leaseholds.

Leasehold estates of a testator were sold under a decree for carrying the trusts of the will into execution. The executor and trustee of the will had never been in possession of the estates. Held, nevertheless, that he was entitled to be indemnified in respect of the rents and covenants.

In this case leasehold estates of a testator had been sold under a decree directing the trusts of the will to be carried into execution. The executor and trustee of the will had never been in possession of the estates; and the question was whether he was entitled to be indemnified in respect of the rents and covenants reserved and contained in the leases under which the estates were held.

THE VICE-CHANCELLOR [Sir L. Shadwell] decided that the executor and trustee was entitled to be indemnified, and referred it to the Master to approve of the indemnity.

[379] Mr. Knight Bruce, Mr. Stuart and Mr. James Parker were counsel in the case. The cases of *Simmons v. Bolland* (3 Mer. 547); *Hawkins v. Day* (*Ibid.* 555; and Amb. 160); and *Vernon v. Lord Egmout* (1 Bligh (N. S.) 554), were referred to.

[379] PLUNKETT v. LEWIS. EVELYN v. LEWIS. Dec. 11, 1840.

Decree. Practice.

Two decrees had been made for the administration of the estate of A. B., deceased, one in a creditors' suit, and the other in a legatee's suit. A motion, by the Plaintiff in the former, to stay the prosecution of the decree in the latter, so far as it directed an account of the deceased's estate and of his debts, was refused, there being no suggestion of a deficiency of assets.

The bill in the first cause was filed by a creditor of a person deceased, and the bill in the second by a legatee of the same person. The Plaintiff in the second cause was an infant. The bill in the first cause was filed in July 1839, and the bill in the second cause was filed in August following. The decree in the second cause was dated on the 14th of July 1840, and the decree in the first on the 31st of the same month. The two decrees were in the offices of different Masters, and advertisements for creditors had been published in each suit.

Mr. Knight Bruce and Mr. Richards, for the Plaintiff in the first suit, now moved that the prosecution of the decree in the second cause, so far as it directed an account to be taken of the deceased's personal estate and debts, might be stayed. They urged the inconvenience, confusion and unnecessary expense which would be caused by the creditors being twice examined and the accounts of the personal estate being twice taken.

[380] THE VICE-CHANCELLOR [Sir L. Shadwell]. It is not suggested that there is any deficiency of assets; and, that being so, I see no reason why I should interfere.

There may be an application made under such circumstances as may make it right for the Court to interfere; but no such case is now made.

Mr. Jacob, Mr. Girdlestone, Mr. Stuart, Mr. K. Parker, Mr. Teed and Mr. Bacon appeared to oppose the motion.

[380] THE ATTORNEY-GENERAL *v.* THE EAST INDIA COMPANY AND OTHERS.
Dec. 14, 15, 1840.

[See *Braund v. Earl of Devon*, 1868, 37 L. J. Ch. 464.]

Pleading. Parties. Information and Bill. Charity.

An information and bill was filed to set aside a long lease of premises vested in the Coopers' Company for charitable purposes. The Plaintiffs were three members of the court of assistants of the company (who alleged that they acted as trustees of the charity), and an almsman and almswoman, who were objects of the charity. A general demurrer to the information and bill was allowed, as no relief was prayed with respect to the Plaintiffs individually. But leave was given to amend the record by making it an information only.

In this case an information and bill, in which five individuals were both relators and Plaintiffs, was filed against the East India Company, J. C. Melvill (who was the secretary to that company), the Coopers' Company and certain other persons, stating, in effect, that in the 6th year of the reign of King Edward the 6th a schoolhouse, almshouse and certain other tenements (situate at Ratcliffe in Middlesex) were vested in the Coopers' Company, in trust to pay, for ever, to the head-master and under-master of the school the yearly salaries of £10 and £6, 13s. 4d. respectively, and to [381] 14 poor men and women in the almshouse the yearly sum of 26s. 8d. each, and to make certain other payments of specific sums. The information and bill further stated that, on the 30th of October 1770, the Coopers' Company granted a lease of certain parts of the property, consisting of two wharfs with the houses, sheds and other erections thereon to the East India Company, for the term of 260 years at the yearly rent of £155: that three of the Plaintiffs were members of the court of assistants of the Coopers' Company, which was the governing body of that company; and that those three Plaintiffs, as members of such court, acted as trustees of the said charity, and were respectively bound duly to administer the funds of the charity for the benefit thereof: that the two other Plaintiffs were an almsman and almswoman entitled to receive the benefit of the charity, and were interested in the due application of the revenues thereof: that in Trinity term 1839 the Coopers' Company commenced an ejectment against the East India Company for recovering possession of the demised premises, but they refused or neglected to proceed with the action, or to institute other proceedings for the purpose of setting aside the lease and recovering the full annual value of the demised premises for the

benefit of the charity : that under the circumstances stated in the information and bill, the lease was obtained by the East India Company by fraudulent means, and ought to be set aside : and that the grant of the lease for the term of 260 years was a breach of trust on the part of the persons constituting the Coopers' Company at the time : that the Defendants then had, in their custody or power, various deeds, &c., relating to matters contained in the information and bill : that the East India Company was a corporate body, and the Plaintiffs were unable to have a discovery upon [382] oath of the matters aforesaid, without making Melvill a party to the suit.

The bill prayed that it might be declared that the lease was obtained from the Coopers' Company through fraud ; and that the same might be set aside for the benefit of the charity ; and that it might be declared that the execution of the lease was a breach of trust on the part of the persons constituting the court of assistants of the Coopers' Company at the time ; and that the lease might be declared invalid, and be delivered up to be cancelled : and that a proper occupation rent might be put upon the premises comprised in the lease ; and that the East India Company might be decreed to account with the Coopers' Company for such rent ; and that the full annual improved value of the premises might be received by the Coopers' Company, and applied by them for the benefit of the charity ; and that, if necessary, the East India Company might be decreed to deliver up possession of the premises to the Coopers' Company.

Melvill demurred to the discovery, and the East India Company demurred to the discovery and relief prayed by the information and bill.

Mr. Knight Bruce, Mr. Jacob and Mr. Lloyd, for the demurring parties. The ostensible object of the information and bill is to set aside the lease granted in 1770. The information and bill treats the demised premises as charity property ; for it prays that the lease may be set aside for the benefit of the charity. The Plaintiffs seem to be impressed with the notion that it is the practice of the Court to set aside every lease of charity property, [383] if it be a long lease. But that notion is erroneous : for no case has decided that the mere length of a lease is of itself a sufficient ground for setting it aside. In order to induce the Court to interfere, the lease must be shewn to have been an improvident one at the time when it was granted. In this case it appears that the property demised is a piece of ground measuring no more than 135 feet by 227, and that the East India Company pay for it so large a rent as £155 a year. *The Attorney-General v. Hungerford* (2 Clark & Fin. 357) ; *The Attorney-General v. Cross* (3 Mer. 524).

Secondly, in the instrument by which the property, which is alleged to be charity property, was vested in the Coopers' Company, there is nothing whatever which binds that company to do more than make the specified payments. Those payments are less in amount than a quarter of the rent payable to them by the East India Company : and if the Coopers' Company are only liable to pay those sums, the property is not charity property, but belongs to the Coopers' Company, subject to those payments. [THE VICE-CHANCELLOR. There is nothing said about the surplus rents.] Thirdly, the bill alleges that three of the Plaintiffs are members of the court of assistants of the Coopers' Company ; and that as such they act as trustees of the charity, and are bound duly to administer the funds of the charity. Those three persons, however, have no right to make themselves Plaintiffs on this record ; for they have no such interest in the subject-matter of the suit as entitles them to do so : moreover, if they ought to be parties, all the other members of the court of assistants ought to be parties ; for there is no reason [384] why those three should be singled out. The same observations apply to the two other Plaintiffs, the almsman and almswoman. This objection on the ground of misjoinder is not a mere objection to the form of the suit, but to the very substance of it : for the Attorney-General and this Court have, neither of them, the same control over an information and bill as they have over a simple information. If an information is improperly filed, the proceedings in the suit may be stayed : but that is not so where the suit is commenced by an information and bill.

Mr. G. Richards, Mr. Bethell, Mr. Willcock and Mr. Hubback, in support of the information and bill. The demurrers have been attempted to be supported on two grounds : the first is want of equity ; and the second, misjoinder of parties.

The demurring parties are not the Coopers' Company, but the East India Company and their secretary. What right have those parties to endeavour to protect themselves by saying that the property does not belong to the charity, but to the Coopers' Company? Besides, it appears from the instrument set forth in the information and bill, that the founder did not intend to benefit the Coopers' Company, but to devote the whole of the property to charitable purposes, for that instrument directs that "the master, wardens or keepers of the company for the time being, for their pains about performing the premises and viewing the tenements aforesaid twice in the year, that they be in due reparation, may have, among themselves, for a drinking among the men of the mystery and company aforesaid, 26s. 8d. yearly, that is to say, at the two times at which they [385] shall be viewing the tenements aforesaid, whether they are in due reparation or not, by equal portions." This direction is wholly inconsistent with the Coopers' Company being entitled to the surplus rents.

The lease was granted for 260 years; and a Court of Equity will not uphold a lease of charity property, granted for anything like that length of time. *The Attorney-General v. Owen* (10 Ves. 555); *The Attorney-General v. Brooke* (18 Ves. 319). At all events, a lease of so long duration must be taken to be an improvident mode of dealing with the charity property until the contrary is shewn.

The other objection is that the parties who are Plaintiffs have no interest which entitles them to maintain the suit. But, supposing that to be so, the information may proceed, notwithstanding the Court may be of opinion that the bill is not sustainable. *The Attorney-General v. Vivian* (1 Russ. 226). The demurrers are demurrers to the information as well as to the bill; and, unless it can be shewn that no relief can be given upon the information, the demurrer must fail.

We submit, however, that the parties who are named as Plaintiffs on this record have such an interest as entitles them to maintain the suit. Three of the Plaintiffs allege that they are members of the court of assistants of the Coopers' Company, and that, as such members, they act as trustees of the charity, and are bound duly to administer the funds of the charity for the benefit thereof: and it is quite plain that the two other Plaintiffs, one of whom is an almsman and the other an almswoman, have an [386] interest in the charity. [THE VICE-CHANCELLOR. I do not understand the allegation to which you have alluded. If the three gentlemen who are first named as Plaintiffs are bound to administer the funds of the charity, why do they not do it? They are the governing body; then why does not the governing body govern?] They are only members of the governing body: the court of assistants is the governing body. If an information only had been filed in this case, these three gentlemen would have had a sufficient interest to justify their being made Defendants to it: how then can it be contended that they have not a sufficient interest to entitle them to join with the Attorney-General in filing an information and bill? The almsman and almswoman have a right to insist that their stipends (which were fixed at a time when the rents of the charity estates were much less than they are at present) ought to be increased: they, therefore, have been properly made Co-plaintiffs. But if it was not necessary to make them Co-plaintiffs, that circumstance does not invalidate the bill. *Rhodes v. Warburton* (ante, vol. vi. p. 617).

Lastly, we submit that it was not necessary to make all the members of the court of assistants parties to the record, it being quite sufficient, in a case of this sort, to bring before the Court sufficient parties to represent the individuals interested in the revenues of the charity estates.

THE VICE-CHANCELLOR [Sir L. Shadwell]. My opinion is that, as far as the charity is concerned, there is a sustainable case. But I cannot comprehend what particle of interest those three gentlemen have who are first named as Plaintiffs on this record. The [387] statement as to them is very singular. It is that they are respectively members of the court of assistants of the Coopers' Company: it does not appear that there are more members of the court of assistants: "that the court of assistants is the governing body of the said company, and that your last-named orators, as members of such court, act as trustees of the said charity, and are respectively bound to administer the funds of the said charity for the benefit thereof." I do not see how persons can be bound to do what is impossible. If the Plaintiffs represent that they are bound to administer, it must be taken that they can administer

the funds of the charity : and, if so, I do not see for what purpose the record is framed as an information and bill : for there is not a particle of individual interest asserted in it. What is asked is that it may be declared that the lease was obtained from the Coopers' Company by fraudulent means, and that the same may be declared to be fraudulent, and may be set aside for the benefit of the charity : and also that it may be declared that the execution of the lease was a breach of trust on the part of the persons constituting the court of assistants of the Coopers' Company at the time ; and that the same may be delivered up to be cancelled ; and that the full annual improved value of the premises comprised in the lease may be received by the Coopers' Company and applied and administered by them for the benefit of the charity ; so that, on the face of this record, there is no sort of relief asked by the persons named as Plaintiffs, none whatever : and, if those persons do not ask any relief for themselves individually, then there is the objection which has been made *ore tenus*, namely, that the other parties who stand in precisely the same character ought also to be parties to the record.

[388] I think, however, that the record is wrongly constructed ; because persons have been made Co-plaintiffs who have asked nothing for themselves, and do not shew that they are individually entitled to anything.

The information and bill, therefore, cannot be sustained collectively : but as there is, apparently, a case for relief, I will give leave to amend, for the purpose of converting the record into an information only. The persons, however, who are named as Plaintiffs must remain on the record in the character of relators, in order that they may be answerable for costs.

[388] REES v. KEITH. Dec. 17, 1840.

[S. C. 10 L. J. Ch. 46 ; 5 Jur. 20.]

Husband and Wife. Chose in Action. Reduction into Possession.

A woman being entitled to two sums, one secured by a mortgage in fee to herself, and the other to a trustee for her, married. The mortgagees having been applied to, but being unable to pay the sums, the trustee paid them to the husband. The husband died, leaving the mortgages untransferred. Held, that he had reduced both sums into possession.

Eleanor, the wife of W. Rees, was, at and before the time of her marriage, entitled to £450 secured by a mortgage in fee made to her by R. Reeve ; and also to £800 secured by a mortgage in fee made by S. Cushing to P. Millard in trust for her. The mortgagees having been applied to, by or on behalf of Mrs. Rees, shortly after her marriage, to pay the sums due from them respectively, but being unable to pay the same, Millard paid those sums to Mr. Rees ; and Rees signed a memorandum whereby he agreed to transfer Cushing's mortgage to Millard. Mr. Rees afterwards died ; and a suit having been instituted respecting his estate, the Master, on a reference made to him, found that the [389] payment of the £800 to, and the signing of the memorandum by Rees, was a reduction by him of that sum into possession ; but that the payment of the £450 to him was not a reduction by him of that sum into possession.

Rees's widow and his executors both excepted to the report.

Mr. Jacob, Mr. Koe and Mr. Walker, for the executors, said that this was not a suit between Mrs. Rees and Cushing, or between her and Reeve, but between her and her husband's estate, and that, for the purposes of this suit, it was quite clear that the £450, as well as the £800, had been reduced into possession ; that it was held, in *Doswell v. Earle* (12 Ves. 473), that even an anticipated payment to the husband was good against the wife surviving.

Mr. Wigram and Mr. Lovat, for Mrs. Rees, said that the debts still remained due from the debtors respectively ; that Mr. Rees had no power to reduce either of them into possession during the coverture, as he could not have compelled the mortgagors

to pay the sums due from them without giving a reconveyance of the mortgaged estates, which it was not in his power to do, as he could not have compelled his wife to join with him in levying a fine for that purpose; *Purdew v. Jackson* (1 Russ. 1); *Honner v. Morton* (3 Russ. 65, secs. 68 and 69). [THE VICE-CHANCELLOR. Suppose that the mortgagors had paid the sums due from them to the husband.] They might have sustained a bill against the husband and wife for a [390] reconveyance; but the husband could not have compelled his wife to join in a reconveyance; and, besides, no payment has been made by either of the mortgagors. The debts were due at the husband's death, and they still remain due from the debtors. If a suit had been instituted to compel the wife to join in reconveying the estates, she would then have been able to enforce her equity to a settlement out of the sums due on the mortgages; but, if the argument for the executors is to prevail, the wife will be deprived of the means of enforcing her equity. In *Doswell v. Earle* the widow had acquiesced, for nine years after her husband's death, in the payment which had been made to her husband; but, in this case, there has been no acquiescence on the part of the widow.

THE VICE-CHANCELLOR [Sir L. Shadwell], in the course of the argument, said that the subject in dispute was a debt due to the wife; and, if it had been paid, there was an end to the claim; that the only question was whether the £800, as well as the £450, had not been paid, in fact, by Millard for the mortgagors.

His Honor delivered judgment as follows:—

This is a very simple point.

Suppose that the mortgagor had said to Mr. Rees: "I owe your wife £800: here is a cheque for the money." Would not the debt be destroyed; and would not the wife be a mere trustee of the legal estate for the mortgagor?

If a contrary doctrine were held, a mortgage in fee made to a woman who afterwards marries could not be paid off during the coverture.

[391] It seems to me, I confess, that, if the debt is paid, there is an end to the wife's equity. (See *Bosvil v. Brander*, 1 P. W. 458.)

[391] TAYLOR v. RUNDELL. Dec. 21, 1840.

[S. C. affirmed, Cr. & Ph. 104; 41 E. R. 429 (with note).]

Answer. Insufficiency. Discovery.

A., B. and C. were members and three of the directors of a mining company, and also lessees, in trust for the company, of mines in Nova Scotia, under a lease, by which a portion of the profits was reserved to the lessor. The lessor's executors filed a bill against A., B. and C. for an account of the profits of the mines, and required them to set forth a list of all accounts, &c., relating to the mines in the possession of them or their agents. The Defendants set forth a list of all the accounts in the possession of themselves and of the secretary of the company in London, adding that there were other accounts in the possession of the company's agent in America; that the Defendants had no power to inspect or use the accounts of the company, except when sitting at the board of directors or by an order of the board; and that they had not the permission of the board to use the accounts for the purposes of the suit, and they believed that the directors declined to allow them to use the same, or to give them any further information which might enable the Plaintiffs to prosecute the suit. Held, that the answer was insufficient, as it did not state that the Defendants had, as they lawfully might, applied to the agent in America for a list of the accounts in his possession.

The Plaintiffs were the executors of the late Duke of York. The Defendants were members and three of the directors of a mining association, and were also lessees, in trust for the association, of mines in Nova Scotia, (1) under a lease granted by the

(1) These mines had been the subject of a suit between the duke's executors and the Attorney-General as representing the Crown. See *ante*, vol. 8, p. 413.

duke, reserving to himself, his executors, &c., a portion of the profits of the mines. By the covenants in the lease the Defendants were bound to render to the duke, yearly, such accounts as should be necessary to shew the profits of the mines, and to appoint a person, to be nominated by the duke, to be a director of the association, and to [392] allow him to sit at the board and to have all the other powers and privileges of a director for the purpose of protecting the duke's interest; and, shortly after the execution of the lease, a gentleman named Parkinson was nominated and appointed accordingly. The bill was filed for an account of what was due to the duke's estate under the reservation in the lease. It interrogated the Defendants whether there were not in the possession of themselves or their agents, and especially of their agents in America, divers accounts, &c., relating to the produce and profits of the mines.

The Defendants annexed two schedules to their answer, which they said contained a full and true list of all the accounts, &c., in their possession or power, or in the possession or power of the secretary to the association in London. They added that the secretary was the agent of the association and not their agent; and that they had no agent in America; but they believed that the association had an agent there, and that he had in his possession many accounts, &c., relating to the matters in question; but, inasmuch as he was in the habit of transmitting monthly to the secretary to the association in London copies of all the accounts and other documents relating to the mines, they believed that the documents in the secretary's possession (which were mentioned in the second schedule) would furnish all the information that could be obtained by inspecting the documents in the possession of the agent in America; that the Defendants, being engaged in extensive mercantile concerns of their own, had paid but little attention to the affairs of the association; and that, save as therein set forth, they had no knowledge, other than was contained in the documents mentioned in the schedules, of any matters connected with the mines; that, in fact, the [393] documents mentioned in the second schedule were not in the possession or power of the Defendants in any other sense than that they and the other directors, including Parkinson, when assembled as a board, were competent to order the same to be used and inspected by a vote of the board; that they had no authority to make use of those documents as individuals except by an order of the board, and except that, under the co-partnership deed, they had a right, in common with the other members of the association, to inspect and take copies of those documents from the 14th to the 35th day after every general yearly meeting of the association, but not after that period; that Parkinson had the same opportunities of inspecting and using the documents as they had; that they had not the permission of the directors to have or use the documents for the purposes of the suit; but, on the contrary, the directors declined to allow them to use the documents, or to give them any further information which might enable the Plaintiffs to prosecute the suit against them (who were mere trustees), without bringing the other members of the association before the Court.

The Master having overruled exceptions taken to the answer for insufficiency, the Plaintiffs excepted to his report.

Mr. Knight Bruce, Mr. Wigram, Mr. Jacob and Mr. James Russell, for the Plaintiffs. The Defendants say they believe that the American agent of the association, of which they are directors, has, in his possession, many documents relating to the accounts of the mines; but they do not say that they have ever applied to him for any information as to [394] those documents or their contents. They are bound to obtain all the information in their power, and to communicate it to the Plaintiffs.

Mr. Wakefield, Mr. Bethell and Mr. Wood, for the Defendants. The answer states, expressly, that the Defendants have paid but little attention to the affairs of the association, and that, save as therein set forth, they have no information whatever, other than is contained in the documents mentioned in the schedules, as to any matters connected with the mines. The agent in America is not the agent of the Defendants, but of the association at large; and, consequently, the accounts in America are not in the possession or power of the Defendants, but of the association as a body. The Defendants have no access to any of the accounts, except for 21 days after every general yearly meeting. This Court will not order a party to do that

which it is not in his power to do. Besides, Mr. Parkinson was appointed a director on the nomination of the duke, and for the express purpose of watching over and protecting the duke's interests. That gentleman has the same means of obtaining information as to the concerns of the association as the Defendants have. The Defendants are trustees for the association as well as directors of it; will the Court order them to do an act which would be a breach of their duty and a violation of the rules of the association prescribed by the co-partnership deed? The Plaintiffs cannot obtain any further information as to the matters in question, without making all the other members of the association parties to the suit. *Farquharson v. Balfour* (Turn. & Russ. 184); *White v. [395] Williams* (8 Ves. 193); *Freeman v. Fairlie* (3 Mer. 29; see 43 and 44); *Walburn v. Ingilby* (1 Myl. & Keen, 61); *Murray v. Walter* (1 Craig & Phill. 114).

Mr. Knight Bruce, in reply, said that the cases cited related to the production of documents; that the question before the Court was not whether the Plaintiffs had a right to the production of the accounts of the mines, but whether they had a right to a discovery of the contents of those accounts; that a party might have a right to know the contents of a document, though he might not be entitled to have the document produced.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am of opinion that the answer is not sufficient.

The Defendants, as directors, are not placed in a position in which they may not legally require the agent of the association abroad to inform them what documents, relating to the concerns of the association, are in his possession or power. They state in their answer that copies of some of the foreign documents have been transmitted to the secretary to the association in London, and they set forth a list of them. Then, without stating that they have made any application to the agent abroad, they content themselves with saying that he has in his possession many books of account and other documents relating to the accounts of the mines, and also some deeds relating to the title to the mines; and that the secretary receives, monthly, from the agent abroad, copies of all the accounts and other documents of interest or importance relating to the mines; but it does not appear that the Defendants have made any [396] application to the agent abroad to furnish them with a list of the deeds and documents which may be in his possession.

I am not aware of anything which prevents any of the directors from requiring the agent to furnish them with the information which the Plaintiffs seek to obtain through the Defendants; and as the Defendants do not state that they have applied to the agent abroad for the information (which they may lawfully do), the exceptions must be allowed.(1)

[397] BAIN v. LESCHER. Dec. 24, 1840.

[See *In re Seyton*, 1887, 34 C. D. 515.]

Will. Construction. Proof of Will made Abroad.

Testator directed his residue to be divided amongst the children of L. D., to wit, J. D., E. D. and A. D. Held, that the gift was not made to the children as a class, but as individuals; and that, one of them having died in the testator's lifetime, the share intended for that child was undisposed of.

Testator directed that the legacies given by his will to females, married or single, should be for their own benefit and their children, and should never be subjected to the control of their respective husbands. Held, that the females took for their lives, for their separate use, with remainders to their children.

A British subject, resident in France, made his will and died there, having appointed A. and B., who were resident in France, and C. and D., who were resident in

(1) Affirmed by Lord Cottenham, C., 1 Craig & Phill. 104. See *Christian v. Taylor*, *post*, 401.

England, his executors. The will was translated into French, and the translation was registered by A. and B. in the proper Court in Paris. A duly authenticated copy of the translation was then procured, and translated into English by a notary public in London; and that translation was proved by C. and D. in the Prerogative Court.

The testator in the cause was a British subject, resident in France, and having personal property in that country as well as in England. His will was partly in the following words:—

"I, the undersigned John Devereux, formerly resident at Moorfields, London, and now at Avenue de Neuilly, near Paris, make my present testament and last will, by which I revoke all testaments and wills that I have heretofore made, and dispose of my property in the manner following, to wit, I give and bequeath £100 sterling to each of my sisters in Ireland who shall be living at the time of my decease; to Mr. Nicholas Devereux of Castlebridge, near Wexford in Ireland, £50 sterling; to Mrs. Louisa Langton Drew of Paris £1000 sterling; to Alexander and Napoleon Lariviere, sons of Madame Louise Lariviere, whom I hereby nominate and constitute as their guardian till [398] their majority, £500 sterling each. I give and bequeath all the rest of what I possess to be divided, in equal portions, *amongst the children of the said Louisa Langton Drew*, to wit, John Louis Drew, Louisa Lariviere, Julia Bain, Isabella Agnes Drew, Edward Alexander Drew and Napoleon Drew. It is my wish that all my property be immediately converted into money; that the shares of those who shall be of age shall be given to them without delay, and that the shares coming to the minors be placed in the public funds of Paris or London, as shall be most convenient for the testamentary executors; and, till they become of age, I hereby nominate and appoint my testamentary executors, hereinafter mentioned, as guardians and trustees of the said minors during their minority: And I direct that *the legacies given by the present will to females, married or single, shall be for their own benefit and their children, and shall never be subjected to the control of their respective husbands*. I hereby nominate and appoint Madame Louise Lariviere, Thomas Pickford, Brittanic Consul at Paris, M. O'Maly, Esq., residing at No. 5 Rue du Faubourg St. Honoré, and William Lescher, Esq., of Thomas Street, Whitechapel, London, as executors of my present testament and last will."

John Louis Drew died in April 1837. The testator died in April 1838. Julia Bain had one child, and Louisa Lariviere had two children born at the testator's death, and still living.

A French translation of the will was first registered, in the proper Court in Paris, by Pickford and O'Maly. A copy of that translation was then made and signed by a notary in Paris; and Pickford, as British consul there, certified that the signature was the signature of [399] the notary. An English translation of the copy was then made by a notary public in London; and that translation was proved, by Lescher and Louisa Lariviere, in the Prerogative Court of the Archbishop of Canterbury.(1)

The bill was filed by Julia Bain, by her next friend, and by Isabella Agnes Drew, Edward Alexander Drew and Napoleon Drew, against William Joseph Lescher, Louisa Langton Drew, Louisa Lariviere and her two children, the husband and child of Louisa Bain, and the testator's next of kin.

On the cause coming on to be heard for further directions, the questions were—

First, whether the share of the residue given to John Louis Drew (who died in the testator's lifetime) was undisposed of, or whether his surviving brothers and sisters were entitled to it.

Secondly, what was the effect of the direction that the legacies given to females should be for their own benefit and their children, and should never be subjected to the control of their respective husbands.

Mr. Knight Bruce and Mr. Stephenson, for the Plaintiffs. The residue is given to the children of Louisa Langton Drew, as a class. It is true that the testator

(1) The reporter was informed that the Prerogative Court refused to admit to probate the original will, which was written in English by the testator himself.

names [400] the children ; but that makes no difference. *Knight v. Gould* (2 Myl. & Keen, 295) ; *Viner v. Francis* (2 Cox, 190).

Secondly. The direction as to the legacies given to females is nothing but a redundant and circuitous mode of excluding the marital right. Some of the legacies given to females are only £100 in amount. The testator could not intend that such small sums should be settled on the legatees and their children. *Robinson v. Waddelow* (*ante*, vol. viii. p. 134) ; *Cooper v. Thornton* (3 Bro. C. C. 96 and 186) ; *Robinson v. Tickell* (8 Ves. 142) ; *Shuttleworth v. Greaves* (4 Myl. & Cr. 35).

Mr. Jacob and Mr. Heathfield, for the children of Julia Bain and Louisa Lariviere, contended that the children took either as joint-tenants with their mothers, or in remainder after the deaths of their mothers.

Mr. G. Richards and Mr. Piggott, for the testator's next of kin, said that the residue was given to the children of Louisa Langton Drew, not as a class, but *nominatim*, as individuals, and, consequently, that the share given to John Louis Drew had become undisposed of.

Mr. Bagshawe appeared for the Defendant Lescher.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The residue is given to the children of Louisa Langton Drew, not as a class, but as individuals ; for the testator names them.

[401] With respect to the construction which ought to be put upon the direction as to legacies given to females, I think that the sentence ought to be read as if the words "married or single" were omitted ; for all females must be either married or single. The direction will then be that the legacies shall be for the benefit of females and for the benefit of the children of females ; and my opinion is that the construction which ought to be put upon those words is that the females take their legacies and shares of the residue for their lives, with remainders to their children, and, under the words that follow, for their separate use.

[401] CHRISTIAN v. TAYLOR. Dec. 18, 19, 1840 ; Jan. 12, 1841.

[S. C. 10 L. J. Ch. 145.]

Answer. Insufficiency. Defendant. Accounts. Documents.

A Defendant, who is required to set forth accounts, is bound to set them forth as well as he is able without much labour or expense, and he is not bound (more especially where he has not been a party to the transactions, but is only the representative of a party, and the accounts are long and complicated) to refer to the books for the purpose of making out the accounts. He must, however, allow the Plaintiff to inspect the books.

Where the documents of which a Defendant is required to set forth a list are numerous, it is not necessary for him to specify each of them ; but it is sufficient for him to describe them, so as to enable the Plaintiff to move for them ; as, for instance, to say that they are contained in bundles or hogsheads, sealed up, and marked A, B, &c.

P. M. Callow and Richard Taylor, both deceased, had carried on the business of wholesale grocers at Liverpool, in co-partnership, from 1799 until the 20th of December 1832 ; and during that time had speculated extensively in cotton and other colonial produce on their joint account. On the 20th of December 1832 the partnership was dissolved, and Callow sold and [402] assigned his share of the business to Thomas and William Taylor, two of Richard Taylor's sons. Callow died in February 1833, intestate, and, in April following, the Plaintiff, his sister, took out administration to his estate. Thomas Taylor died in March 1836, and William Taylor took out administration to his estate. Richard Taylor died in June 1837, having appointed his sons, William and John, the Defendants, his executors.

The bill was filed in November 1838, praying that the deed of dissolution and assignment might be declared to be fraudulent and void ; that an account might be

taken of the partnership dealings and transactions, so as to ascertain what was due to Callow on the 20th of December 1832; that an account might be also taken of what was due on the same day to him in respect of the speculations, and of what had since become due to him and his estate in respect of the profits which had been made by carrying on the grocery business; and that what should be found due on taking those accounts might be paid out of the assets of Thomas and Richard Taylor and by the Defendant, William Taylor, according to their respective liabilities; and that the assets and effects of the grocery business might be sold, and the proceeds applied in paying to the Plaintiff what should be so found due.

The bill required the Defendants to set forth with great minuteness and particularity several accounts relating to the matters in question, and, amongst them, an account of the profits of the partnership made in every year from its commencement until its dissolution; and also a full, true and particular account of all joint speculations in the purchase of cotton, colonial produce and other merchandize into which Callow and Richard Taylor [403] had entered, and the quantity of merchandize purchased on the occasion of each of the speculations, and the prices paid, and in what shares the parties contributed to the purchase-monies respectively, and the dates and amounts of each contribution, and from what sources the purchase-monies were derived, and when and at what prices the merchandize was on each occasion sold, and what was the profit and loss on each speculation, and how the monies arising from the sale of the merchandize was on each occasion applied and to whom it was paid. The bill also required the Defendants to set forth a list of all the books, papers and accounts, relating either to the grocery business or to the speculations, which then were or ever had been in their possession.

The Defendants, in their answers, said that they could not set forth the accounts from their knowledge, remembrance, information or belief: and that they could not make out the accounts without incurring a ruinous expense and loss of time; that an accountant, whom they had employed, had been unable to do more in six weeks than to make out the accounts in the manner required for a space of time less than a year; and that they were ready and willing and thereby offered to allow the Plaintiff to inspect the books, &c., of the late partnership at their counting-house, and to furnish him, at his own expense, with any copies of or extracts from the same: that they had set forth a list of books, papers and accounts in their possession relating to the matters in question, and that they also had in their possession three hogsheads, sealed up, containing old papers, consisting of invoices, orders for goods, letters, &c.; that to specify the documents contained in the hogsheads would occupy a schedule of enormous length, and consume many weeks and more time than they had been [404] allowed for putting in their answer; (1) but they were ready to deposit the hogsheads with their Clerk in Court, to afford the Plaintiff an opportunity of inspecting the documents therein contained.

The Master having reported the answers to be insufficient, the Defendants excepted to the report.

Mr. Knight Bruce and Mr. Walker, in support of the exceptions. The Plaintiff, in requiring the Defendants to set forth the long and complicated accounts to which the exceptions relate, is attempting to make a most unjust and oppressive use of the orders of the Court. The Defendants say that, if they shall be compelled to make out the accounts, they shall incur such an expense and loss of time as will be their ruin. In point of fact, they have answered fully to the matters excepted to; for they say that they cannot set forth the accounts according to their knowledge, information and belief; and that the books, which they offer to allow the Plaintiff to inspect, will furnish all the information required. The Defendants were not engaged in any of the speculations or other transactions to which the bill relates; nor did they keep the accounts; and as they offer to permit the Plaintiff to inspect the books, he has the same means as they have of obtaining all the information that he requires. *Seeley v. Boehm* (2 Madd. 176). Secondly. There is a full answer as to every document except those con-[405]-tained in the three sealed hogsheads. It is every-day's practice in

(1) This seems to be a reason for applying for further time to answer, rather than for not setting forth a list of the documents.

setting forth a list of documents to specify those that are most important, and to add that there are others tied up in bundles marked A, B, &c., and to offer to produce them. The only question is whether the documents are sufficiently identified in order to enable the Plaintiff to move for the production of them: and we submit that in this case the documents are sufficiently described for that purpose.

THE VICE-CHANCELLOR. I have always understood the rule to be that a Defendant, with regard to transactions that are not his own, is not bound to find out information for the purpose of communicating it to the Plaintiff. In this case, the Defendants are merely the executors of Richard Taylor, who was co-partner with Callow, whom the Plaintiff represents. If they had said that they had never looked into the partnership books, and that they did not mean to look into them, I apprehend that no objection could be made to the answer in point of form. What obligation is there on the Defendants to go through the books for the purpose of giving the Plaintiff the information which he asks?

Mr. Jacob and Mr. James Russell, for the Plaintiff, relied on *White v. Williams* (8 Ves. 193), and said that the account of the yearly profits of the partnership business, which the Defendants were required to set forth, would not consist of more than 32 items.

Mr. Knight Bruce, in reply. In *White v. Williams* the questions related to certain payments made by the trustees themselves.

[406] THE VICE-CHANCELLOR. As I collect from *White v. Williams*, the Defendants did not refer to the documents in such a manner as to enable the Plaintiff to move for them. It has been the habit, ever since I have been in the profession, for a Defendant, who is required to set forth a list of documents in his possession, to specify those that are most important, and then to say that there are others contained in bundles marked so and so; and I cannot but think that, if a Defendant says that there are documents contained in hogsheads which are marked and sealed up, it is a sufficient description of them. Before, however, I decide the questions that have been raised, I will compare, very minutely, the interrogatories with the answers to them.

Jan. 12, 1841. THE VICE-CHANCELLOR [Sir L. Shadwell]. Since this case was argued, I have had an opportunity of comparing the answers with the exceptions; and my opinion is that I ought to hold the answers to be sufficient. [His Honor here stated the facts of the case.] The object of the bill is to shew that the transaction, with regard to the dissolution of the partnership, was unfair; and, for that purpose, it is evidently important to shew the amount of the profits of the partnership down to the time of the dissolution. It must be observed, however, that the Defendant, William Taylor, had nothing to do with the business until after the dissolution; and the Defendant, John Taylor, who is merely a personal representative of one of the deceased co-partners, cannot be assumed to have any greater degree of knowledge with respect to the profits of the partnership than the Plaintiff, who is the personal representative of the other co-partner, has. The part-[407]-nership subsisted for a period of 32 years; and it appears, from the answers, that it has required great labour and expense to make out an account of the nature required for a few months only of that period.

In *White v. Williams* the bill was filed by the Plaintiff as heir at law and devisee of his father against trustees under a conveyance, by the father, of estates in the West Indies, alleging that the trusts were all satisfied, and praying for a reconveyance and an account and payment of all sums due from the Defendants on account of the trust. Lord Eldon, C., in his judgment, said: "It is not sufficient for the trustees to refuse to give information, by their answer, further than to enable the Plaintiff to go into the Master's office; and it is not enough that the answer gives a ground for an account in the Master's office, and that the Plaintiff is enabled to go there; but they are bound to give the best account they can, by their answer referring to books, &c., sufficiently to make them part of their answer. The Court would consider the trustees as giving the information very oppressively, if they were to set forth a schedule with reference to transactions for 20 years together; but it requires them to refer to books to give all convenient opportunity of inspection, and to refer to them so as to make them part of the answer, and so as to ascertain whether that is the best account they can give. The Plaintiff has a right to compel them, by their answer, to say that

is the best account they can give. . . . As to all the exceptions that go to the point of setting out the totals, the Master is right; but I give no opinion whether the trustees are bound to state them otherwise than thus: that they have laid the accounts, from which the totals will appear, in the Master's office; and that those [408] accounts enable the Plaintiff to learn as much as they themselves know of them."

Now, in the present case, the answers state that the Defendants have attempted to make out the accounts in the manner in which they are sought to be obtained, and that they are not able to render such accounts, at least without subjecting themselves to so much inconvenience and expense as would operate very oppressively upon them. They then refer to the books and documents in which the particulars of the accounts are to be found, and give the Plaintiff the opportunity of making them out, as fully as they could do themselves; and it seems to me that, according to the observations of Lord Eldon in *White v. Williams*, they ought not to be required to do more.

The second question is with respect to the documents. The Defendants are asked, in the usual terms, to set forth a list of the documents in their possession relating to the matters in the bill; and, in compliance with that requisition, they state that they have in their possession three hogsheads sealed up, containing old papers, consisting of invoices, orders for goods, &c. Then they add that to specify the documents contained in the hogsheads would occupy a schedule of enormous length, and consume many weeks and more time than they had been allowed by the Master for putting in their answer. With respect to this part of the case, I have always understood the practice to be to refer to documents as contained in bundles or boxes, or to give some other description of them of the like nature; and, if they are so described as to enable the Plaintiff to move for the production of them, the answer has been always, as far as my experience goes, held to be suffi-[409]-cient. In this case I think that the documents in the hogsheads are sufficiently described to enable the Plaintiff to obtain a production and inspection of them; and, consequently, the Defendants are not bound to set forth a list of them.

The result is that the answers are sufficient in both particulars, and the exceptions to the Master's report must be allowed.

[409] ——— v. CHRISTOPHER.(1) Jan. 12, 1841.

Affidavit. Marksman.

A marksman signed an affidavit with his name at length, his hand having been guided on the occasion. The affidavit was ordered to be taken off the file.

Motion to take the bill (which was a bill of interpleader) and the affidavit annexed to it off the file, on the ground that the Plaintiff, who was a marksman, had subscribed his name to it, his hand having been guided on the occasion. The *jurat* was in the form applicable to the signature of a name at length.

Motion granted.

Mr. Knight Bruce, for the motion.

Mr. Stephenson, *contrà*.

[410] MEUX v. SMITH. Dec. 16, 1840; March 17, 24, 26, 1841; Jan. 17, 1843.

[S. C. 1 M. D. & D. 396; 2 M. D. & D. 789; 10 L. J. Ch. 225; 12 L. J. Ch. 209; 7 Jur. 821. See *In re New Land Development Association and Gray* [1892], 2 Ch. 147. Followed, *Bird v. Philpott* [1900], 1 Ch. 822.]

Lien. Bankrupt. Vendor and Purchaser. Equitable Mortgage.

G., a publican, agreed to sell his public-house (which M. & Co. supplied with beer) to A. A. being unable to pay the whole purchase-money, M. & Co., at his request,

(1) *Ex relatione*.

agreed to pay to G. £1000, part of it. At a meeting of the parties for completing the purchase, M. & Co. paid the £1000 to G. G. then executed the conveyance of the house, and, *immediately afterwards, delivered it to M. & Co.*; and A. signed a memorandum expressing that he had deposited the deed with M. & Co., for securing, by way of equitable mortgage, the payment to them of the £1000. Shortly afterwards, M. & Co. discovered that A. was an uncertificated bankrupt. Held, nevertheless, that they had, as against A.'s assignees, a lien on the deed for the £1000.

The Plaintiffs carried on the business of brewers, in co-partnership together, in Tottenham Court Road, Middlesex, under the firm of Sir Henry Meux & Co.

In September 1838 one Gurney was possessed of a public-house called The Dolphin, situate in Whitechapel Road, Middlesex, for a term of 63 years, commencing from Midsummer 1838, in which he had for some time carried on the business of a publican; and, on the 13th of that month, he was indebted to the Plaintiffs, in the sum of £1000 and upwards, for beer sold and delivered by the Plaintiffs to him. On the same day he was also indebted to an amount exceeding £1000 to Seager, Evans & Co., who were distillers at Millbank, Westminster.

Upon the sale of a public-house by the occupying publican, it is the practice for the vendor to pay the debt due to the brewers who serve the house out of the purchase-money: and, as it often happens that the purchaser has not the means of paying the whole of his purchase-money, an application is usually made, either by him or by the vendor for him, to the brewers to advance the amount required to make up the purchase-money upon the security of the premises agreed to be [411] purchased, and to pay the same to the vendor; and, if the brewers comply with the request, they, at the time fixed for the completion of the purchase, give immediately to the vendor a cheque drawn upon themselves at their place of business for the amount, and, after the completion of the purchase, the cheque is presented by the vendor at the house of business of the brewers; and the vendor receives payment of the cheque by having the amount of it written off the amount of the debt due from him to the brewers; and, upon the delivery of the cheque to the vendor, the vendor delivers immediately to the brewers the title-deeds, including the conveyance of the public-house; and the deeds are held by the brewers until the repayment of the sum advanced by them, with legal interest: and it is also usual for the brewers to take from the purchaser a memorandum signed by the purchaser, whereby he agrees that the deeds shall be deposited with the brewers as a security, not only for the sum paid by them in part of the purchase-money and the interest thereof, but also for all other sums which may become due to them, from the purchaser, in respect of his dealings and transactions with them in the course of his business. On some occasions the sum necessary to make up the deficiency of the purchase-money is advanced, in shares previously agreed on, by the brewers and by the distillers who have served or are intended to serve the house; and the brewers and the distillers agree that their respective debts shall not have priority one over the other, and, in such case, the deeds and memorandum are delivered to and remain with either the brewers or the distillers, but on behalf of both; and the debts, when paid, are paid *pari passu*.

[412] Shortly before the 13th of September 1838 Gurney contracted with Leonard Albin to sell to him the public-house called The Dolphin, and, for that purpose, to grant a lease of it to him for the whole of the term of 63 years, wanting 10 days, at the yearly rent of £102, 10s., in consideration of £2450: but Albin not being able to pay more than £450 of the purchase-money, he and Gurney went together to the Plaintiffs' brewery, and Gurney then informed the Plaintiffs that he was about to sell the public-house to Albin, and that Albin was unable to advance the whole of the purchase-money; and Albin thereupon requested the Plaintiffs to pay to Gurney the sum of £1000, part of the purchase-money, and made a similar request to Seager, Evans & Co.; and the two firms agreed to comply with the requests made to them respectively.

Gurney also agreed to sell to Albin all his furniture, stock-in-trade and fixtures in the public-house at a fair valuation; and the same were accordingly valued at £500.

On the 13th of September 1838, which was the day fixed for the completion of

the purchase, Charles Callow, the agent of the Plaintiffs, met Gurney and Albin and the agent of Seager, Evans & Co., at the public-house, for the purpose of completing the purchase; and Callow, in payment of the £1000 which the Plaintiffs had consented to pay as before mentioned, then gave to Gurney a cheque for that sum, drawn by him upon the Plaintiffs and made payable to Gurney. On the following day Gurney presented the cheque at the Plaintiffs' brewery for payment; and the Plaintiffs wrote the amount of it off the debt due from him to them. Seager, Evans & Co. [413] paid, in like manner, to Gurney the £1000 which they had consented to pay; and Albin paid the rest of the purchase-money, and also the sum at which the furniture, stock-in-trade and fixtures had been valued. Gurney, on the cheques being delivered and the payments being made to him, executed an indenture, dated the same 13th of September, whereby he demised the public-house to Albin for the term agreed upon; and, at the same time, he delivered to Albin possession of the furniture, &c. Immediately upon the execution of the lease, and in pursuance of the before-mentioned arrangement, Gurney delivered the lease to the clerk of the Plaintiffs' solicitors as the agent and on behalf of the Plaintiffs, and the same was retained by the solicitors, for a short time, for the purpose of being registered in Middlesex, and was then deposited in the strong-room at the Plaintiffs' brewery.

The bill alleged that, under the circumstances aforesaid, the Plaintiffs became entitled to a lien upon the public-house for the £1000 paid by them, and the interest thereof; and that the lease was delivered to and was held by them, as well on behalf of themselves and in respect of their lien as on behalf of Seager, Evans & Co., and in respect of their lien upon the premises for the £1000 paid by them, and the interest thereof.

Albin being desirous that the Plaintiffs and Seager, Evans & Co. should supply him with goods for the purposes of his business of a licensed victualler and publican, the two firms agreed to do so upon the usual terms; and they requested Albin to sign and give to the Plaintiffs, on behalf of themselves and Seager, Evans & Co., a memorandum of the deposit of the lease, which was to operate by way of further security for the two [414] sums of £1000, and also for any debts which might accrue due from Albin, to the two firms respectively, in consequence of their dealing with him in his trade. Accordingly, Albin signed and gave to the Plaintiffs, on behalf of themselves and Seager, Evans & Co., a memorandum, dated the 13th day of September 1838, in the words following: "*Memorandum—I have this day deposited with Sir Henry Meux & Co. the lease of The Dolphin public-house, Whitechapel Road, for securing on demand the repayment to them of the sum of £1000, and to Messrs. Seager, Evans & Co. the sum of £1000, now respectively lent and advanced by them to me; with interest thereon respectively at five per cent. per annum from the date hereof, and also for securing, unto the said Sir Henry Meux & Co. and Messrs. Seager, Evans & Co. respectively, or the partners for the time being constituting their respective firms, the payment of all such other debts and sums of money as shall, at any time hereafter, become due and owing from me, to the partners for the time being constituting the said firms respectively, for goods sold and money lent, or upon any other account whatsoever: and I undertake and agree, on demand and at my own costs, to execute unto Sir Henry Meux & Co. and Messrs. Seager, Evans & Co., or the partners for the time being constituting the said respective firms, or to such person or persons as they shall direct, an under-lease of the premises comprised in the said lease so deposited as aforesaid, for such term as they shall respectively think fit, not extending to the whole term for which I hold the same; such under-lease to be granted at the yearly rent of a peppercorn, by way of mortgage for securing the payment of the monies and interest so intended to be secured as aforesaid, and with such powers of sale, and such powers of giving receipts and discharges to purchasers, and other clauses and [415] provisions incident thereto as the said Sir Henry Meux & Co. and Messrs. Seager, Evans & Co., or the partners for the time being constituting their respective firms as aforesaid, may think fit: and I declare that the said Sir Henry Meux & Co. and Messrs. Seager, Evans & Co. respectively, or such partners for the time being as aforesaid, shall be entitled to and have a lien upon the said lease so deposited as aforesaid (but not an assignment of the whole of my term and interest therein) until the whole of the monies and interest intended to be secured as afore-*

said, shall be fully paid and satisfied : and, lastly, for the considerations aforesaid, I hereby undertake and agree, so long as I shall be indebted upon the security aforesaid, not to make or execute any transfer, assignment or other disposition, either absolutely or conditionally, of the legal estate of or in the said premises, or in any part thereof, to any other person than the said Sir Henry Meux & Co. and Messrs. Seager, Evans & Co., or their respective firms for the time being."

Although it was expressed in the memorandum that Albin had deposited the lease with the Plaintiffs, yet, in fact, the lease never was in his hands or possession, but the same was delivered to or deposited with the Plaintiffs by Gurney, in the manner and under the circumstances before mentioned. Albin, upon the execution of the lease, entered into possession of the public-house and premises.

Shortly before the end of 1838 the Plaintiffs, for the first time, discovered that in June 1837 a *fiat* in bankruptcy was issued against Albin (who was then a wine and spirit merchant at Liverpool), under which he was declared a bankrupt, and that the Defendants, John [416] Smith, John Reckless and David Hart were appointed assignees of his estate, and that Albin *had never obtained his certificate*. On making that discovery, the Plaintiffs and Seager, Evans & Co. proceeded to take steps for enforcing their lien upon The Dolphin public-house ; and, in August 1839, they entered into a treaty with one Thorn for the sale of it to him for £2200 : but, before they made any contract with Thorn, they informed the assignees of all the circumstances of the case and made certain arrangements with them, the result of which was that, by an indenture, dated the 7th of September 1839, and made between the assignees of the first part, the Plaintiffs and Seager, Evans & Co., of the second part, and Thorn, of the third part, after reciting the lease of the 13th of September 1838, and that £2000, part of the consideration money of £2450 expressed to have been paid by Albin to Gurney was, in fact, paid to Gurney by the parties thereto, of the second part, in equal moieties, and that the recited indenture of lease was thereupon delivered to those parties, and that they then held the same as a security for the £2000 and interest, and that they were entitled to a lien upon the indenture of lease for £2000 and interest, as purchasers to that extent, and that the £2000 was still due and owing to them with interest from the 13th of September 1838, and that Albin, at the time of granting the lease, was and still remained an uncertificated bankrupt, by reason whereof the lease became the property of and was then legally vested in the parties thereto, of the first part, as Albin's assignees, *subject nevertheless to the lien for the £2000 and interest*, and that the last-mentioned parties, as such assignees, had taken possession of the premises demised by the lease, and that Thorn had agreed with them for the purchase of the premises [417] for the residue of the term of 63 years less 10 days for £2200, and that it had been agreed between the several parties thereto that £2100, part of the £2200, should be paid to the parties thereto, of the second part, in full satisfaction and discharge of their aforesaid lien, and that, in consideration thereof, they had agreed to join in releasing the premises in manner hereinafter contained : it was witnessed that, in consideration of £1050 paid by Thorn to the Plaintiffs, and of £1050 paid by him to Seager, Evans & Co., and of £100 paid by him to Smith, Reckless and Hart, they and the parties of the second part assigned and released respectively the public-house to Thorn for the residue of the term of 63 years wanting 10 days.

The sums of £1050, £1050 and £100 were paid by Thorn, according to the tenor of the assignment ; and, upon the execution of it, the Plaintiffs delivered to him the lease of the 13th of September 1838. Although the assignment was dated as above, yet, in fact, it was not executed until the 9th of November 1839, previously to which day, namely, on the 24th of September 1839, a memorandum was signed by the Plaintiffs and Seager, Evans & Co., and by Smith, Reckless and Hart, in the words following : "Memorandum—That although Messrs. John Smith, John Reckless and Daniel Hart, assignees of Leonard Albin, an uncertificated bankrupt, have, at the request of the other parties to a certain indenture not yet executed, bearing date the 7th day of September instant, and made between the said assignees of the first part, Sir Henry Meux & Co. and Messrs. Seager, Evans & Co. of the second part, and John Thorn of the third part, whereby the premises called The Dolphin are conveyed, for the residue of a term of years, to the [418] said John Thorn, in consideration of

£2200 (that is to say, £2100 paid to the parties of the second part and £100 paid to the parties of the first part), agreed to join therein without raising, on the face of such indenture, any question as to whether the said assignees have, as between them and the parties of the second part, a right to such £2100 or any part thereof, inasmuch as the said John Thorn objected to have the same appear on the said deed ; yet, nevertheless, it is hereby declared and agreed, between the said parties of the first and second parts, that such indenture and the concurrence of the said assignees therein, and in the payment over of the £2100 to the said parties of the second part, was and is expressly on the condition and understanding that the same is *without prejudice to any right or claim (if any) of the said assignees, either at law or in equity, to such £2100 or any part thereof* ; and that the fact of the execution of such indenture by the said assignees shall not prejudice any right whereof the said assignees were possessed before the date hereof ; nor shall the signature, by the said parties of the second part to this memorandum prejudice any right whereof they were possessed before the date hereof ; and that, in case of any proceeding hereafter, either at law or in equity or otherwise, between the said assignees and the said parties of the second part in respect thereof, the said indenture is not to be given in evidence or used in bar or to the prejudice of any such right or claim (if any) of the said assignees ; provided that this memorandum shall be delivered up to be cancelled, and the subject-matter of the said indenture be considered finally settled, unless the assignees shall, on or before the 1st day of January next, proceed to enforce some claim in respect of such £2100."

[419] In December 1839 the assignees, claiming to be entitled to the £1050 paid by Thorn to the Plaintiffs, as part of Albin's estate, commenced an action against the Plaintiffs to recover that sum, as money had and received by the Plaintiffs to their use.

The Plaintiffs, being advised that they had no defence at law to the action, filed the bill in this cause in January 1840, stating the matters before mentioned, and that they had no notice, either actual or constructive, until after they had paid the £1000 and the lease had been delivered to and deposited with them, that Albin was or had been a bankrupt ; that the cheque which was drawn on the Plaintiffs for £1000, part of the purchase-money for the public-house, was handed over by Callow, as the agent and on behalf of the Plaintiffs, immediately to Gurney ; and that it was made payable to him only, and not to his order or to bearer ; and that the same was paid to him by allowing the amount thereof to him in account as before mentioned ; and that the cheque or the proceeds thereof never was or were in the possession or power of Albin ; and, moreover, that the indenture of lease was delivered by Gurney, on the execution thereof, immediately to the clerk of the Plaintiffs' solicitors as the agent and on behalf of the Plaintiffs ; and that the same was deposited by them at the brewery of the Plaintiffs, and remained in the possession of the Plaintiffs until the delivery thereof to Thorn ; and that it never was in the possession or power of Albin ; that the Plaintiffs were entitled, under the circumstances stated, *to stand in the place of Gurney as to the £1000, the portion of the purchase-money which was paid him by the Plaintiffs ; as being purchasers from him of the lien to which he would have been entitled upon the premises, in case the £1000 had* [420] *not been paid to him* ; that, even if they were not entitled to stand in the place of Gurney in respect of his lien, yet they were entitled to a lien upon the public-house for the £1000 and interest, in preference to and as having a priority over the claim of the assignees ; and that the assignees were not entitled to take the premises or to receive the purchase-money for the same, except subject to the Plaintiffs' lien, or without discharging or satisfying what was due to the Plaintiffs, in respect of the £1000 and interest ; that, according to the true construction of the memorandum of the 24th of September 1839, the right of the Plaintiffs, as against the assignees, to a lien upon the public-house for the £1000 and interest was not to be prejudiced or affected by the execution of that memorandum or by the sale of the premises ; and that the Plaintiffs were at liberty, notwithstanding the sale, to assert and maintain their right to such lien, as against the assignees, in the same manner, to all intents and purposes, as if the premises had not been sold and the lease had remained in the possession of the Plaintiffs ; and that, under the circumstances aforesaid, the Plaintiffs were entitled to receive and retain the £1050 so paid to them by Thorn as part of the purchase-money for the public-house, by virtue of their lien and in satisfaction and discharge thereof.

The bill prayed that it might be declared that, upon the delivery of the lease of the public-house to the Plaintiffs, they became and were entitled to a lien upon the house for the £1000 paid by them to Gurney in part of the purchase-money of the premises, together with lawful interest thereon; and that it might be declared that the Plaintiffs were entitled to receive and retain the amount of the £1000 and interest out of the [421] proceeds of the sale of the premises in preference and priority to the claim of the assignees to such proceeds; and that they might be decreed to retain the same accordingly; and that the assignees might be restrained from prosecuting their action.

The injunction having been obtained,

Mr. Knight Bruce, Mr. G. Richards and Mr. Freeling, for the Plaintiffs, shewed cause against dissolving it. They said that the Plaintiffs were entitled to the same lien as Gurney would have had if he had not been paid that portion of the purchase-money which he received from the Plaintiffs; that the transaction was one entire transaction; that the under-lease granted by Gurney never was in Albin's hands, but was delivered over by Gurney immediately after he had executed it to the Plaintiffs' agent; so that Albin did not acquire, even for a single moment, any interest in the demised premises, except subject to the Plaintiffs' lien; that his assignees could not stand in a better situation than he did; but must take the property as he took it, that is, subject to the lien; for the assignees could not adopt the transaction in part, and repudiate it in part.

They cited *Dryden v. Frost* (3 Myl. & Cr. 670), and *Ex parte Pollard* (Mont. & Chitty's B. C. 238).

Mr. Jacob and Mr. Keene appeared for Albin's assignees. They said that Gurney never had any lien on the premises; for he was paid the whole of his purchase-money: that the Plaintiffs were no more entitled to the lien which Gurney would have had if he had not been [422] paid the whole of his purchase-money, than a surety in a bond who had paid the debt of his principal was entitled to the rights of a specialty creditor as against the assets of the principal; and that, as Albin was a bankrupt at the time when the transaction took place, he was incapable of acquiring property except for the benefit of his assignees, or of creating any equity by which they would be affected.

They cited *Parry v. Wright*.(1)

THE VICE-CHANCELLOR [Sir L. Shadwell]. The sole question in this case is whether the lien which the brewers had was not co-existent with the commencement of the lease at law; and it seems to me, on the circumstances stated, that that very act which did give existence to the lease at law, namely, the delivery, was the act which constituted the deposit and lien. This appears to me to be reasonably plain; but, supposing it were doubtful, still the matter must be discussed; and my opinion is that a question of this kind is far better discussed in this Court than it can be in a Court of law, because there might be a literal interpretation put on the words of the agreement of the 13th of September 1838 which might be destructive of the case. It is quite consistent with the expression in that agreement: "I have this day deposited the lease," that the transaction should be held to be one in which there never was any actual deposit made by Mr. Albin him-[423]-self; but that he intended that the transaction should proceed in such a form as that, by the delivery of the lease, the deposit should commence. My opinion is that that is the right construction, consistent with the terms of the agreement, and one which would uphold the brewers' claim. Therefore I think that the injunction should be continued.

Albin's assignees appealed to the Lord Chancellor from the above decision.

Mr. Jacob, Mr. Wigram and Mr. Keene, for the Appellants, said that, in the memorandum of the 13th of September 1838, the deposit of the under-lease was expressed to have been made by Albin himself: that there was no equity in the case

(1) 1 Sim. & Stu. 369. A bill had been filed by Seager, Evans & Co., stating the same facts, and praying the same relief as the bill in *Meux v. Smith*. Cause was shewn, at the same time, against dissolving the injunctions in the two causes. Mr. Swanston and Mr. Chandless appeared for the Plaintiffs in *Seager v. Smith*.

distinct from the legal right; and, if there were, that there was no necessity for the Court to interfere; as the action sought to be restrained was for money had and received, which was an equitable action, that is, one in which a Court of law would take into consideration and give effect to all the equities affecting the claims of the parties: that, at all events, the Vice-Chancellor ought to have ordered the money, which was the subject of the action, to be paid into Court.

Mr. Knight Bruce, Mr. G. Richards and Mr. Freeling appeared for the Respondents.

The counsel for the Appellants referred to 2 Sugd. Vend. & Purch. 409, edit. 10th, and *Toulmin v. Steere* (3 Mer. 210).

[424] The counsel for the Respondents cited *Ex parte Pollard*; *Harrison v. Walker* (Peake's N. P. C. 150); *Taylor v. Plumer* (3 M. & S. 562); *Gladstone v. Hadwen* (1 M. & S. 517); *Everett v. Buckhouse* (10 Ves. 94); *Hunt v. Mortimer* (10 Barn. & Cress. 44); *Ashley v. Kell* (2 Stra. 1207); *Winks v. Hassall* (9 Barn. & Cress. 372); and *Dryden v. Frost*.

THE LORD CHANCELLOR [Cottenham]. In this case the Plaintiffs seek to have an action for money had and received restrained, on the ground that they were equitable incumbrancers on the property of which the money in question was the fruits of the sale; and, with respect to the agreement which was entered into on the sale, I think the true construction of it must be considered to be that the thing should remain in the same state (the rights of the parties being to be decided), or as nearly as possible in the same state as if the sale had not taken place.

As the assignment by which the sale was effected recites the title of the Plaintiffs as equitable incumbrancers, and as the assignees are parties to it, it would, if taken by itself, be an acquiescence in the Plaintiffs' demand. It seems that the assignment assumed that shape at the request of the purchaser who was to take the benefit of the assignment: and, as between the parties between whom the question was depending, whether the Plaintiffs had an equitable claim on the property or not, it was agreed that, notwithstanding the expressions used in that assignment, the rights of both parties should remain the same as they were before, and not [425] be affected at all by it. This consequence, however, necessarily followed from the sale, namely, that, instead of an action of trover to recover the lease which would have been the form of action in which the assignees would have asserted their title if the property had not been sold, the action brought was an action for money had and received; the money in question being a part of the purchase-money which was paid over to the Plaintiffs on the sale taking place. I therefore think that I am bound to look at this case without reference to the circumstance of the property having changed its form from that of an under-lease, to the purchase-money which stands in the place of that under-lease; and that that transaction ought not to affect either the rights or remedies which the parties seek to have enforced in this Court.

Looking, therefore, at the case as it would have stood independently of the transaction of the sale (the parties having agreed that that should not make any difference in their rights), I have a case of extreme hardship on the part of the Plaintiffs. But that would not operate, if the case were one in which it was perfectly clear that, notwithstanding the hardship to which they are exposed, they could have no equity against the persons who, at law, probably would be considered as having the title to the lease.

Now the transaction is one which, as stated by the bill, is met by the answer as to very many material parts of it: not by any statements denying the statements in the bill; but by that which naturally was the case with regard to these assignees, I mean the statement that they were ignorant of the truth, one way or the other, of the facts stated in the bill. It is perfectly certain that, [426] when the Plaintiffs advanced their money, they were dealing with persons who were the apparent owners of the property. Gurney was the owner of the lease; and he entered into an arrangement by which the person who turned out to be an uncertificated bankrupt, although he was not known by the parties to be so at the time, agreed to take the lease; but he had not the money which was required by Mr. Gurney for the sale of the lease. Whether Gurney and Albin came together to the Plaintiffs or not is a matter which is stated in one way in the bill, and as to which ignorance, on the other hand, is

alleged in the answer. But it is quite clear, from the nature of the transaction itself, that in order to enable Albin to pay the money to Gurney, he procured £1000, part of it, from Messrs. Meux & Co., and another £1000 of it from Messrs. Seager & Co. What passed at the meeting which was held for completing the purchase the Court, at present, has no means of knowing. Something may depend upon what then passed. The assignees, of course, knew nothing of what passed; they were not present, and they could know nothing except as they had been informed by other persons.

The form of the deed is not an assignment, but is an under-lease from Gurney to the person, who, in fact, turned out to be an uncertificated bankrupt; and, on that ground, the assignees claim. They say that, inasmuch as he was an uncertificated bankrupt, he could not acquire any property for himself; but was capable of acquiring property for the benefit of his assignees only. On that ground, assuming that he was, at one moment, the lessee, and, therefore, the proprietor of the lease, and that the Plaintiffs claim through him, and through the title and interest which he had, the assignees say that he had [427] no right and no power, as against them, to create any interest in the property which was in himself; that he became entitled to the property by the under-lease executed by Gurney, and, thereby, the assignees immediately became entitled to it; and that they were not bound by the subsequent dealings which took place between himself and the Plaintiffs and the other parties, Messrs. Seager & Co. That is the case of the assignees.

Now the case on the part of the Plaintiffs is, of course, at the present moment, not capable of proof. Nor, of course, are the allegations in the bill to be taken as any evidence of the title which they state. But the transaction, as admitted by the answer itself, shews, from what took place before the under-lease was executed by Gurney, that the real question will be probably (for that may depend on the evidence of what took place at the meeting), not whether the Plaintiffs can maintain any title derived from the uncertificated bankrupt; but whether this sort of case may not be made out, namely, that previously to the contract being carried into effect between Gurney and the bankrupt, there was a contemporaneous contract between the uncertificated bankrupt and Meux & Co., by which it was agreed that, although the uncertificated bankrupt was to take a lease in his own name, yet that the lease so taken in his name was to the extent of the money advanced, to be for the benefit of Meux & Co. and Seager, Evans & Co. It may be that the evidence will displace that case: but it is possible from the nature of the transaction, and not improbable that that case may be made out. It is the most probable history of the transaction as it appears, not only from the memorandum itself, but from the facts as they are admitted in the answer, namely, [428] that the party who was the nominal lessee had not, himself, the money, but was obliged to borrow it from some other parties previously to his becoming entitled to the under-lease from Gurney. It is, therefore, not improbable that, previously to his taking the lease, it was arranged that the money should be advanced, and the security given to those by whom the money should be advanced: at least, that is the question to be tried in the cause. What the effect of those facts is, if they turn out to be as stated on the part of the Plaintiffs, will be the question to be decided in the cause. It is not now the time for me to express my opinion as to the result of those facts if they are established. I am only to look at the pleadings for the purpose of seeing whether there be or be not a question to be tried between the Plaintiffs and those who, at law, are the owners of the lease, namely, those who stand in the place of the bankrupt, to whom, whilst he was uncertificated, the lease was made.

I cannot say that the case is so clear, on the part of those who are asserting a title at law, and that I am so certain that the equity asserted by the Plaintiffs would not be established against this property, as to justify me in refusing, to the Plaintiffs, the opportunity of going into and proving and arguing their case, when the proper time shall come.

Under these circumstances, I think I am exactly in that position in which the Court constantly finds itself, where it is bound to give to the party asserting the equity the opportunity of proving the case and obtaining the judgment of the Court on the equity so asserted. Of course, that will not apply if the Court saw no ground

stated. It is not merely the asserting of an equity which [429] induces the Court to grant an injunction and to give relief. There must be a probable case; at least, a case which is capable of being argued; that the Court may see that there is a question to be discussed, and a question to be adjudicated on.

I have no difficulty, therefore, in saying that the case is such as makes it the duty of the Court to protect the parties who were in possession of the lease, and who, therefore, could only have been compelled to part with it by an action at law; and the bringing of which, if it had not been commenced, this Court would certainly have restrained for the purpose of giving the Plaintiffs the opportunity of making out the equity which they have asserted. The injunction, therefore, against the action was, I think, very properly granted by the Vice-Chancellor.

Now it has been said that this action at law will try the equity; but it has not been made out, to my satisfaction, that it would. But if it would, it is not the course of this Court, in a matter certainly originally belonging to this Court and which still belongs to this Court, to send, or rather to permit a question of equitable lien upon the deposit of deeds under a contract in writing for that purpose, to be adjudicated on in the course of an action for money had and received. That is a subject-matter for the jurisdiction of this Court; and it is one in which, when a proper case arises for that purpose, this Court will maintain its jurisdiction, and, according to its own rules, decide on the rights between the parties.

In all those cases where the property exists in the shape of money, the Court is bound, as it interferes [430] with the claim of the party who is asserting a legal right to it, to take care that the property shall be put in a safe place of deposit, in order to abide the ultimate decision of the Court. It is said that this money is perfectly safe. No doubt it is perfectly safe; but this Court cannot proceed on the degree of credit which particular parties may be entitled to in the many transactions of this great city. I cannot take notice of it, and this Court knows nothing about it. It is, at present, money out on personal security; and, whether those persons who have got it have a degree of credit which makes it as safe as if it were in the hands of the Accountant-General of this Court is not a question which this Court can entertain. If I were to do that, a great variety of distinctions would have to be considered as to the degree of security which money in a particular position, in particular hands, would be likely to have. Under those circumstances, I do not feel myself at all at liberty to entertain any question as to whether the money is or is not safe where it is. I have no doubt, personally, that it is perfectly safe where it is; but I cannot exercise the jurisdiction of this Court on any such ground; and, therefore, if it is required on the part of the assignees that the money should be paid into Court, it is a matter quite of course that the money to which they are *prima facie* entitled and the legal title to which I prevent them from asserting by continuing the injunction should be secured in Court, for the purpose of abiding the ultimate result of the question between the parties.

I think the injunction, therefore, must be continued.

[431] Jan. 16, 17. The cause now came on to be heard.(1)

Mr. Bethell and Mr. Freeling appeared for the Plaintiffs. They cited *Ex parte Browne* (15 Ves. 472); *Ex parte Lees* (16 Ves. 472); *Butler v. Hobson* (5 Bing. N. C. 128).

Mr. James Russell, Mr. Anderdon and Mr. Shebbeare appeared for the Defendants. They cited *Ex parte Coombe* (17 Ves. 369); *Hesse v. Stevenson* (3 Bos. & Pull. 565); *Swan v. The Bank of Scotland* (1 Deacon, 746); *Ex parte Rucker* (1 Mont. & Ayr. 481).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not require any reply; because the case appears to me to remain pretty much the same as it did when it was brought before me for the purpose of the injunction.

I do not understand that, with respect to that which constituted the ground of equity, the Lord Chancellor entertained a different opinion from me. The only

(1) The cause of *Seager v. Smith* was heard at the same time. Mr. Swanston and Mr. Chandless appeared for the Plaintiffs; and Mr. James Russell, Mr. Anderdon and Mr. Shebbeare, for the Defendants.

difference of opinion was this—that I, perhaps, thought the case so clear that it was not necessary to have the money brought into Court; but the Lord Chancellor thought that it might be open to doubt; and, therefore, did order the money to be brought into Court. I believe that was the sole difference between us.

[432] Looking at the transaction as it appears on the whole of the evidence, I see no reason to alter the opinion which I expressed on the principal question in the cause, when I ordered the injunction to be continued. I am perfectly willing to admit that, where a matter proceeds on the footing of a memorandum, and that is the transaction between the parties, the Court will not allow the memorandum to be departed from. But here I am obliged to take the antecedents and the subsequent facts, which have been given in evidence, together; and it appears to me to be distinctly made out that the application was, first of all, made by Albin to Messrs. Meux at one time, and to Messrs. Seager at the other, to advance him the sum of £1000 each, for the purpose of enabling him to take the house from Mr. Gurney. Then the parties met on the 13th of September, and, there having been the previous promise given by Messrs. Meux for themselves, and by Messrs. Seager for themselves, that they would advance the sum of £1000 each, Messrs. Meux, by their agent, delivered to Gurney a cheque on themselves for one of the sums of £1000, and Messrs. Seager delivered to him a cheque on themselves for the other sum of £1000: and Gurney being indebted to each of those firms, Messrs. Meux wrote off the amount of the cheque given by them from the debt due to their firm, and Messrs. Seager wrote off the amount of the cheque given by them from the debt due to their firm. This mode of dealing was the same in effect as if Messrs. Meux and Messrs. Seager had advanced £1000 each to Albin; and so the parties understood it. Then Gurney executed the under-lease: and, whether he first sealed it and then delivered it to the clerk of Messrs. Meux's solicitors, or said: "I seal and deliver this as my act and deed," and then delivered it to the clerk, appears to me to be unimportant: because [433] it was all one transaction: and it appears to me that the creation of the legal estate was simultaneous with the creation of the equitable lien of the brewers and the distillers.

Now it is observable that Messrs. Meux and Messrs. Seager had actually entered into the contract that they would pay those two sums of £1000 each; and I should like to know whether they did not do so for a consideration. Because, on the footing of their undertaking to pay the two sums of £1000, and £1000 to Mr. Gurney for Mr. Albin, Mr. Gurney did actually execute the lease, and caused to depart from himself the legal estate, *pro tanto*, of that thing which he held by virtue of the original lease. In point of fact, the whole was conducted *bonâ fide*; and, on the two cheques being presented to the different parties, they acted on their promise at once and discharged Gurney's account to the amount of those cheques.

I do not think that the mere terms of the memorandum, which was only given as part of the transaction, ought to have the effect of defeating the whole of the case; but they are to be taken rather in aid of the case; and though the matter may be partially misrepresented, the substance of the memorandum tallies with the rest of the evidence; and my opinion, therefore, is that Messrs. Meux and Messrs. Seager have, in their different suits, established their right to have the equitable lien which was created by means of the deposit.

[434] GORST v. LOWNDES. Jan. 15, 1841.

[S. C. 10 L. J. Ch. 161; 5 Jur. 457.]

Term. Will. Construction.

A testator directed the income of his property to be accumulated for the term of 21 years from his death. The testator died on the 5th January 1820. Held that, in the computation of the term, the day of his death was to be excluded; and, consequently, that the dividends on stock which became due on the 5th January 1841 were subject to the trust for accumulation.

The testator in the cause devised his real and personal estate to trustees, in trust to receive the income arising from the whole of his real and personal estate, *for the*

term of 21 years from his death, and, during the continuance of the aforesaid term, to accumulate such income, and, from time to time and at such times as the trustees should think fit, to invest the personal estate and the income of his real and personal estate and all accumulations thereof in the purchase of real estates, and to take conveyances thereof in their own names, and to accumulate and apply the income of the purchased estates in like manner; and, at the expiration of the term of 21 years, upon trust to convey all the real estates then vested in them by the will or by any of the means aforesaid to certain uses in strict settlement.

The testator died at about half-past two o'clock in the afternoon of the 5th of January 1820.

On the 6th of January 1841 the first tenant for life, under the will, presented a petition stating that the clear residue of the testator's personal estate and the income of his real estates and the accumulations thereof, up to the 4th of January 1841, consisted of £184,984 consols and of certain other sums of stock: that the Petitioner was advised and submitted that the term of 21 years from the death of the testator expired on the 4th of January 1841: that one half-year's dividend on the £184,984 consols accrued due on the 5th of January 1841, which was after the expiration of the [435] term; and that the Petitioner was entitled to that dividend as such first tenant for life.

Mr. Jacob and Mr. Ellison, for the Petitioner, said that the period of accumulation was to be computed in the same way as the period of minority; and that, if a child was born on the 5th of January 1820, it would be of age on the 4th of January 1841: that though, by the Act of Parliament by which the stock in question was created (25th Geo. 2, c. 27), the dividends were payable on the 5th day of January and the 5th day of July in every year, yet the dividends were not *demandable* until the following day. They cited *Toder v. Sansam* (1 Bro. P. C. 468), *Lester v. Garland* (15 Ves. 248), *In re Farquhar* (Mont. & Macarth. 7), *Godson v. Sanctuary* (4 Barn. & Adol. 255), *In re Whitby* (Mont. & Chitty, 671), *Pellew v. The Inhabitants of Wonford* (9 Barn. & Cres. 134), *Hardy v. Ryle* (*Ibid.* 603), *Blunt v. Heslop* (8 Adol. & Ell. 577).

Mr. Wigram and Mr. Lowndes, *contra*, cited *Ackland v. Lutley* (9 Adol. & Ell. 879) and *Pugh v. The Duke of Leeds* (Cowp. 714).

Mr. G. Richards and Mr. E. F. Smith appeared for the trustees.

Mr. Knight Bruce and Mr. Bridger appeared for other parties; but were instructed not to take any part in the argument.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I should have thought this the simplest question in the world.

[436] I have generally understood the rule to be that, ordinarily speaking, where a party creates a term from a certain day, that day is excluded in the computation of the term.

Here the testator has directed the trustees of his will to receive and accumulate the income of his real and personal estate for the term of 21 years from his death; and I should have thought it to be perfectly clear that, where a person gives such instructions, the term would have extended to the 21st anniversary of the day mentioned; and that the whole of that anniversary would be a portion of the term, or, in other words, that the day of his death would be considered as a point, and the last 5th of January would be included in the term of 21 years.

The Act of Parliament which has been referred to says that the dividends on consols shall be issued and paid half-yearly on the 5th day of January and 5th day of July. That dividend, therefore, which accrued due in the course of the 5th of January before the term ended was a sum to which the trustees were entitled.

I do not think that there is any weight in the objection that the accumulations were to be laid out in land, and, therefore, ought to be considered as land. For, although it is true that, if that had been done, there would have been certain days appointed for payment of the rent, yet no one can tell what those days would have been. As the funds stand, the accumulation was to go on till the end of the 5th of January 1841, and, by the Act of Parliament, the dividend became payable on that day, and therefore must be considered [437] to have been then paid; and the rights of the parties were then determined.

Declare that the dividends which became due on the 5th of January 1841 were part of the accumulated fund.

[437] AKED v. AKED. Jan. 19, 31, 1843.

Practice. Clerk of Records and Writs. Office Copies.

The Clerk of Records and Writs is not compellable to file the answer of a Defendant who has refused to take an office copy of the bill.

The Clerk of Records and Writs, in whose division this cause was, having declined to file the answer of the Defendants because they had refused to take an office copy of the bill, a motion was made, on behalf of the Defendants, that the clerk might be directed to file the answer notwithstanding such refusal.

Mr. Bethell and Mr. Rogers, in support of the motion, contended that the Six Clerks or the Clerks in Court, before their offices were abolished by 5th & 6th Vict. c. 103, had no *right* to impose on a party to a suit the necessity of taking an office copy of a pleading in the suit, nor had the Clerks of Records and Writs (to whom the duties of the Six Clerks and Clerks in Court, as officers of the Court, had been transferred), any such right. They referred to sections 1, 2, 3, 21, 22 and 31 of the Act above mentioned: and to the 3d, 8th, and 32d of Lord Lyndhurst's Orders of the 26th of October 1842, and the second schedule thereto. They added that the 14th rule of 11 Geo. 4 and 1 Will. 4, c. 36, s. 15, which provided that, where a Defendant was in contempt in not answering, and should be able to put in his answer by borrowing or obtaining a copy [438] of the bill without taking an office copy of it, he should not be compellable to take any such copy, was not a recognition of the right in question, but was merely a bye-allusion to a *practice* existing in the Six Clerks' Office.

The motion was not opposed.

Jan. 31. THE VICE-CHANCELLOR [Sir L. Shadwell]. I believe that no one acquainted with the practice of the Court doubts that, before the month of October last, it was the settled practice of the Court that an office copy of the Plaintiff's bill should be taken by the Defendant before he could be allowed to file his answer.

The order of the 28th of November 1743, in Mr. Beames's Orders, p. 369, under the head of "Sworn Clerks and Waiting Clerks," p. 395, has this regulation: "Where any person entitled to privilege of Parliament, pursuant to the Act of Parliament of the 12th & 13th of King William the 3d, has been served with an office copy of the bill, such person shall not be obliged to take out or pay for any other copy of such bill upon his appearance thereto:" which regulation plainly shews that, but for that regulation, the Defendant would have been obliged to take an office copy of the bill upon entering his appearance.

In the *Cursus Cancellariæ*, 2d edition, published in 1727, p. 99, there is this passage: "After the Defendant has appeared he must first take out an office copy of the Plaintiff's bill before he can answer it; which copy costs him about 12d. per sheet in the Six Clerks' [439] Office; and, with this copy, he ought to apply to counsel, who will advise him either to answer or to plead or demur to the Plaintiff's bill." This passage directly shews what the practice was one hundred and sixteen years ago; and, though it does not appear to have been founded upon any express order of Court, yet, from its long continuance, it was as binding as if it had been founded upon a positive order.

The 14th rule of the 15th section of 1 Will. 4, c. 36, clearly recognizes the practice to be binding: and upon the spirit, though not the letter of that rule, I acted on the 27th of July 1836, in the case of *King v. Bryant*, when the Defendant was brought up, by *habeas*, for not putting in a further answer. He said he had put it in. But it was stated that the Clerk in Court refused to file it, because the Defendant refused to pay for an office copy of the exceptions. I ordered that the Defendant should either make an affidavit that he was unable to pay for the office copy, or that he should pay for it. The Defendant paid for the office copy, and the answer was filed. It is to be observed that the Defendant was not only a solicitor, but one by no means willing to do more than he was obliged to do.

But it has been said that the Act 5 & 6 Vict. c. 103, which has abolished the office of Six Clerks, has abolished all the customs and incidents relating to it. The Act has abolished the office; but has not abolished the business transacted by means of it, or altered the mode of doing it. On the contrary, by the third section, it is enacted that the business of the Clerks of Records and Writs shall be, besides what is specified in the Act, such as the Lord Chancellor shall, in a given manner, direct: and, by the Third Order of the 26th of October [440] last, his Lordship has directed in these words: "That the Clerks of Records and Writs shall perform all such duties as have heretofore been performed by the Six Clerks, Sworn Clerks or Waiting Clerks, as officers of the Court, in relation to the several matters hereinafter mentioned; that is to say—

The filing, custody, copying and amending of all informations, bills, demurrers, pleas, answers, and other pleadings and records:

The entering of appearances, rules, consents, notes and memorandums of service:

The certifying of appearances and proceedings:

The custody of exhibits deposited for inspecting and copying:

The attendance with records and exhibits on the Judges of the Courts, on the Masters in Ordinary, and at Assizes or elsewhere:

The enrolment of decrees and orders; and all other duties heretofore performed by the Six Clerks, Sworn Clerks or Waiting Clerks, as officers of the Court, in relation to suits and matters in equity, and not as attornies, solicitors or agents of the parties in suits or matters in equity.

How are these duties to be performed otherwise than in the way in which they were formerly performed? Can it be supposed that this order, which directs the duties to be performed, has varied the manner of performing them? For instance, must not the Clerk of Records and Writs determine whether a bill or answer [441] is in a proper form to be filed, by the same rule as a Six Clerk would have done? If the schedule of fees had omitted the fees upon office copies of bills, there would have been some ground for the application. But the schedule has not omitted them. The Act of Parliament, in the 22d section, has declared that it is expedient that the Suitors' Fund shall, at all times, be kept up; and, by the 21st section, has directed that all fees should be paid into it; and it has, by the 30th and 33d sections, charged it with new expenses: but it has not said one word as to the abolition of fees formerly taken by the practice of the Court. If the Legislature had intended that those fees should have been abolished, without doubt the Act would have contained a provision to that effect. If the Lord Chancellor had intended so, the orders would have expressed that intention. But, in that respect, the Act and orders are silent.

It is said that the magnitude of the fees demandable under the practice makes this a case of great importance. Without doubt it does. But the noble and learned Lords who concurred in framing and passing the Act must have been as well aware of that as the solicitors of the Court, and yet were content to say nothing about abolition.

When the orders were sent to me for perusal before they were signed, I never thought for a moment that they were intended to have such an effect as is imputed to them; and I know from very high authority that it was not intended that the fees authorized to be taken, by the custom of the Court, upon the filing of an answer, should be abolished.

Upon the whole, my opinion is that there is no ground for the application, and no order can be made upon it.

[442] STUART v. LORD BUTE. Jan. 13, 1841.

[S. C. 12 Sim. 460; 13 Sim. 453.]

Insufficiency. Defendant. Answer. Examination.

A Defendant, who was required to set forth in his answers to the interrogatories certain entries in the books of a firm of which he was a member, stated in his

answer that he and his co-partners had given express directions to their agent, in whose custody the books were, not to produce them to anyone or allow any stranger to inspect them, without the express authority of the Defendant and his co-partners: that the books were not in the power of the Defendant alone, but of the Defendant and his co-partners, and that the Defendant had no right or lawful power to produce them or to set forth their contents without the consent of his co-partners. Held, that the answer was insufficient, as the Defendant did not state that his co-partners had refused to consent to his setting forth the entries.

The Master having certified that the examination put in by the Defendant, Lord Wharncliffe, to interrogatories exhibited under the decree, was insufficient, his Lordship excepted to the certificate.

The first interrogatory was as follows:—"Whether or no are you now engaged in partnership with Lord Ravensworth and John Bowes, Esq., or any and what person or persons for the purpose of working and carrying on the collieries in the pleadings of this cause mentioned, or any of them, and how long have you been in such partnership?"

In answer to that interrogatory the Defendant said he was then engaged in partnership with the parties and for the purpose mentioned, and that he had been in such partnership from the year 1809, or *thereabouts*, to the best of his recollection, information and belief, to the then present time.

THE VICE-CHANCELLOR said that there were no limits which, of necessity, must be given to the words "or *thereabouts*," and consequently that the answer to the first interrogatory was insufficient.

The second interrogatory was as follows:—

[443] "Whether or no are the accounts and books of account of the said partnership, which commenced in the said year 1726, from the commencement or since any and what period of time, or any and which of such accounts or books of account kept at the office situate at Newcastle-upon-Tyne, in which the affairs of the said partnership are carried on, or in any and what other place, and whether or not in the custody of Nicholas Wood or any other and what person or persons, and whether or not as agent or agents for the said partnership of which you are now a member, or how otherwise; and, in particular, are not the accounts and books of account of the said partnership which commenced in the year 1726, for and during the said years 1792, 1793 and 1794, or some and which of such accounts or books of account, now, or have not such accounts and books of account, or some and which of them, been, at some time and when last, at the said office, or at some and what other place, and whether or not in the custody of the said Nicholas Wood or some other and what person or persons, as you know or, for some and what reason, believe, else what has become of such last-mentioned accounts and books of account to the best of your knowledge, information and belief?"

The answer to that interrogatory was as follows:—"To the second of the said interrogatories this examinant saith that *he believes* the accounts and books of account of the said partnership which commenced in the said year 1726, from the commencement thereof, are kept at the said office, and in the custody of the said Nicholas Wood as agent for the said partnership of which this examinant is now a member; and this Defendant is informed and *he believes* that the accounts and books of account of the said partnership, which commenced in the [444] year 1726, for and during the years 1792, 1793 and 1794, are now at the said office and in the custody of the said Nicholas Wood, but as the agent for the said partnership, and not otherwise; and the said Nicholas Wood has no right or power to remove the same or any of them, or to produce them to any stranger, or to deal therewith, in any manner, without the express consent or authority of this examinant and his said co-partners."

Mr. Knight Bruce and Mr. Jacob, for the Plaintiffs, contended that, as the interrogatory related to a fact which was within Lord Wharncliffe's own knowledge, his Lordship was bound to answer it positively, and that it was not allowable for him to answer it according to his belief merely.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that this answer is sufficient. Because the question is addressed to a fact of which it is almost impossible that Lord Wharncliffe can have personal knowledge to the full extent to which it goes.

The question is whether the books of the partnership which commenced in the year 1726 are in the possession of Mr. Wood. Now Lord Wharncliffe may have very good reason for believing that the books of the partnership are in Mr. Wood's possession : but how it is possible that his Lordship should *know* the fact, I declare I am unable to conceive ; because how can he know that there might not have been some other book besides the many waggon-loads of books that happen now to be at the office ? It appears to me to be a fact which is of itself beyond the power of human possibility to say he knows, having regard to the subject-matter of the interrogatory.

[445] I think the answer is sufficient on the face of it, and quite sufficient to enable the parties to act upon it, particularly as I observe that the Defendant finishes the answer thus : " And the said Nicholas Wood has no right or power to remove the same or any of them, or to produce them to any stranger, or to deal therewith, in any manner, without the express consent or authority of this examinant and his said co-partners."

In answer to the third interrogatory, the Defendant said that Nicholas Wood had, during the last two years, namely, at the annual meeting held by the Defendant and his co-partners, in May 1838, applied to the Defendant and his co-partners, when they were all present, for directions respecting the accounts and books of account of the partnership which commenced in the year 1726, and, in particular, such of the accounts and books of account as related to the years 1792, 1793 and 1794 ; and that the Defendant and his co-partners had, concurrently, given directions to Wood not to produce the accounts or books of account to any person whatever, or allow any stranger to inspect them without the express direction or authority of the Defendant and his co-partners, and in particular, that the Defendant, at the meeting in May 1838, concurred with his co-partners in giving such directions ; and that such directions were given in consequence of an application made to Lord Ravensworth by or on the part of the Plaintiff Lord Stuart de Rothsay.

The counsel for the Plaintiffs admitted that answer to be sufficient.(1)

[446] The fourth interrogatory required the Defendant to set forth, according to the best of his knowledge, information and belief, a full, true and particular list or schedule and description of all and every the ledgers, day-books, bankers' books, bill-books, and other accounts and books of account, of and relating to the partnership which commenced in the year 1726, and their dealings and transactions during the years 1792, 1793 and 1794, which then were, or, at any time, had been in his possession, custody or power, or in the possession, custody or power of his solicitors or agents, solicitor or agent, or of the partnership of which he was then a member, or of Nicholas Wood or any other person or persons as agent or agents for the last-mentioned partnership, and which contained any entry or entries relating to the several particulars thereafter mentioned (that is to say) the quantities of coals resting at the pit's mouth and the staiths belonging to or used by the partnership which commenced in the year 1726, at the death of the testator John Earl of Bute, and the subsequent sale of such coals, and the clear amount of money produced by the sale thereof, and when and by whom such monies were received, and how the same were applied, and also the sums due, to the last-mentioned partnership, at the death of the testator John Earl of Bute, from the several persons then employed by them as fitters, and from the Tyne Bank at Newcastle, and from Richard or Robert Clark, the cashier of the collieries, and from the several other persons then indebted to the last-mentioned partnership ; and when and by whom the several sums so due from the fitters, from the Tyne Bank and the cashiers and the several other persons, were received, and how the same respectively were applied ; and whether the late Countess of Bute, as devisee for life of the testator's share of the [447] collieries, or the late William Stuart Lord Archbishop of Armagh, as her executor, in respect of such her life-estate, received or derived any benefit or profit from the use of the said coals and monies, in the working and carrying on the collieries from the time of the death of John Earl of Bute, or

(1) The answer to the third interrogatory was inserted in the text, because it is referred to in the judgment.

relating to any or either of those particulars, or which contained any entries or entry shewing or tending to shew the quantity of coals sold, by each of the fitters indebted to the partnership at the death of the testator, in each month of the years 1792, 1793 and 1794 subsequent to his death, or the price at which such coals were sold, or the bills drawn upon or sums paid, by such fitters, to the partnership, during each of those months, or the state of the account of each of the fitters with the partnership in each of those months, or the dividends paid to the late Countess of Bute or to her executors or any person or persons on her or their account, in respect of the profits made by the partnership; and where and in whose possession or custody the ledgers, day-books, bankers' books, bill-books, accounts and account-books, and every of them, then were, and what had become of such of them as had been, but were not then, in such possession, custody or power.

The 5th interrogatory required the Defendant to set forth a full, true and particular schedule or copy of all and every the entries or entry contained in any of the ledgers, day-books, bankers' books, bill-books and other accounts and books of account by the last interrogatory mentioned or inquired after, which, in any way, related to the several particulars and matters in the last interrogatory more particularly mentioned or any of them, or by which the truth respecting the same might in any degree be ascertained; and to state, with refer-[448]-ence to each of the entries, in what book or account and in what page the same was to be found.

The 6th interrogatory was as follows:—"Say whether you have, before putting in your answer and examination to these interrogatories, made yourself or caused to be made by others and whom, any and what search into or examination of the several accounts and books of account of or relating to the said partnership which commenced in the year 1726, now in your possession, custody or power, or in that of your solicitors or agents, solicitor or agent, or of the said partnership of which you are now a member, or of the said N. Wood, or any other person or persons as agent or agents of the said last-mentioned partnership, or what steps you have taken to enable yourself to give the information asked for by these interrogatories."

The Defendant, in answer to the 4th interrogatory, said that he had, in the schedule thereto annexed, set forth, to the best of his knowledge, information and belief, a full and true and particular list or schedule and description of all and every the books of account of or relating to the partnership which commenced in the year 1726, and their dealings and transactions during the years 1792, 1793 and 1794, which then were in the office at Newcastle belonging to the Defendant and his co-partners, and which books were not in the possession or power of the Defendant, but of him and his two co-partners jointly, and that he had no right or power to remove or part with or produce the same or any or either of them without the consent or authority of his co-partners; and, save as appeared thereby and by the schedule thereto, the Defendant denied that any ledger, day-book, bankers' book, bill-book or other account or [449] book of account of or relating to the co-partnership and their dealings and transactions during the years 1792, 1793 and 1794, was then or ever was in his possession, custody or power, or in the possession, custody or power of his solicitors or agents, solicitor or agent, or of the partnership of which the Defendant was then a member, or of Nicholas Wood, or any other person or persons as agent or agents for the last-mentioned partnership, or which contained any entry or entries relating to the several particulars in the 4th interrogatory mentioned or referred to, or relating to any of such particulars, or which contained any entries or entry shewing or tending to shew the quantity of coals sold by each of the fitters indebted to the partnership at the death of the testator in each month of the years 1792, 1793 and 1794 subsequent to his death, or the price at which such coals were sold, or the bills drawn upon or sums paid by such fitters to the partnership, during each of those months, or the state of the accounts of each of the said fitters with the said partnership in each of those months, or the dividends paid to the late Countess of Bute, or to her executors or any person or persons on her or their account, in respect of the profits made by the partnership.

In answer to the 5th interrogatory, the Defendant said that the books comprised in the schedule thereto were very voluminous and the accounts therein of great length, and that he had never read or examined any or either of such books or any or either

of the accounts or entries contained therein respectively or in any or either of them, and that he was wholly ignorant of such books and accounts and entries, and that he knew not and was unable to set forth, as to his belief or otherwise, a full, true and particular schedule or copy or description of all and every the entries or entry (if any) contained in [450] such books or any or either of them, which in any way related to the several particulars and matters in the last preceding interrogatory more particularly mentioned, or any or either of them, or by which the truth respecting the same might, in any degree, be ascertained, or to state with reference to each of the said entries (if any) in what book or account or in what page the same (if any) was to be found : and that he had no right or lawful power to set forth the contents of the books mentioned in the schedule thereto, or any or either of them, or any part of such contents, as required by that interrogatory, without the consent or authority of his co-partners, even if he knew or had the means of setting forth such contents.

In answer to the 6th interrogatory, the Defendant said that he had, before putting in his examination, made or caused to be made, by his solicitors, an inquiry as to the number and nature and extent of the books and accounts comprised in the schedule thereto, and he had been informed and he believed that the same were very voluminous and extensive ; but that, save as aforesaid, he had not, before putting in his examination, made himself or caused to be made, by any other person, any search into or examination of the several accounts and books of account, mentioned in the schedule thereto, of or relating to the partnership which commenced in the year 1726, then in the possession or power of this Defendant and his co-partners as aforesaid, or taken any steps to enable himself to give the information asked for by the interrogatories.

Mr. Stuart and Mr. Parry, for the Defendant Lord Wharnccliffe, said that the right to enforce the setting forth of the contents of a document was identical with [451] the right to enforce the production of the document itself : that one of several partners could not be compelled to produce the books of the partnership in opposition to the wishes of his co-partners and in a suit to which they were not parties ; and, consequently, he could not be compelled to set forth their contents : that the contents of the books were as much the property of the co-partners as the books were ; and it would be absurd to hold that a partner was not bound to produce the books, but was bound to make a copy of their contents and give it to his adversary, without the consent of his co-partners : that, as a party who had in his possession a document containing a confidential communication could not be compelled to produce it, so neither could he be compelled to set forth its contents. *Murray v. Walter* (1 Craig & Phill. 114), *Taylor v. Rundell* (ante, p. 391 ; and 1 Craig & Phill. 104), *Unsworth v. Woodcock* (3 Madd. 432), *Latimer v. Neate* (4 Clark & Fin. 570), *Atkyns v. Wright* (14 Ves. 211), *Somerville v. Mackay* (16 Ves. 382).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not see how the inability to give this statement of the entries is made out.

In a case where a party says in his answer that the book in question is not in his possession, but is in the possession of himself and of A. and B., and that they refuse to let him have it : he states a physical impossibility to give the information required. But what is the difficulty in this case ? For I confess that I cannot make it out.

[452] Why am I to presume that this partnership is unlike any other partnership, and is so constituted as that one partner may not take a copy of the entries in a book belonging to the partnership ?

As I understand what is stated in the answer to the third interrogatory, it is this, namely, that Lord Wharnccliffe and his co-partners have concurrently given orders to Wood, their agent, not to allow access to the books and accounts of the partnership.

Now, so far as the circumstance of making a copy can be identified with the circumstance of production, the two things would be subject to the same rule. And if you state a case in which it appears to be physically impossible for the Defendant alone to make a production, then the Court says that it can make no order on him for production. So where a copy is required to be made, if it appear that the Defendant is so circumstanced as that he cannot make it, of course the Court would not order him to do that which is impossible. But is it represented, on this examination, that it is impossible ? It does not appear to me that there is anything like it.

What is stated in the answer to the third interrogatory is this: "And that this examinant and his co-partners have concurrently given directions to Nicholas Wood not to produce the accounts or books of accounts, or any of them, to any person whatever, or allow any stranger to inspect them without the express direction and authority of this examinant and his co-partners." But can the Defendant, by joining with the other two partners, make the matter rest on the concurrence of the three, unless he can shew that he had a right himself, as against the Plaintiff, to give that authority to Nicholas Wood? There is no pretence for that.

[453] Then, what is said in answer to the fifth interrogatory is a very different thing. The Defendant first states that the books comprised in the schedule are very voluminous: which is a statement that has no reference to the contents: for it does not follow that because the books are voluminous, the entries are voluminous; and, therefore, the statement that the books are voluminous is merely surplusage, and merely put in to mislead. Then he states: "That he has no right or lawful power to set forth the contents of the books mentioned in the schedule thereto, or any or either of them, or any part of such contents as required by the interrogatory, without the consent or authority of his co-partners." Now suppose that to be true; still he does not state that his co-partners have refused to give their consent: and, therefore, as it stands on his own answer to that interrogatory, it does not appear that he is unable to set forth the contents.

Unless a physical inability is made out on the answer, my opinion is that the Court must hold that he is bound to set forth the contents.

[454] DOBEDE v. EDWARDS. Jan. 16, 1841.

Practice. Dismissal.

An order was made that a cause should stand over, with liberty to the Plaintiff to amend within a month, and, on his making default, that the bill should be dismissed with costs. The Plaintiff made default, and the Defendant obtained an order to dismiss without notice. Held, that the order was regularly obtained.

When this cause came on to be heard, it was found to be defective for want of parties: whereupon it was ordered that the cause should stand over, with liberty to the Plaintiff either to amend or to file a supplemental bill within a month, for the purpose of bringing the absent parties before the Court; and, on his making default therein, that the bill should be dismissed with costs. The Plaintiff having made default,

Mr. Tennant obtained an order without notice for dismissing the bill with costs. The registrar, however, being of opinion that notice of the application ought to have been given, declined to draw up the order.

THE VICE-CHANCELLOR was inclined at first to agree with the registrar; but afterwards directed the order to be drawn up: saying that the 17th General Order of November 1831, after pointing out the proceedings to be taken by a Plaintiff after replication, directed that if he should make default therein, then, upon application by the Defendant *upon notice of motion*, the Plaintiff's bill should stand dismissed out of Court with costs, unless the Court shall make special order to the contrary: so that the words "notice of motion" were inserted where the Court thought that notice ought to be given; and therefore it was to be inferred that where, as in the present instance, those words were not introduced, notice of the application for the order need not be given.

[455] BLATHWAYT v. TAYLOR. Jan. 19, 1843.

Account. Practice.

If the executors and trustees of a will file a bill for the purpose of having the rights of the Defendants in the residue ascertained, without either praying that the accounts of the personal estate may be taken, or offering to account for it, but admitting that there is a residue; the Court will declare the rights of the Defendants in the residue, without directing the accounts of the personal estate to be taken, although the Defendants apply at the hearing to have the accounts taken.

The bill was filed by the trustees of a will against the pecuniary and residuary legatees, praying that the rights of the Defendants in a legacy of £9000 and in the residue might be ascertained and declared, the Plaintiffs being ready to act as the Court should direct.

The bill admitted that there was a residue; but did not pray or contain any offer, on the part of the Plaintiffs, to have the accounts of the personal estate taken.

Mr. Anderdon and Mr. Craig, for one of the Defendants, a tenant for life of a share of the residue, submitted that the accounts of the personal estate ought to be taken, in order to ascertain the amount of the residue.

The Plaintiffs, by their counsel, objected to the accounts being taken.

THE VICE-CHANCELLOR held that, as the bill admitted that there was a residue, the Court would decide what the rights of the parties were with respect to it, without ascertaining its amount; and that the Defendants were not entitled to have the accounts of the personal estate taken in this suit, but must file a bill for that purpose.

Mr. Bethell and Mr. Blunt, for the Plaintiffs.

Mr. Wakefield, Mr. Burge, Mr. Koe, Mr. Teed, Mr. Hull, Mr. Glasse and Mr. W. R. Ellis, for Defendants.

[456] HODSON v. BALL. Dec. 2, 24, 1841.

[S. C. affirmed, 1 Ph. 177; 41 E. R. 599 (with note).]

Pleading. Practice. Supplemental Bill in the Nature of a Bill of Review.

A legatees' bill did not seek to charge the executors for wilful default, and the decree was made accordingly. Afterwards the Plaintiff filed another bill against the same Defendants, alleging that, during the prosecution of the decree, he had discovered that the executors, in various instances (which he stated), had been guilty of wilful default, and praying that they might be charged accordingly. Held, that the latter was a supplemental bill in the nature of a bill of review; and as it had been filed without leave the Court ordered it to be taken off the file, notwithstanding it was regular so far as it stated the death of one of the Defendants to the original bill, and prayed that the suit might be revived against his personal representative: held, also, that it was not necessary for the Defendant, on whose behalf the motion was made, to serve his Co-defendants with notice of the motion.

In 1835 one of the sons of John Hodson, deceased, filed a bill against Robert Richardson and John Ball, the two surviving executors and trustees of John Hodson's will, and also against the representative of Elizabeth Hodson, deceased, who was the testator's widow and the other executor and trustee of his will and had principally acted in the execution and performance of the trusts, praying (amongst other things) that the trusts of the will might be carried into execution; that the usual accounts might be taken of the testator's personal estate, and of the rents, profits and proceeds of the sale of his real estates, come to the hands of the executors and trustees: but the bill did not charge them with having been guilty of wilful neglect or default, or pray any relief against them on that ground; and consequently the decree in the

cause, which was pronounced in June 1839, was in the form usual in suits of the like nature.

Whilst the decree was being prosecuted in the Master's office, Richardson died intestate, and his sister, Elizabeth Richardson, took out administration to his estate.

[457] In July 1841 the Plaintiff filed a bill against Elizabeth Richardson and the surviving Defendants to the original suit, which, after stating the proceedings in that suit, alleged, by way of supplement, that in the course of the proceedings in the Master's office under the decree the Plaintiff, for the first time, discovered that Robert Richardson and Ball, as well during the life of the testator's widow as after her decease, had repeatedly interfered and acted in the trusts of the will, and in the management of the trust estate, and were privy to all the widow's dealings and transactions in relation thereto: that she, with their privity and consent, had wasted and misapplied the testator's estate; and that they had been guilty of culpable *laches* or default, and had thereby enabled and, in fact, allowed the widow to waste and misapply the estate to a large amount, and thereby had rendered themselves personally liable to answer and account for all the monies received by her in respect of the estate. The bill prayed that the original suit and the decree might be revived against Elizabeth Richardson, and that the Plaintiff might have the benefit thereof against all the Defendants; and that it might be declared that, in taking the accounts of the testator's estate, his widow or her estate ought to be charged with all such sums of money belonging to the estate as, but for her wilful neglect or default, might have been received by her, as well as for all such sums of money as were in fact received by her; and that her estate ought also to be charged with interest upon the amount of all sums of money which had been wasted, lost or improperly retained by her; and in case the Defendant, S. Hodson, her personal representative, should not admit assets to answer the purposes aforesaid, then that the usual accounts might be taken of her estate; and in case it should appear that her [458] assets were insufficient to answer what should be found due from her estate, then that it might be declared and decreed that, under the circumstances therein stated, the Defendant Ball and the estate of Robert Richardson ought to make good such deficiency; and that it might be also declared that, in taking the accounts of the testator's estate, the Defendant Ball and the estate of Robert Richardson ought to be charged with all such sums of money as, but for their wilful default or neglect, might have been received by them, or have come to their hands in respect of the testator's estate, either in the lifetime of his widow or after her decease, and also with interest upon all such sums of money belonging to the estate as they had wasted or misapplied.

The last-mentioned bill having been filed without the leave of the Court, a motion was now made, on behalf of the Defendant Ball, that it might be taken off the file for irregularity.

Mr. G. Richards and Mr. Phillips, in support of the motion, said that the bill in question sought to vary the decree of June 1839, and therefore it was a supplemental bill in the nature of a bill of review, and the Plaintiff had acted irregularly in filing it without having previously obtained the leave of the Court. *Anon.* (2 P. W. 283; and see *Mitf. Plead.* 91, 4th edit.), *Wortley v. Birkhead* (3 Atk. 809), *Young v. Keighly* (16 Ves. 348); that the Plaintiff, by inspecting the documents which were mentioned in the schedule to S. Hodson's answer, might have obtained all the information which formed the ground of the bill in question, and which, he alleged, did not come to his knowledge until after the decree had been carried [459] into the Master's office; and that the proper course, in a case of this nature, was to move that the bill might be taken off the file: *Perry v. Phelps* (17 Ves. 173; see 176, 183, 184); *Partridge v. Osborne* (5 Russ. 195); *The Attorney-General v. The Fishmongers' Company* (4 Myl. & Cr. 1); *Milligan v. Mitchell* (1 Myl. & Cr. 433; see 447); *Colclough v. Evans* (*ante*, vol. iv. p. 76); *Crompton v. Wombwell* (*Ibid.* 628); *Story on Plead.*, p. 270, note.

Mr. Wakefield and Mr. Mylne, for the Plaintiff, said that the bill was neither a bill of review nor a supplemental bill in the nature of a bill of review, as it did not seek to alter a single letter of the decree; but its object was to obtain relief *in addition* to that which was given by the decree: *Mitf. Plead.* pages 83 and 84, edition 4th: that, at all events, the bill was regularly filed so far as it was a bill of revivor; and

that the Court might, at the hearing, dismiss so much of it as was supplemental ; but could not order it to be taken off the file, more especially as the other Defendants had not been served with notice of the motion. [THE VICE-CHANCELLOR. One Defendant may apply against the Plaintiff, without serving the other Defendants with notice of the application.]

With respect to the cases which had been cited, the Plaintiff's counsel said that in the anonymous case in Peere Williams not a single fact was stated, and the motion to dismiss the bill did not succeed ; that *Young v. Keighly* did not apply, as it was an application for leave to file a bill of review, and not to take a bill of [460] review off the file because it had been filed without the leave of the Court ; that the passage in Lord Eldon's judgment for which *Perry v. Phelps* had been cited, "or, as in the late case of *Young v. Keighly*, to an application that it may be taken off the file" was clearly a mistake ; for the application in *Young v. Keighly* was for leave to file a bill of review ; that *Wortley v. Birkhead* and *Partridge v. Usborne* were in the Plaintiff's favour ; for they shewed that the proper course was to demur to the bill, and not to move that it might be taken off the file ; that in *The Attorney-General v. The Fishmongers' Company*, Lord Cottenham did not say that leave was necessary to file a supplemental bill for the purpose of putting new matter in issue, but stated the proposition hypothetically (see 4 Myl. & Cr. pp. 9, 10) ; that, in *Milligan v. Mitchell*, the cause was in so advanced a stage that the bill could not be amended without leave ; and leave was given to amend, but by adding parties only ; the Plaintiff, however, introduced new matter into the bill ; and the bill was ordered to be taken off the file, because he had amended his bill to an extent which the permission given him did not warrant : that *Crompton v. Wombwell* was in the Plaintiff's favour, for there the supplemental bill did not seek to make a new or different case, and on that ground the demurrer to it was overruled ; that *Colclough v. Evans* did not apply, as the supplemental bill in that case sought to change entirely the issue raised by the original bill, and on that ground the demurrer to it was allowed.

Mr. G. Richards replied.

[461] THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case a motion was made by the Defendant Ball to take a bill off the file for irregularity. The irregularity alleged was that in substance the bill was a supplemental bill in the nature of a bill of review. The motion was opposed on two grounds. First, that it was not a supplemental bill in the nature of a bill of review ; and secondly, that, if it were, the form of the application was wrong.

Now whether it is or is not a supplemental bill in the nature of a bill of review depends upon what is contained in it.

The original bill, as appears on the face of the bill in question, was filed by a person who claimed under the will of John Hodson ; and Ball, the party who makes the application, and a person of the name of Richardson were made Defendants to it ; and it asked an account, as far as they were concerned, of the testator's personal estate. It appears that some supplemental bills and bills of revivor were subsequently filed, which did not affect Ball. Then a decree was made, in the year 1839, which directed, in the common form, that an account should be taken of the personal estate. By the words "common form" I mean the decree did not direct the account to be taken with a view to make the accounting parties responsible for what they might have received, but for their wilful default. Then the Plaintiff filed the bill in question, and, after stating those matters, he alleges in it that, after the decree, he for the first time discovered, contrary to what he had before supposed, certain circumstances which appear to be such as, if they were made out, would have justified a decree in the terms of making the executors responsible for what, but for their wilful [462] default, they might have received. Then though no expression is used, such as "review," yet the bill proceeds to ask, as far as Ball is concerned, that on taking the accounts Ball and the estate of Richardson, who had previously died, ought to be charged with all such sums of money as, but for their wilful default or neglect respectively, might have been received by them. And it also prays that they may be made responsible for so much as the estate of Elizabeth Hodson, their co-executrix, may prove deficient to answer what may be found due in respect of her default and mismanagement of the testator's estate. In effect, therefore, this bill does ask that

a decree may be made which is inconsistent with the original decree; and, therefore, although it does not mention the term "review," yet it is, to all intents and purposes, a supplemental bill in the nature of a bill of review; and, consequently, it ought not to have been filed without the leave of the Court; and the leave of the Court was never asked.

The only point that remains to be considered is, whether the application is right in point of form? Now it is observable that the present Lord Chancellor, when he gave judgment in that very singular case of *Partridge v. Usborne*, says, speaking of the case of *Palmer v. Danby*, which was decided in 1795: "Since that time—a period of more than a century—it does not appear that there are any other decisions relative to the point" (5 Russ. 249), that is, the filing of a bill of review. So that in no instance for above one hundred years has the rule, in this respect, been dispensed with. It is certainly true that very little in the way of decision is to be found respecting bills of review, after a period of nearly a cen-[463]-tury back; and, therefore, a question might well arise as to what is the proper course to be pursued.

Now Lord Eldon, in the case of *Perry v. Phelps*, has certainly expressed his opinion as to what the course of proceeding ought to be; although I admit that the observation which Mr. Wingfield made when that case was mentioned is correct, namely, that there has been a mistake made either by Lord Eldon with reference to what had been done in *Young v. Keighly*, or by the reporter. There is, however, no ground for supposing that Lord Eldon did not say, "It must be open to plea or demurrer, if known to the forms of the Court; or, as in the late case of *Young v. Keighly*, to an application that it may be taken off the file." In *Partridge v. Usborne* there had been a discussion before the Lord Chancellor whether or not there should be leave given to file a supplemental bill in the nature of a bill of review. The Lord Chancellor reserved his judgment upon the point; and before he had decided it the Plaintiff took upon himself to file a supplemental bill in the nature of a bill of review; whereupon a motion was made that that bill might be taken off the file. Now I observe that, throughout the argument which was adduced on the part of the Plaintiff against that motion, it is not once suggested that the motion itself was wrong in point of form; and, when the Lord Chancellor gives his judgment upon the motion, he throws out not one word indicating an opinion that the motion was wrong in point of form; and, therefore, I conceive that the course that was adopted by the parties in *Partridge v. Usborne*, as well as the expression of Lord Eldon, do warrant the application, namely, to take the bill off the file.

In the course of the argument reference was made to an anonymous case in 2 P. W. p. 283; but which [464] turns out to be *Davies v. Larmar*, argued on the 3d of June 1725. The report in Peere Williams commences with a dissertation by the reporter on the state of the law; then he says: "But in the present case, the Plaintiff having deposited the £50, and annexed an affidavit to the bill that the deed on which the bill of review was founded did first come to the Plaintiff's knowledge after the pronouncing the decree, the Court allowed the bill of review, upon the Plaintiff paying the costs of the Defendant's motion, which was to dismiss the bill for that it was filed without the leave of the Court." It was said that that was not correct. But I have procured a copy of the order in that case, which was made by Lord Chancellor Macclesfield on the 3d of June 1725, and it appears to be this: "Upon opening of the matter this present day unto this Court by Mr. Lutwich, being of the Defendants' counsel, in the presence of Mr. Attorney-General and Mr. Williams, of counsel for the Plaintiff, it was alleged that the Defendants having obtained a decree against the Plaintiff touching the matters in question, the Plaintiff, to delay the said Defendants' receiving the benefit thereof, exhibited an original bill against the Defendants, thereby seeking to impeach the said decree, which, being contrary to the rules of the Court, the said Defendants put in a demurrer thereto, which on arguing was allowed. That the Plaintiff, on pretence of a discovery of new matter, has since exhibited a bill of review against the Defendants, and has deposited the sum of £50 with the registrar, according to the rule, but did not before the exhibiting such bill obtain an order for leave to bring the same, which he ought to have done: therefore, and for that, the Plaintiff hath not paid the Defendants the £5 for the costs of their said demurrers being allowed, and in regard the said bill is brought

only to delay and harass the said [465] Defendants, it was prayed that the Plaintiff's said bill of review may stand dismissed with costs. Whereupon, and upon hearing the Plaintiff's counsel and of what was alleged on both sides, it was ordered that, upon the Plaintiff's paying unto the Defendants the said £5 costs of allowing their demurrer, and 40s. for the costs of this motion, the Plaintiff be at liberty to proceed on the said bill of review." (Reg. Lib. (A.) 1724, fol. 476.) Now that plainly shews that the Lord Chancellor thought that the Defendants had a case for making the motion. Something also must of course have happened, which is not apparent, in consequence of which, after the Defendants had been paid the costs of their motion by the Plaintiff (which is an admission that the motion was right at the time when notice of it was given), the Court thought proper to hear the cause.

Now it should be recollected that the practice has been of late, in various instances where a bill has been filed irregularly, to move that it may be taken off the file; and there is this difference between moving to dismiss, as in the case of *Davies v. Larmar*, and the present application (which is to take the bill off the file), that the Court is in the habit, according to modern practice, of allowing a bill to be dismissed with costs after it has been regularly filed and something has happened subsequently which makes it impossible that the suit should go on; as, for instance, in the case of a bill which is not duly prosecuted; although it is admitted to have been rightly filed, yet, if it be not duly prosecuted, then the application is to dismiss it with costs. But, in a case where a bill has been filed without the leave of the Court, or rather, I should say, against the leave [466] of the Court, or inconsistent with the leave of the Court, as in the case where the Court has given special leave to amend and a bill has been filed, not according to the permission but embracing other objects and introducing other things than were comprehended in the leave, there the practice is to move that it be taken off the file for irregularity.

I cannot but think, therefore, that, in substance, the practice which the Defendant contends for is supported by the case of *Davies v. Larmar*; and that the opinion of Lord Eldon, coupled with what took place in the case of *Partridge v. Usborne*, is quite sufficient to warrant me in saying that the present application ought to be granted.

My opinion, therefore, is that the Defendant's case is right in substance, and that his application is right in point of form. Consequently the bill must be taken off the file, and the Plaintiff must pay the costs of the motion.(1)

[467] BLUNDELL v. GLADSTONE. March 27, 29, 30, 1841.

[S. C. affirmed, 1 Ph. 279; 41 E. R. 638 (with note); sub nom. *Camoy's v. Blundell*, 1 H. L. C. 778; 9 E. R. 969 (with note).]

Will. Construction. Mistake. Misnomer. Practice. Evidence. Exhibit.

Testator devised his estates to the second son of Edward Weld of Lulworth, Esq., for his life, with remainders to his sons, successively, in tail male, with like remainders to the third and other sons (*except the eldest*) of the said Edward Weld, and their sons, with remainders to the first and other sons of each brother (*except the eldest brother*) of the said Edward Weld, successively, in tail male, with remainders to the second and other sons (*except the eldest*) of Lady Stourton, *one of the sisters of the said Edward Weld*, successively, in tail male.

The will was dated in 1834, and the testator died in 1837. There was not, either at the date of the will or at the testator's death, any such person as Edward Weld of Lulworth; but it appeared, from evidence as to the state of the Weld family, that Joseph Weld was then the possessor of Lulworth; that he had an *elder brother* named Thomas, and had had another brother, Edward, older than himself, who died a bachelor in 1796; that he had two sons, Edward Joseph, his eldest, and Thomas, his second son; and that Lady Stourton was his sister. The question was whether the second son of Joseph, or of Edward, or of Edward Joseph, was

(1) Affirmed. See 1 Ph. 177.

intended to be the object of the first devise. The Court decided in favour of the second son of Joseph.

If a document has not been proved, nor has any order been obtained for proving it, *visâ voce*, at the hearing, the Court will not allow it to be proved on the cause being heard, either on the equity reserved, or for further directions.

Charles Robert Blundell, Esq., by his will, dated the 28th of November 1834, gave certain manors and other hereditaments in Lancashire to John Gladstone, Robert Gladstone and Thomas Robinson, their heirs and assigns: "Upon trust to permit and suffer the *second son of Edward Weld of Lulworth in the county of Dorset, Esq.*, to occupy and enjoy the same, and to take, to his own use, the rents and profits thereof, for and during his natural life, without impeachment of waste, and, from and after his decease, then upon trust for the first and every other son of the said second son of the said Edward Weld, severally, successively and in remainder, one after another, according to the priority of their respective births, and the heirs male of the body and respective bodies of every such son; and, for default of such issue, upon trust for the third and every other son and sons (*except the eldest*) of the said Edward Weld, severally, successively and in remainder, one after another, according to the priority of their re-[468]-spective births, and for the male issue of each such son, in tail male, but in as strict settlement on each such son and his respective male issue in tail male as the rules of law or equity will allow; and, for default of such issue, upon trust for the first and every other son of each brother (*except the eldest brother*) of the said Edward Weld, severally, successively and in remainder, one after another, according to the priority of the respective birth of such son and sons, and for the male issue of each such son in tail male, the son and sons of the elder of such brothers of the said Edward Weld and his and their respective male issue being preferred to and taking before the son and sons of the younger of such brothers of the said Edward Weld, but, nevertheless, in as strict settlement on every such son respectively and his male issue in tail male as the rules of law or equity will allow; and, for default of such issue, upon trust for the second and every other son and sons (*except the eldest*) of Lady Stourton, the wife of the Right Honourable William Lord Stourton and *one of the sisters of the said Edward Weld*, successively and in remainder, one after another, according to the priority of their respective births and the issue male of each such son in tail male, but in as strict settlement on every such son and his respective male issue in tail male as the rules of law or equity will allow; and, for default of such issue, upon trust for the first and other son and sons of *all the other sisters of the said Edward Weld*, severally, successively and in remainder, one after another, according to the priority of the respective birth of such son and sons, and for the male issue of each such son, in tail male, the son and sons of the elder of such sisters, and his and their respective male issue being preferred to and taking before the son and sons of the younger of such sisters of the said Edward [469] Weld, but, nevertheless, in as strict settlement on every such son successively and his respective male issue in tail male as the rules of law or equity will allow; and for default of such issue, upon trust for the first and other son and sons of the eldest and every other daughter and daughters in succession of the said Edward Weld, severally, successively and in remainder, one after another, according to the priority of the respective birth of such son and sons, and for the male issue of each such son, the elder daughters' son and sons, and his and their male issue, being preferred and taking before every younger daughter's son and sons, but, nevertheless, in as strict settlement on each such son and his male issue in tail male as the rules of law or equity will allow; and, for default of such issue, upon trust for Henry Mostyn of Usk, in the county of Monmouth, solicitor, for his life; and, after his decease, upon trust for the first and every other son of the said Henry Mostyn, severally, successively and in remainder, one after another, according to the priority of their respective births, and the heirs male of the body of every such son lawfully issuing."

The testator then directed that the person for the time being beneficially entitled to the actual possession of his real estates under the trusts aforesaid should reside in his mansion-house, and keep the same and the gardens, hothouses and appurtenances in good repair and condition, and should, immediately on coming into possession, or, if

then under age, within one year after being of age, take the name and arms of Blundell; and that his furniture, plate, linen, china, glass, carriages, statues, &c., should be held by his trustees as heirlooms.

The testator died on the 30th of October 1837.

[470] There was no person, either at the date of the will or at the testator's death, who correctly answered the description of "Edward Weld of Lulworth," as will be perceived on referring to the pedigree. The person who was in possession of Lulworth at both those periods was named Joseph Weld. His eldest son was named Edward Joseph, but commonly used and was known by the name of Edward only. His second son was named Thomas and was the Plaintiff in the suit. He had taken the name of Blundell, in compliance with a direction in the will.

In support of the Plaintiff's case it was proved that the testator, when he gave his solicitor instructions to prepare his will, called the possessor of Lulworth by the name of Edward Weld; and that he was but imperfectly acquainted with the Christian names of the members of the Weld family: that, in the course of conversations which took place between him and certain of the other witnesses as well prior as subsequent to the date of his will, he repeatedly called the possessor of Lulworth by the name of Edward; and that in 1836 or 1837 he told one of the witnesses that he had left his real estates to the second son of Edward Weld of Lulworth Castle, in liferent, and stated that he had never seen the second son and did not know his Christian name.(1)

The sanity of the testator having been called in question, an issue, *devisavit vel non*, was directed at the hearing of the cause; and, the jury having found in [471] the affirmative, the cause now came on to be heard on the equity reserved.

The principal question was: Who was intended by the testator to be the object of the first trust in his will?

Mr. Jacob and Mr. Macdonnell, for the Plaintiff. There was no member of the Weld family whose name was Edward except an elder brother of Joseph, the present possessor of Lulworth. He, however, died in 1796, which was nearly forty years before the will was made. Moreover, he had no issue; and as he intended to become a priest of the Romish church, there was no probability of his having issue. He, therefore, could not be the person whose second son was intended to be the first equitable tenant for life under the will.

Neither could Edward Joseph Weld be that person: for, in the first place, he does not accurately answer the description of Edward Weld of Lulworth: inasmuch as his name was Edward Joseph and not Edward, and he was not the possessor of Lulworth. Secondly. The first trust in the will was intended to take effect in possession; but Edward Joseph Weld was a bachelor at the testator's death. Thirdly. Lady Stourton is mentioned in the will as being the sister of the person whose second son was to be the first *cestui que trust*. Now, Lady Stourton is the aunt and not the sister of Edward Joseph Weld. Fourthly. The same person is mentioned as having an elder brother: but Edward Joseph Weld never had an elder brother.

Joseph Weld answers the description in every particular, except that he is called Edward instead of [472] Joseph; which is clearly a mistake. He was the possessor of Lulworth; he had a second son living at the date of the will and at the testator's death; Lady Stourton was his sister; and he had an elder brother living at the date of the will, namely, Thomas Weld, the Cardinal.

The evidence that has been given for the Plaintiff, and especially the evidence of what the testator said to his solicitor when he gave instructions for his will, puts the question beyond all doubt. The following cases shew that evidence of conversations and other matters *dehors* the will is admissible to shew what the testator meant where there is either no person who correctly answers the description of the devisee or legatee, or no property which accurately corresponds with that which the will purports to dispose of. *Pitcairn v. Ogbourne* (2 Vez. 375); *Beaumont v. Fell* (2 P. W.

(1) Other parts of the evidence are either stated or alluded to in the argument. The Vice-Chancellor, however, decided the case on the expressions used in different parts of the will, without regard to any portion of the evidence, except that which shewed the state of the Weld family at the date of the will.

141); *Stockdale v. Bushby* (19 Ves. 381); *Dowset v. Sweet* (Ambl. 175); *Parsons v. Parsons* (1 Ves. jun. 266); *Day v. Trig* (1 P. W. 286); *Door v. Geary* (1 Vez. 255); *Dobson v. Waterman* (3 Ves. 308, n.); *Penticost v. Ley* (2 Jac. & Walk. 207); *Garvey v. Hibbert* (19 Ves. 125); *Doe v. Martin* (4 Barn. & Adol. 771); *Lowe v. Lord Huntingtower* (4 Russ. 532, n.); *Doe v. Jersey* (3 Barn. & Cres. 870); *Doe v. Huthwaite* (3 Barn. & Ald. 632).

Mr. Macdonnell cited *Heming v. Whittam* (*ante*, vol. ii. p. 493); *Herbert v. Reid* (16 Ves. 481); *Thomas v. Steward* (7 T. R. 144, n.).

[473] Mr. Knight Bruce and Mr. Witham, for the junior branches of the Weld family and some of the other parties entitled in remainder under the will. At the date of the will there was no such person in existence as Edward Weld of Lulworth. The testator could not have meant Edward Joseph Weld; for he had no elder brother, nor any sister who was the wife of William Lord Stourton.

The testator makes the second son of Edward Weld tenant for life of his estates; and the Court must assume that he meant an existing person; otherwise he would be violating a rule of law. The other parts of his will shew that he did not contemplate that there would be any vacancy in the possession of his estates, but that he took it for granted that there would be some person to take possession of them immediately after his death.

The cases of *Doe v. Huthwaite* and *Lowe v. Lord Huntingtower* clearly shew that the Plaintiff's evidence is admissible. The recent cases of *Miller v. Travers* (8 Bing. 244) and *Doe v. Hiscocks* (5 Mees. & Wels. 363) have limited the admissibility of extrinsic evidence in a manner which is contrary to the greatest authorities in our law.⁽¹⁾

[474] Mr. Witham referred to *Thomas v. Steward* (7 T. R. 144, note (b.)); and *River's case* (1 Atk. 410).

Mr. Wakefield and Mr. Rolt appeared for Defendants, who claimed to be entitled to annuities under the will.

Mr. Bethell and Mr. Campbell, for Edward Joseph Weld. Our client claims to be entitled under the trust in the will, for the first and every other son of each brother (except the eldest brother) of the said Edward Weld. His claim is founded on the following grounds, namely, [475] that there was a member of the family whose name was Edward, who had an elder brother, and who was himself the brother of Lady Stourton; and, consequently, the description in the will applies to him in every particular. [THE VICE-CHANCELLOR. It is plain, from the evidence, that the testator, at or about the time when he made his will, was told that Edward Weld, the uncle, to whom you are alluding, died in 1796.] In our view of the case it is wholly immaterial whether there is or not any such evidence; for we contend that, where the words of a will describe, correctly, either a person or an object which does exist

(1) The judgment in *Doe v. Hiscocks* seems to contain some passages, at least, which are in favour of the admissibility of extrinsic evidence in the principal case. Lord Abinger, C.B., says, "All the facts and circumstances respecting *persons* or property to which the will relates are, undoubtedly, legitimate and often necessary evidence, to enable us to understand the meaning and application of his words. Again: the testator *may have habitually called certain persons or things by peculiar names*, by which they were not commonly known. If these names should occur in his will, *they could only be explained and construed by the aid of evidence to shew the sense in which he used them*. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." The judgment in *Miller v. Travers*, too, contains a passage which seems to be in favour of the admissibility of the evidence: "The other class of cases is that in which the description contained in the will of the thing intended to be devised, or of the person who is intended to take, is true in part, but not true in every particular. As where an estate is devised, called A., and is described as in the occupation of B., and it is found that, though there is an estate called A., yet the whole is not in B.'s occupation; or, *where an estate is devised to a person whose surname or Christian name is mistaken, or whose description is imperfect or inaccurate*; in which latter class of cases parol evidence is admissible to shew what estate was intended to pass, and who was the devisee intended to take, provided there is sufficient indication of intention appearing on the face of the will to justify the application of the evidence."

or has existed, extrinsic evidence is not admissible to shew that the words are to be taken in any other than their primary and literal sense. *Delmare v. Robello* (1 Ves. jun. 412); *Holmes v. Custance* (12 Ves. 279); *Chambers v. Brailsford* (18 Ves. 368); *Doe v. Westlake* (4 Barn. & Ald. 57). In *Hampshire v. Pierce* (2 Ves. 216; see the judgment) Sir John Strange, M.R., says: "The distinction as to admitting parol evidence, I have always taken to be that, in no instance, it shall be admitted in contradiction to the words of the will; but, if words of the will are doubtful and ambiguous, and unless some reasonable light is let in to determine that, the will will fall to the ground; anything to explain, not to contradict the will, is always admitted. So it is in the case of having two sons of the same name; which has gone upon that as well as all the cases; it being doubtful there which testator meant; and, therefore, when admitted in that case, it is not to contradict the words of the will, but to let in light so far agreeable to the words as to enable the [476] Court to support the act done." *Doe v. Lyford* (4 M. & S. 550); *Doe v. Chichester* (4 Dow. P. C. 65); *Doe v. Hiscocks*. In the judgment in *Miller v. Travers* (see 8 Bing. 251) there is the following passage, which shews that the rule as to the admissibility of parol evidence is as we have contended it to be. "Upon examination of the decided cases on which the Plaintiff has relied in argument, no one will be found to go the length of supporting the proposition which he contends for; on the contrary, they will all be found consistent with the distinction above referred to—that an uncertainty which arises from applying the description contained in the will either to the thing devised, or to the person of the devisee, may be helped by parol evidence; but that a new subject-matter of devise, or a new devisee, where the will is entirely silent upon either, cannot be imported by parol evidence into the will itself."

Mr. G. Richards and Mr. Vansittart Neale, for Lady Stourton's sons. We contend that the person intended by the testator was Edward Joseph Weld; and, as he was not married at the testator's death, and has only one son at the present time, the estates vested on the testator's death, and still remain in Lady Stourton's second son.

If a legacy is left to a person who has two Christian names, and the testator happens to mention only one of them, is that a ground for depriving him of his legacy, or for admitting parol evidence to shew that someone else was intended to take the legacy? Edward Joseph [477] Weld is sufficiently identified by being called Edward Weld; more especially as he was generally known by and used the name of Edward only. The words, "one of the sisters of the said Edward Weld," are words of description merely. Besides, there is as much reason for saying that the testator by mistake described Lady Stourton as the sister of Edward Joseph Weld, as there is for saying that he called Joseph Edward by mistake. The cases that have been cited for the Plaintiff are no authority for admitting parol evidence in the present case. In *Beaumont v. Fell*, *Day v. Trig* and *Pentecost v. Ley* parol testimony was admitted, because there was either no person or no property to answer the words of the bequest. In *Doe v. Huthwaite* the testator called Stokeham Huthwaite, the second son, and John Huthwaite, the third son of J. Huthwaite, whereas John was the second, and Stokeham the third, son. So that, in that case, the words of description contradicted the names; but that is not so here.

Mr. Neale referred to *Mason v. Robinson* (2 Sim. & Stu. 295).

Sir William Follett, Mr. Wigram and Mr. Fleming, for Lord Camoys, the testator's heir. We submit that, under the trust in question, the Plaintiff is not entitled.

The correct rule of law as to the admissibility of parol testimony is that it may be admitted to shew either what property the testator intended to give, or to whom he intended to give it. It is admissible only [478] in a case of equivocation; that is, where either two properties or two persons are found answering the description in the will. It must be a completely accurate description applying equally to two or more persons; but if that is not the case, parol evidence is not admissible. The case of *Doe v. Hiscocks* is an illustration of this. There the devise was, "to John Hiscocks, eldest son of the said John Hiscocks," who was the son of the testator. The fact was that Simon Hiscocks was the eldest son, and John Hiscocks was the second son of the testator's son; and the Court of Exchequer refused to receive extrinsic evidence in order to shew to which of the two sons the testator intended to give the property; because the words did not accurately apply to either of them.

Wigram on Extrinsic Evid. pages 54 and 104. *Miller v. Travers*. If there had been no person answering the description of Edward Weld, then evidence would have been receivable to shew that the testator, when he named Edward, meant Joseph. But here there is a person who answers that description; for it is proved that, on all ordinary cases, Edward Joseph Weld used the name of Edward only, and that he was known to the testator and others by that name. A man's name is that by which he is commonly known; and a devise to him by that name would entitle him to take. Besides, Edward Joseph Weld was the party entitled, on the death of his father, to the Lulworth estates; it was very reasonable, therefore, that the testator should leave his estates to the second son of the eldest son and heir of Joseph Weld. In the judgment in *Doe v. Hiscocks* there is the following passage which supports this part of our case: "Again, the testator may have habitually called certain persons or things by peculiar names, by which they were not commonly known. If these names should occur in his will, they could only be explained and con-[479]-strued by the aid of evidence to shew the sense in which he used them, in like manner as if his will were written in cypher, or in a foreign language. The habits of the testator in these particulars must be receivable as evidence to explain the meaning of his will." Is there any evidence that it was *the habit* of the testator to call Joseph Weld Edward? Mr. George Weld, one of the witnesses, says that, in the course of a conversation which he had with the testator in 1830, the testator asked him who was the possessor of Lulworth, and that the witness replied that his brother, Joseph, was the possessor of Lulworth; the testator, therefore, was informed that the possessor of Lulworth was named Joseph. The witness then goes on to say: "He then enquired what family my brother had; and I told him that he had five children; and I mentioned their names to him. He then made some particular enquiries respecting the second son of my brother Joseph, and asked where he was and what sort of a young man he was, and whether any provision had been made for him. In the course of this conversation respecting the possessor of Lulworth and his family, the testator repeatedly called him by the name of Edward, and though I every now and then corrected him and told him that my brother Edward had been dead some years, and that it was my brother Joseph who was the possessor of Lulworth, he kept speaking of the possessor of Lulworth by the name of Edward." Mrs. George Weld, another of the witnesses, was present on the same occasion, and gives much the same account of the conversation; but the evidence of her and her husband, which is the only evidence upon the subject, does not make out that it was *the habit* of the testator to call the possessor of Lulworth Edward. It shews, merely, that in the course of one conversation, the testator, twice or three times, [480] called him by that name. Then Mr. Eden, the solicitor who prepared the will of 1834, says, in his evidence, that he did not, in the first instance, receive any written instructions from the testator touching the preparation of his will, save that he considered the testator's then last will of 1827 as a general basis of the new will, but to be varied or altered by the testator's directions or instructions. It appears from this evidence that the will of 1827 was before the parties at the time, and was taken as the basis of the new will. Now, by the will of 1827 (see 11 Sim. 489), the testator, after limiting his estates to Sir Thomas Stanley and his first and other sons in strict settlement, devised them upon trust for the second son of Joseph Weld, Esq., the next younger brother of the Rev. Thomas Weld of Lulworth for life, and, after the decease of such second son, upon trust for his first and other sons, successively in tail male, and, for default of such issue, upon trust for the third son of the said Joseph Weld, for life, with remainders to his first and other sons successively in tail male. Therefore, there can be no doubt that, in the year 1827, the testator knew Joseph Weld's right name, and was in the habit of calling him by it. On this evidence we submit that the words, "Edward Weld of Lulworth" are a correct description of Edward Joseph Weld, for, at the date of the will of 1834, he was of age, and was residing at Lulworth. If there is any other part of the description which does not correctly apply to him, then the case falls within the principle of *Doe v. Hiscocks*. The only part of the will which we are to look at is that which contains the devise or limitation, and there we find that the party in whose favour the devise or limitation is made is described as the second son of Edward Weld [481] of Lulworth, and we find that there was a person answering the description of

E. Weld of Lulworth, and, therefore, it cannot be said to be a mistake. No part of the description applies to Joseph Weld, except that he was of Lulworth. It was said that, in a subsequent part of the will, there is a limitation in favour of the first and other sons of each brother (except the eldest) of Edward Weld, and that Edward Joseph Weld never had an elder brother. The words of that limitation, however, are as inapplicable to Joseph Weld as they are to his eldest son; for Thomas Weld, who afterwards became Cardinal Weld, was a priest of the Romish church, and, therefore, could have no issue. Besides, the exception of the eldest brother is no part of the description of the party in whose favour the limitation is made. That limitation is not made to A. B. having an elder brother; the exception is contained in a distinct and separate sentence. The same observations may be made with respect to the naming of Lady Stourton as the sister of Edward Weld. That circumstance may perhaps affect the limitation for the benefit of Lady Stourton's sons, but it cannot affect the trust in favour of the second son of Edward Weld; for if it did affect it, then an inaccurate description of one party would make a prior accurate description of another party inaccurate. Suppose that the devise had been to the second son of Joseph Weld, and in a subsequent part of the will the testator had called Lady Stourton his aunt, would that have made the first description inaccurate? 2 Powell on Devises; Jarman's edit. p. 7. Why are we to conclude that the mistake is in the devise to the second son of Edward rather than in the devise to Lady Stourton's sons? In *Jones v. Colbeck* (8 Ves. 38; see p. 42) [482] the Master of the Rolls lays it down that if there is a gift to a person by the description which applies to that person exclusively, you are not, by inference and argument from other parts of the will, to control the effect of a positive bequest. Here there is a positive devise to the second son of Edward Weld; and that devise is not to be affected by a subsequent part of the will in which another devisee is described as standing in a degree of relationship to Edward Weld which she does not bear. In *Right v. Compton* (9 East, 267), Lord Ellenborough C.J., in delivering the judgment of the Court, says, "That the exposition of every will must be founded on the whole instrument, and be made *ex antecedentibus et consequentibus*, is one of the most prominent canons of testamentary construction; yet where, between the parts, there is no connection by grammatical construction or by some reference express or implied, and where there is nothing in the will declarative of some common purpose from which it may be inferred that the testator meant a similar disposition by such different parts, though he may have varied his phrase or expressed himself imperfectly, the Court cannot go into one part of a will to determine the meaning of another, perfect in itself and without ambiguity, and not militating with any other provision respecting the same subject-matter." We submit, therefore, that in this case it is not part of the description of the devisee that he should be the second son of a person who was a brother of Lady Stourton; and, also, that the testator might as well have made a mistake in calling Lady Stourton a sister of Edward Weld as in calling Joseph Weld Edward. Supposing, however, that everything which is found in the will relating to Edward Weld is [483] to be considered as part of the description of the devisee, then, as the whole of it is not correctly applicable either to Edward or to Joseph, the devise is void according to *Doe v. Hiscocks*.⁽¹⁾ The case of *Thomas v. Thomas* (6 T. R. 671) supports the same proposition. It may be inferred from the judgment in *Beaumont v. Fell* that the Court would not have decided as it did, if there had been more than one person who claimed the legacy. *Delmare v. Robello*. [THE VICE-CHANCELLOR. There the gift was to the children of the testator's two sisters Reyne and Estrella. The testator had a sister named Reyne, and a third sister named Rebecca; and the question was whether evidence should be admitted to shew that the testator, when he named Reyne, meant Rebecca; that is, to shew that there was a mistake, the gift being clear.] In *Andrews v. Dobson* (1 Cox, 425), there was a bequest to James, son of Thomas Andrews of Eastcheap, printer. There was no Thomas Andrews in Eastcheap; but there was a

(1) In *Doe v. Hiscocks* the Court of Exchequer decided, not that the devise was void, but that the evidence which, it must be observed, consisted of the instructions given by the testator for his will, and declarations made by him after its execution, were not receivable.

James Andrews, a printer there, and he had a son, Thomas, by his first wife, who was related to the testator, and a son, James, by his second wife, who was not related to the testator. Thomas claimed the legacy, insisting that the testator meant Thomas the son of James, instead of James the son of Thomas; but the Court refused to direct any inquiry on the subject, and dismissed the bill. *Doe v. Needs* (2 Mees. & Wels. 129) was a case of clear equivocation. All the cases are consistent in [484] deciding that, if any part of the description equally applies to two persons, the Courts cannot carry the testator's intention into effect. We submit, therefore, that the Plaintiff is not entitled to the testator's estates.

Mr. Wigram cited *Wilkinson v. Adam* (1 Ves. & B. 422); *Fraser v. Pigott* (1 Younge, 354); *Lewis v. Lewellyn* (Turn. & Russ. 104); *Jones v. Tucker* (2 Mer. 533); *Jones v. Curry* (1 Swans. 66); *Webb v. Honnor* (1 Jac. & W. 352); *Hampshire v. Pierce* (2 Vez. 216); *Strode v. Russell* (2 Vern. 621; 8 Vin. Abr. 194, pl. 23); *Pocock v. The Bishop of Lincoln* (3 Brod. & Bing. 27); *Doe v. Osenden* (3 Taunt. 147); *Mounsey v. Blamire* (4 Russ. 384); *Doe v. Bower* (3 Barn. & Adol. 453); *Delmare v. Robello* (1 Ves. jun. 412); *Doe v. Westlake* (4 Barn. & Ald. 57); *Doe v. Southern* (1 M. & S. 299); *Doe v. Needs*.

Mr. Skirrow, Mr. Girdlestone, Mr. Parry and Mr. Bagshawe appeared for the other parties.

Mr. Jacob, in reply, said that, taking the whole of the will together, there could be no doubt that the testator intended the second son of Joseph Weld to be the first *cestui que trust* under his will; and, therefore, there was no necessity for resorting to any evidence, except for the purpose of placing the Court in the same situation, with regard to knowledge of the objects of testator's bounty, as the testator himself stood in at the time when he made his will (see Wigram on Ext. Evid. 51, *et seq.*); and that the Court, in every case where it was called upon to construe a will, [485] was entitled to have evidence produced for that purpose; that from the language in which the first trust in the will was expressed, and from the directions as to taking the testator's name and arms, as to residence in his mansion-house, and as to the furniture, &c., it was clear that the testator meant the object of that trust to be an existing person; and that he did not contemplate that there would be any vacancy in the enjoyment of his estates at his death; that, according to the argument for the Defendants, the testator had made three mistakes; but, according to the argument for the Plaintiff, he had made only one, and that a very common one, namely, a mistake as to a Christian name.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This is a very simple case.

I have listened to all that has been said, both by way of observation on the will and on the cases that have been cited, and my opinion is that this case is quite within the rule which is laid down in *Miller v. Travers*; and that it may be decided with the greatest facility and satisfaction, without adverting to what was laid down in *Doe v. Hiscocks*.

The sole question is, who was the person described as "Edward Weld of Lulworth, in the county of Dorset, Esquire?" That is the sole question, and for the purpose of determining it I shall only advert to the evidence which has been given, and very properly given, of the state of the Weld family, entirely rejecting from my consideration everything else *dehors* the will that can be at all said to bear upon what the testator's intention was. I look only at the facts of the case, namely, at those facts which shew the state of the Weld [486] family at the date of the will, and what the testator has said in his will.

I find then these facts about which there is no dispute, namely, that Mr. Joseph Weld, the present owner of Lulworth Castle, had, at the time the will was made, an elder brother living, who was named Thomas; and that he had had a brother of the name of Edward, who, in 1796, was being educated for holy orders in the Romish church, and died at the age of 20 or 21. Mr. Joseph Weld has two sons, Edward Joseph Weld, for whom counsel appear in this cause, and Thomas Weld, who is the Plaintiff in the suit; and he has also a sister, Lady Stourton. Then those things being so, I look at the will, not merely at one line but at every part of it, for the purpose of determining the meaning of that part of it, the construction of which is disputed. I take that to be the legitimate mode of construction; whether it be a

question who shall be the person to take, or what is the thing to be taken, or what is the interest to be taken in it. And, in so doing, I merely follow the rule which is laid down in *Miller v. Travers*.

I find then in this will that, after the devise of the legal estate in fee to trustees, the testator declares the trust to be, to permit and suffer the second son of Edward Weld of Lulworth, in the county of Dorset, Esquire, to occupy and enjoy the same for his life: then there is a trust for the first and every other son of the said second son of the said Edward Weld successively in tail male, on which nothing arises. Then, in default of such issue, there is a trust for the third and every other son and sons (except the eldest) of the said Edward Weld, on which also nothing arises. Then, in default of issue, there is a trust for the first and every [487] other son of each brother (except the eldest brother) of the said Edward Weld; and, for default of such issue, upon trust for the second and every other son and sons (except the eldest) of Lady Stourton, the wife of the Right Honourable William Lord Stourton and one of the sisters of the said Edward Weld, successively, in tail male. There is nothing material in the rest of the will, except that it is manifest on the face of it that the testator intended the first trust to take effect in possession immediately after his death.

I am, therefore, to consider this will in the same manner as if the testator, when he spoke of Edward Weld of Lulworth, in the county of Dorset, Esquire, had described him as having an elder brother, and as being himself the brother of Lady Stourton. I will take it then that in this will there is a devise in trust for the second son of Edward Weld of Lulworth, in the county of Dorset, Esquire, who has an elder brother and who is himself the brother of Lady Stourton.

It is said that that devise cannot by any means mean the second son of Joseph Weld of Lulworth, in the county of Dorset, Esquire; because it appears as a fact that he has a son named Edward Joseph, and that, for ordinary purposes, he is called Edward: but it is also proved that, on solemn occasions, the gentleman in question writes his name Edward Joseph. It is to be observed, too, that though it may be very true that the description of Edward might be a sufficient description of Mr. Edward Joseph Weld for some purposes, yet that the name Edward given solely to him is not the perfect and accurate description of him by name. Then this is to be further observed that, not only he is not [488] designated fully and accurately by name, but he does not at all answer the description of having an elder brother, or as being himself a brother of Lady Stourton. In answer to that it was said that Mr. Edward Joseph Weld, though erroneously designated with respect to his Christian name, was correctly described as of Lulworth in the county of Dorset, Esquire. I admit that it might be very well to describe Mr. Edward Joseph Weld as Edward Weld of Lulworth, in the county of Dorset, Esquire, for some purposes: but here the testator is making a disposition of his estates, and is evidently speaking of some person who was to be the *stirps* from whom the takers were to arise. Besides, I find that the person whose second son was to succeed the testator in the enjoyment of his estates was a person who had an elder brother and was himself a brother of Lady Stourton. Therefore I have, on one side, a sufficient designation for some purposes (but not a full and accurate one), of one person with two circumstances attached to it and describing him, but which by no means suit him: and on the other side, I have a designation of a person which is inaccurate: but the two other circumstances of description so suit and point to that person as not to leave in my mind the shadow of a doubt that he was the person whom the testator intended to describe.

I decide this case upon the words of the will, coupled with that evidence only which has been given as to the state of the Weld family at the date of the will, and which, I think, is the only part of the evidence which ought to be received. I have thought of the question a good deal from the time when the hearing of the cause commenced; and it seems to me that no advancement [489] would arise from sending a case for the opinion of the Judges of a Court of law, but that the question can be satisfactorily decided in this Court.

If I had had the least doubt on the question, I certainly should have acted as a Judge of this Court who entertains a doubt ought to do: and have sent a case to a Court of law: but the case seems to me to be a very simple one, and wholly free

from doubt: and I think it due to the feelings of the parties and to justice that I should declare my opinion at once.(1)

The will of 1827, mentioned *ante*, page 480, was not proved, nor had any order for proving it been obtained, when the cause was heard originally; but Lord Camoys's counsel proposed to prove it, *vivâ voce*, as an exhibit, at the hearing reported above.

THE VICE-CHANCELLOR [Sir L. Shadwell], however, would not allow the document to be proved; because the cause was substantially before him for further directions, and, therefore, the Court could not allow any exhibit or other matter to be given in evidence which was not proved, or for the proving of which an order had not been obtained when the cause was heard.

[491] HOUGHTON v. HOUGHTON. Jan. 16, 25, April 15, 1841.

[S. C. 10 L. J. Ch. 310; 5 Jur. 528. See *Davies v. Games*, 1879, 12 Ch. D. 818.]

Conversion. Partnership.

Two brothers, A. and B., entered into co-partnership without articles, and purchased land for the purposes of their trade with money borrowed from C., and had the land conveyed to themselves in moieties, to uses to bar dower. Shortly afterwards they mortgaged the land to C. in fee, to secure the money borrowed. A. died intestate, leaving B. his heir: B. then took D. into partnership. Each of the firms erected trade buildings on the land, and paid for them and for the insurance on them, and also paid the interest on the mortgage money out of their partnership funds. Ultimately, B. and D. paid off the mortgage out of their partnership property, and took a reconveyance of the land to themselves as joint-tenants in fee. B. died, and his heir, who was also the heir of A., claimed the land; but the Court held that it was converted into personalty, and dismissed the bill.

In 1812 William Houghton and his brother James entered into co-partnership as soap-boilers, at Liverpool: but it did not appear that any articles of partnership were executed by them, or that the partnership was entered into for any definite term. In March 1816 they agreed to purchase of W. MacIver, for £800, a piece of land in Liverpool, which they had previously rented and used for the purposes of their trade: and, by indentures of the 15th and 16th of that month, one moiety [492] of the piece of land was conveyed to uses for the benefit of James and his heirs, in the usual way to bar dower; and the other moiety was conveyed to like uses for the benefit of William and his heirs. William and James borrowed the £800 from James, their father; and, by indentures of the 18th and 19th of March 1816, they appointed and conveyed the piece of land to their father in fee, by way of mortgage for securing the repayment of the £800 with interest. Afterwards, William and James, the son, erected buildings and other works upon the piece of land, for the purposes of their trade: and they paid the expense of those erections, the insurance on them, and the interest of the £800, under the name of rent, out of their partnership funds. In June 1824 William died intestate and without issue, leaving James, his eldest brother, his heir at law; but no person took out administration to his estate. James, the father, was entitled to his deceased son's personal estate after payment of debts. He, however, did not take possession of it, but suffered his six surviving children to treat it as their property. Immediately after William's death James, the son, took John, another of his brothers, into partnership with him; but no articles of partnership were executed, nor was any time fixed for the duration of their partnership. James and John erected warehouses and other buildings on the piece of land for the purposes of their trade; and defrayed the expense and made the other payments before mentioned out of the funds of their partnership. On that occasion William's

(1) The Lord Chancellor, assisted by Mr. Justice Patteson and Mr. Justice Maule, affirmed the above decision in *H. T.*, 1843.

share of the partnership assets, which constituted the whole of his property, was valued at £3000, and John became the owner of it by paying an equal share of that sum to each of his surviving brothers and sisters. It appeared from John Houghton's answer, and from the evidence in the cause, that in the [493] £3000 was included £600, as the value of William's interest in the piece of land and the works thereon.

In July 1827 James, the father, died, having by his will, dated in June preceding, given all his real and personal estate and effects to his surviving children, except James, their heirs, executors, &c., equally as tenants in common, and appointed them the executors and executrixes thereof. Two of them, Thomas and Alice, proved the will.

On the 12th of May 1831 the testator's children came to a final settlement of all their family affairs; and by an indenture, dated the 14th of that month, and expressed to be made between Thomas and Alice and their sisters, Catherine and Margaret, of the one part, and James and John of the other part, after reciting the deeds of the 18th and 19th of March 1816, the death of William leaving James his eldest brother him surviving, the will and death of James, the father, and that James, the son, and John had agreed with Thomas, Alice, Catherine and Margaret to pay them £640, being the sum to which they were entitled in full discharge of all principal and interest due to them on the mortgage, Thomas, Alice, Catherine and Margaret, in consideration of the £640 paid to them by James, the son, and John, conveyed their interests in the piece of land to James, the son, and John, *as joint-tenants* in fee.(1) The £640 was paid by James and John out of their partnership effects. The last-mentioned deed was executed by all the parties to it except James and John; and the bill alleged that James did not acquiesce in it. That allegation, however, was denied in John's answer, and was disproved by the [494] evidence. In October 1834 James died intestate, leaving the Plaintiff his son and heir: and Susannah Houghton, his widow, took out administration to his estate. The partnership between James and John continued until the death of James.

The bill was filed against John, Thomas, Alice and Susannah, alleging (amongst other things) that, upon the death of William Houghton, his moiety of the piece of land, subject to the mortgage, descended to his brother James, and that James was entitled to have a moiety of the mortgage debt paid out of William's personal estate; that James the elder, as the father of William, became entitled to the whole of his personal estate, subject to the payment of his debts, including a moiety of the mortgage debt; but that no person then took out administration to William; that the partnership accounts between James the younger and William, and between James the younger and John, had been lately adjusted and settled: that, upon the death of James the younger, *the legal estate* of the entirety of the piece of land became and still remained *vested in John*; but that, upon the death of James the younger, *the beneficial interest therein descended to the Plaintiff as the heir at law of James the younger*: that, under the circumstances aforesaid, the Plaintiff was entitled to have the piece of land freed and discharged from the mortgage debt of £800 out of the estate of William as to one moiety thereof, and, as to the other moiety thereof, out of the estate of James the younger; to which, however, Thomas and Alice, as the representatives of James the elder, made some objection; as did also Susannah, as the representative of James the younger: that Alice had obtained letters of administration to William Houghton, and had possessed his assets.

[495] The bill prayed for an account of what was due on the mortgage, and that the amount might be paid out of the estates of William and James the younger; and, in order thereto, that an account might be taken of the personal estate of William possessed by James the elder, in his lifetime, and by Thomas and Alice since his death; and that the same might be applied in a due course of administration; and that one moiety of the mortgage debt might be paid thereout; and that an account might be taken of the personal estate of James the younger, possessed by Susannah,

(1) The deed, as set forth in the bill and admitted in James's answer, purported to convey *the entirety* of the piece of land.

and that the same might be applied in a due course of administration; and that the residue of the mortgage debt might be paid thereout; and that John might be decreed to convey the legal estate in the piece of land to the Plaintiff and his heirs.

John Houghton, by his answer, denied that, upon the death of his brother James, the beneficial interest in the entirety of the piece of land descended to the Plaintiff as the heir at law of his brother James, or that, under the circumstances in the bill mentioned, the Plaintiff was entitled to have the same freed and discharged from the mortgage debt out of the estate of William as to one moiety thereof, and, as to the other moiety thereof, out of the estate of James the younger; for that the land, having been purchased by James the younger and William with the partnership capital, and conveyed to them for the purposes of their partnership, became personal property, and, upon the death of William, his moiety passed to his father, who permitted his sons and daughters to divide it among themselves as if they had been William's next of kin; and that all such sons and daughters, except James, became entitled to all the personal estate of their father under his will, including [496] therein the personal estate of William, and, therefore, the Defendant insisted that the only interest the Plaintiff could have in the piece of land was as to the moiety of James the younger, as one of his children.

Mr. Jacob and Mr. Koe, for the Plaintiff. It does not appear that there were any articles of partnership between William and James Houghton, or that it was a partnership for any definite time; but the circumstance which most materially distinguishes this case from those in which the question has arisen whether land belonging to co-partners is or is not to be considered as personal property is that the piece of land in question was not purchased out of the assets of the partnership, but with money borrowed from the father of the two original co-partners. The land, too, was conveyed to them to uses to bar dower, which is a mode of limitation not usually adopted with regard to partnership property. The cases on the subject are collected and observed upon by your Honor in *Randall v. Randall* (*ante*, vol. vii. p. 271), and *Cookson v. Cookson* (*ante*, vol. viii. p. 529): and it appears from them that land belonging to a partnership is not to be considered as converted into personalty, unless it was bought with partnership money and the partnership was entered into for a definite time and under articles containing certain contracts which shew that it was intended, by the partners, to be treated and dealt with as part of their stock-in-trade. *Thornton v. Dixon* (3 Bro. C. C. 199). When Lord Eldon in *Selkirk v. Davies* (2 Dow. 230, 242), said that, in his opinion, all property involved in a partnership concern ought to be considered as personal, he meant, not that all land on the surface of which a trade was carried [497] on ought to be considered as personalty, but that land which was involved in all the contracts and liabilities of a partnership ought to be considered as personalty. In *Stuart v. The Marquis of Bute* (11 Ves. 657; see 665) Lord Eldon says: "In cases where persons engaged in partnership have bought freehold houses, the difficulty of distinguishing and arranging property of different natures, partly personal, partly real, has never, except by the effect of the contract or the will, been held sufficient against the heir." The case of *Townsend v. Devaynes* (Montagu on Partnership, vol. 1, note 2 A. 96) has been very much misunderstood. There freehold premises had been purchased for the use of a partnership. One of the partners afterwards died; and the contest was whether the premises were to be sold and converted into personalty. The surviving partner insisted that articles of partnership had been entered into between him and the deceased, by virtue of which the premises were to be sold: but those articles were not forthcoming; and, from the account of the case given by Mr. Montagu, it would appear that there were no such articles. By an order in the cause, it was referred to the Master to inquire into the circumstances under which the premises were purchased and held; and whether the deceased partner had entered into any contract for the sale of the premises which was binding on his heir. The Master made his report without the articles being produced; and certified that the deceased had not entered into any binding agreement for the sale of the premises. It appears, however, from Reg. Lib. 1811, fol. 1248, that, upon the hearing of exceptions to the Master's report, a draft of the articles was read by consent, and Lord Eldon declared that the whole of the purchase-money [498] for the premises which the surviving partner had agreed to pay to the executors

of the deceased partner belonged to his personal estate.(1) In *Phillips v. Phillips* [499] (1 Myl. & Keen, 649; see 663), Sir John Leach, M.R., says that all property, whatever may be its nature, purchased with partnership capital for the purposes of the partnership trade, continues to be partnership capital, and to have, to every intent, the quality of personal estate; and that the case of *Townsend v. Devaynes* is a clear decision to that effect. That proposition, however, is certainly laid down too broadly; and it is evident that Sir John Leach was misled by the imperfect statement, to which we have alluded, of the case of *Townsend v. Devaynes*. Moreover, it is to be observed that the proposition applies only to property purchased with partnership capital.

Mr. Knight Bruce and Mr. Sharpe, for John Houghton. The Plaintiff can have no decree, at all events without further inquiry.

The cases of *Randall v. Randall* and *Cookson v. Cookson* establish that land does not necessarily become personalty by being involved in a partnership: but the Court has never said that, whether it is or is not impressed with the character of personalty, depends on contract. The piece of land in question was bought for the purposes of the trade. The partners built upon it and insured the buildings. The expense of the buildings and of the insurance was paid out of the monies of the firm; and every other expense that was incurred with respect to it was treated as part of the expenditure of the firm. [THE VICE-CHANCELLOR. Was the purchase coeval with the commencement of the partnership?] No: the original partners first rented the property; but the trade never existed without it, either as rented or as [500] purchased property. When William Houghton died, James took his brother John into partnership with him. James was heir to William; but he did not claim William's share of the land. It was valued and paid for by John as part of the partnership property. In 1827 James, the father, died, having devised all his property to his surviving children except James. His estate consisted in part of the £800 due on the mortgage; and in May 1831 a family arrangement was entered into, in pursuance of which James and John out of their partnership funds paid to their brother and sisters their shares of the £800, amounting together to £640 (the remainder being retained by John as his share); and, on the 14th of May 1831, the brother and sisters reconveyed the legal estate to James and John as joint-tenants in fee; consequently, James being now dead, the whole legal estate has become vested in John; and, if

(1) The following account of the case cited above is given by Mr. Jacob, from Reg. Lib. *ubi supra*, in a note to his edition of Roper on Husband and Wife, vol. i. p. 346. In this case freehold paper-mills and premises had been purchased for the use of the partnership in which the testator was engaged. It was stated by Devaynes, his partner, that, by a memorandum of agreement between them, on the death of either, the survivor was to have the option of purchasing the share of the deceased as it then stood; and he proposed to buy the testator's share. The executors accordingly agreed to sell it to him for £4700. This suit was instituted by the executors against Devaynes and the heir at law for a specific performance of this agreement, and praying that the heir might join in the conveyance. The first decree pronounced at the Rolls directed a specific performance without prejudice to the claim of the heir. A subsequent order was made by which, in conformity with the principle of the previous cases, it was referred to the Master to inquire into the circumstances under which the premises were purchased and held, and how much, if any, of the £4700 arose from such part or parts of the premises as was or were personal estate; and whether the testator entered into any agreement for the sale of the premises which was binding on his heir at law. The Master reported that £1300 of the £4700 arose from personal estate, and that no binding agreement for a sale had been entered into by the testator. He stated that the memorandum alluded to by Devaynes had not been found. It appears probable, however, that some such document was afterwards discovered; for, by the decree, the Lord Chancellor, upon hearing the exceptions, and upon reading the affidavit of H. Cooke, and the draft of the articles therein referred to (which were admitted to be read by consent of all parties), declared that the whole of the sum of £4700 was part of the personal estate of the testator.

James's estate is entitled to any beneficial interest in the property in question, it is on the ground that the property was involved in the partnership. That being so, the Plaintiff's bill is out of Court; for he sues, not as the personal representative, but as the heir of James. It is true that the bill alleges that James did not either execute or acquiesce in the deed of the 14th of May 1831; but it is most distinctly proved that he was a party to the family arrangement, and that he was cognizant of and acquiesced in the deed: and the Plaintiff does not pray, by his bill, that it may be set aside. It was not executed either by James or by John, because they were the grantees under it.

Mr. Sharpe. As the law now stands, wherever land has been purchased out of partnership property and used for partnership purposes, it is converted into personality; and, [501] on the dissolution of the partnership, either of the partners may insist on its being sold and the proceeds, after paying the partnership debts, divided as part of the property of the partnership. *Townsend v. Devaynes*, *Phillips v. Phillips*, *Broom v. Broom* (3 Myl. & Keen, 443), *Bligh v. Brent* (2 Youn. & Coll. 268). In *Phillips v. Phillips* there were no articles of partnership, and that case is as similar as can be to the present. The decisions in that and the other cases are not impugned either by *Randall v. Randall* or by *Cookson v. Cookson*; for in the former the land, though purchased out of the partnership funds, was not used for the partnership business; and in the latter the land, though used for partnership purposes, was not purchased with partnership property.

Mr. Rolt appeared for Thomas and Alice Houghton; and Mr. Spence, for Susannah Houghton.

Mr. Jacob, in reply, said that the decision in *Phillips v. Phillips* was contrary both to the older and the more recent authorities; and, even supposing it to be right, that it did not apply; for, in the present case, the land was not purchased out of the partnership property: that, at all events, there was no pretence for saying that the land was personalty after the termination of the partnership; all the accounts having been adjusted and settled and the concerns wound up without its having been found necessary to sell it. *Cookson v. Cookson* (see ante, vol. viii. pp. 547, 548).

THE VICE-CHANCELLOR [Sir L. Shadwell]. There is a great mass of evidence in this case; and, before I decide it, I will read over the evidence and the exhibits.

[502] April 15. THE VICE-CHANCELLOR. In this case the Plaintiff filed his bill, representing that he, as the heir at law of James Houghton the younger, was entitled to the inheritance of a certain tenement upon which a mortgage had been made, and that that mortgage ought to be paid off out of the personal estate of the persons who had created it. And he represented in his bill that James Houghton, his father, and William Houghton, his father's brother, in the month of March 1816, purchased the tenement in question, and had it conveyed to them as tenants in common in the usual way to bar dower; and that, on the 19th of March, they made a mortgage in fee of the tenement to their father, James Houghton the elder, for the sum of £800, which appears to have been the purchase-money paid by them for the tenement. Then the bill represented that William Houghton died in the year 1824, and that the equity of redemption in one moiety descended on James, who was the eldest brother of William. It then represented that the father, who had the legal estate, devised it so as to vest it in his two other sons, John and Thomas, and his three daughters. The bill then alleged that the mortgage was paid off, and that the legal estate was conveyed to James the younger and to John; but that James did not acquiesce in that conveyance. The bill then stated the death of James, and the descent to the present Plaintiff, who is his heir at law, of the whole beneficial interest in the tenement.

Now, to meet that case (which, it is observable, was supported by no proof whatever, except the mere fact that the Plaintiff filled the character in which he sued) this case was set up; namely, it was, first of all, said that the tenement in question was purchased by James and William (who carried on the business of soap manu-[503]-facturers) for the purposes of their trade: that William died, in the year 1824, without issue, unmarried and intestate; and though his personal estate (that is to say, the clear residue of his personal estate) belonged in law to his father, yet that the father

did not take it to himself, but allowed it to be shared amongst his other children. On William's death, James took his next brother, John, into partnership; and that partnership continued until James's death. The father himself died in the year 1827, having, by his will, devised all his real and personal estate to John and Thomas and his three daughters as tenants in common. Then, as the bill states, this sort of transaction took place, namely, the father not having taken to himself the personal estate of William, it was treated by William's brothers and sisters as if it belonged to them; and, for the purpose of ascertaining what was the amount of the personal estate, a valuation was made of William's share in the partnership estate and effects, that is to say, a valuation was made of all the partnership estate and effects, and one moiety of the valuation money was allotted as the share of William. In making that valuation, a sum of £600 was inserted for the purpose of representing the beneficial value of the tenement in question; and an account was produced at the hearing, which certainly shews that a sum of £600 was inserted, as the value of the tenement in the account of the various things which, together, composed the partnership property. The whole amount came to £3000; and, therefore, the share of each of the brothers and sisters was taken at £500. Upon the footing of that account John paid, to his brother Thomas and his three sisters, the sum of £500 each, as their shares. In the progress of the settlement of the affairs of the sons mixed together with the affairs of the father, John and James, who carried on [504] the business in partnership together, out of their partnership funds paid off the amount of the mortgage, in this way, namely, as the father had given his real and personal estate to John and Thomas and his three daughters, and the sum which was due on the mortgage was £800, the sum of £640, which is four-fifths of £800, was paid to Thomas and his three sisters in respect of their shares of the money due on the mortgage; and John retained to himself the remaining one-fifth. In pursuance of that transaction, by indentures dated the 13th and 14th of May 1831, the legal estate in the four-fifths, which were vested in Thomas and his three sisters, was conveyed to James and John as joint-tenants in fee. That is the conveyance in which, as the bill alleges, James did not acquiesce.

A great deal of evidence was entered into to support the Defendant's case: many exhibits were produced; and as it was impossible for me, at the time, to go through the whole of them, I took some time to read them over in order to see what they amounted to: and the conclusion which I have come to is that the land was purchased by William and James with money which they had borrowed from their father for the purpose of making the purchase.(1) It is quite plain, however, from the evidence, that the land was treated, in some sense, as partnership property: payments were made to the father under the name of rent, but obviously on account of interest; and a variety of improvements were made on the property at the expense of the partnership; and there was evidence to shew that that sum of £600, which was inserted in the valuation that was made of the partnership property in order to ascertain what William's share amounted to, was inserted with reference to improvements on the land which cost that sum, and which, therefore, might very fairly be considered as the value of the property, when it is considered that the property itself was mortgaged for the whole amount of the original purchase-money.

In my opinion, however, it is not at all a material circumstance to ascertain that the sum mentioned in the valuation as being the value was really the full value. It appears that some of the parties disputed the accuracy of the valuation; and there is complete evidence that Thomas Houghton was dissatisfied and did not think that the account was made out large enough; but the material fact is this, namely, that, for the purpose of dividing the personal estate of William, the value of that property which was in its nature real was included; and that John, acting upon the supposition that, by means of payments according to the account, he should acquire the personal property of William (at least all the shares which his brother Thomas and his sisters had), did make payments to them out of his own money. It is also proved that James knew what was going forward, and that that sum which was actually paid, and appears to have been the amount of the purchase-money *minus* John's share of it, was

(1) The Defendants admitted in their answers that the £800 was borrowed from James Houghton, the father.

paid by a cheque on the partnership, or, in other words, out of the partnership assets ; so that James, who at that time was carrying on the business in partnership with his brother John, did allow a portion of the partnership assets to be applied for the purpose of paying off the mortgage.

Now I confess that I do not think that this case stands on the proposition which was stated so very [506] plainly and broadly by Sir John Leach in the case of *Phillips v. Phillips* : but the question before me is this, whether I have not sufficient evidence of the dealings between James and John with regard to this real estate (in which, as real estate, James then had the sole interest) to shew that James consented, as regarded John, that it should be treated as partnership property : and my opinion is that the evidence does amount to that.

I have this further observation to make, namely, that, by the mode of conveyance which, it appears, was adopted in May 1831, in consequence of directions given by James as well as by John, the legal estate in four-fifths of the property was conveyed to James and John as joint-tenants ; so that this effect was produced at all events, namely, that, independent of any question of equity, four-fifths of the whole property in question belonged to John. The dispute, therefore, in this Court is, in reality, about the remaining one-fifth only ; and, with respect to that one-fifth, my opinion is that there are circumstances which make it imperative upon the Court to declare that, as between James and the Plaintiff who represents him as his heir, and John, the estate is to be considered as personal estate.

My opinion further is that this bill has been filed in utter ignorance of the truth of the case. The allegation in the bill that James never acquiesced in the indentures of May 1831 turns out to be utterly groundless. If that allegation had been proved, still, if the effect of that conveyance had been fully considered and those facts ascertained, which they might have been by applying either to Thomas Houghton or to the attorney who acted for all parties in their transactions amongst themselves, it would have appeared that, with respect to a [507] large portion of the estate, no claim could be supported.

My opinion, therefore, is that I must dismiss the bill with costs.

[507] ARCHER v. SLATER. 1841.

Copyholds. Will.

The probate of a will is not a sufficient authentication of it, so far as it relates to copyholds.

In the course of the argument in this case (reported *ante*, vol. x. p. 624), THE VICE-CHANCELLOR said that he knew of no case in which the Court had established a will relating to copyholds ; and that he had always understood that if a copyholder surrendered his tenements to the use of his will, and then made an instrument which the Ecclesiastical Court, on his death, admitted to probate, the probate copy was sufficient to guide the uses of the surrender.

Lord Eldon, however, in *Jervoise v. The Duke of Northumberland* (1 Jac. & Walk. 570. See Phill. on Evidence, tit. Probate), said : “ This being a devise of copyhold estates, if it is a good will of personal estate, it will be a good will of copyhold estates. I do not know whether it has been proved *as this Court requires* ; but it is admitted. I say so, because I do not take it, according to the old course of the Court, that the fact of the probate of a will in the Ecclesiastical Court was evidence that copyhold estates would pass by it : but here the heir at law (1) admits it.”

(1) The copyholds were descendible according to the course of descent at common law.

Wills relating to personal estate must be now executed in the same manner as wills relating to real estate. But it is apprehended that the Courts of law and Equity will not admit the probate copy as evidence of a devise.

[508] BANKES v. THE BARONESS LE DESPENCER, an Infant, AND OTHERS.
Jan. 14, 24, 25, Feb. 13, 1843.

[S. C. 10 Sim. 576; 59 E. R. 739 (with note); 7 Jur. 210.]

Executory Trust.

Estates settled so as to go along with a barony in fee.

Form of settlement approved of by the Court, in pursuance of a direction contained in a deed executed by the late Lord Le Despencer, that his estates should, so far as the law would allow, be strictly settled after his death, so as to go along with the baronial dignity of Le Despencer (which was a barony in fee), and be held and enjoyed by the person for the time being possessed of the same dignity for the support thereof, so long as the person possessed of the same dignity should be a lineal descendant of the late lord, but with a provision that in case the dignity should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents and profits of the same estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs *per stirpes* of the person or persons respectively by reason of whose death or deaths without issue male such suspension or abeyance should be, for the time being, occasioned.

By the order made at the hearing of this cause for further directions on the 10th of March 1840 (see *ante*, vol. x. p. 576), it was referred to the Master to approve of a proper settlement to be made of the manors, estates, hereditaments and premises comprised in the indentures of the 7th and 8th days of August 1826, upon the uses and trusts and according to the directions expressed concerning the same, in and by the indenture of the 8th of August 1826: and the Master was to state the same to the Court.

On the 6th of July 1842 the Master reported that, the draft of a settlement having been laid before him on behalf of the Plaintiff, he had perused and settled and did approve of the same as a proper settlement to be made of the manors, estates, &c., comprised in the indentures, upon the uses, &c., before mentioned: such settlement being by indenture intended to be made between the Plaintiff, William John Bankes, of the first part, the Defendant, the Baroness Le Despencer, of the [509] second part, the Earl of Falmouth, George Bankes, Esq., and Lord James O'Bryen of the third part. The Master further reported that it had been submitted to him on behalf of the Defendants, Adclaide Stapleton, Anne Byam Stapleton, Jane Eliza Stapleton and Maria Catherine Stapleton, infants (the daughters and only issue of Miles John Stapleton, deceased, the late Lord Le Despencer's third son), by Lord James O'Bryen their guardian, that the draft settlement should contain *clauses for the appointment of a protector or protectors of the settlement during the lives of the respective persons who were to have life-estates, pursuant to and according to the terms of the 32d section of the statute 3 & 4 Will. 4, c. 74 (for the abolition of fines and recoveries, &c.); and also that a term of years determinable with such lives and the expiration of 21 years from the death of the survivor of such tenants for life should be limited, and trusts declared to effect the purposes directed with respect to the rents and profits during suspension or abeyance of the baronial dignity of Le Despencer, instead of the shifting proviso inserted in the draft indenture.* But he was of opinion that, regard being had to the draft as prepared, the same was unnecessary. And it having been submitted to him on the part of the last-named Defendants that, after the conveyance by the Plaintiff William John Bankes, as the surviving trustee of the indenture of the 8th day of August 1826, to the trustees proposed to be appointed by the draft deed of all the estates comprised in the indenture of the 8th day of August 1826, the words following, that is to say, "*and all other hereditaments which are liable to the trust for settlement contained in the said last-mentioned indenture of release,*" ought to be inserted; and also that a clause ought to be inserted giving the Court of Chancery power to alter, vary and explain the limitations of the proposed deed of settle-[510]-ment: and such additions being assented to by the Plaintiff and

by the Defendant the Baroness Le Despencer, he had inserted such additions in the draft : but, such additions being objected to on the part of the Defendant, Sir Francis Jarvis Stapleton (the late lord's youngest and only surviving son), he was of opinion that it would be more accurate in point of form to omit the first of the before-mentioned additions ; and, with respect to the second of such additions, he was of opinion that such a clause as that proposed might be found useful ; but it was alleged by the Defendant, Sir F. J. Stapleton, that the insertion of such a clause was not warranted by the order of the 10th of March 1840.

The draft approved of by the Master purported to be a conveyance by the Plaintiff to the Earl of Falmouth, George Bankes and Lord James O'Bryen, their heirs and assigns, of all the manors or lordships, capital, messuage or castle and other messuages, park, farm, lands, meadows, coppices, woods and wood-grounds, cottages, buildings and other hereditaments in the indentures of the 7th and 8th of August 1826, mentioned and referred to, and thereby conveyed or expressed so to be, together with their rights, royalties, &c. ; *and all other hereditaments which were liable to the trust for settlement contained in the last-mentioned indenture* ; to the use of the Baroness Le Despencer for her life, without impeachment of waste, to the use of trustees during her life, in trust to preserve, &c., to the use of her first and other sons successively in tail, to the use of her daughters equally as tenants in common in tail, with cross-limitations between or amongst them in tail, and if she should have only one daughter, to the use of that only daughter in tail ; to the use as to one-fourth part of the manors, &c., of Adelaide Stapleton [511] for her life, without impeachment of waste, to the use of the trustees during her life, in trust to preserve, &c., to the use of her sons and daughters for the same estates as were expressed to be given to the Baroness's sons and daughters respectively ; and as to two other fourth parts, to uses in favour of Anne Byam Stapleton and Jane Eliza Stapleton, and their sons and daughters, similar to the uses in favour of Adelaide Stapleton and her sons and daughters respectively ; and as to the remaining fourth part to the use of Maria Catherine Stapleton in tail.(1) The draft then provided that, in case of the failure or determination of the uses thereinbefore declared as to the shares of any of the four last-mentioned young ladies, their shares, as well original as surviving or accruing, should go to the three others of them and their issue for the same estates, &c., as were thereinbefore limited with respect to their original shares ; and it declared uses of the entirety of the manors, &c., after the failure or determination of all the uses thereinbefore limited, in favour of Sir Francis Jarvis Stapleton and his sons and daughters, similar to those in favour of the Baroness Le Despencer and her sons and daughters respectively.(2)

At the end of the limitations the shifting proviso was inserted. It was as follows :—

“ Provided always, and it is hereby declared and agreed that, notwithstanding some of the limitations [512] hereinbefore contained are made to several persons as tenants in common, or applicable to undivided parts or shares of and in the said manors and hereditaments hereby settled, the object and intent of the settlement hereby made, is to limit the entirety of the same manors and hereditaments as far as the law will permit, so as to accompany the dignity of Le Despencer as long as the person possessed of the same dignity shall be a lineal descendant of the said Thomas Lord Le Despencer, in pursuance of the direction in that behalf contained in the said recited indenture of appointment and release of the 8th day of August 1826 ; and the said limitations to tenants in common, or applicable to undivided parts or shares, are made upon the assumption that, at the respective times at which the same are limited to take effect in possession, the said dignity will be in abeyance ; and, therefore, in order the better to effect the said object and intent of this settlement, it is hereby further declared and agreed that in case (but only during the lives of the several descendants of the said Thomas, late Lord Le Despencer, to whom estates

(1) This young lady was born *after* the late Lord Le Despencer's death.

(2) There were several other lineal descendants of the late Lord Le Despencer, and the draft contained limitations in their favour : but for the purposes of this report it was not necessary to state them.

for their lives respectively are hereinbefore limited, and the life of the longest liver of the same, and the term of 21 years to be computed from the day next before the day of the decease of such longest liver), at the time or respective times at which the said manors and hereditaments hereby settled shall, under the limitations of these presents, become vested in possession in any two or more of such lineal descendants in undivided shares, the said dignity shall not be in abeyance, or in case at any time or times during the limited period hereinbefore mentioned, and while after the said manors and hereditaments shall have so become vested in possession in undivided shares as aforesaid, the said dignity shall be in abeyance, and such abeyance shall be determined [513] by the prerogative of the Crown or otherwise, in favour of any one person being a lineal descendant of the said Thomas, late Lord Le Despencer, then and in either of the said cases, and so often as the same shall happen during the limited period aforesaid, the several uses and limitations hereinbefore limited and contained shall cease and determine, and the entirety of the said manors and hereditaments with their appurtenances shall, thereupon, become vested in the person in whom the said barony or dignity shall become vested by the determination of such abeyance in her or his favour or otherwise, for such and the like estate in possession, and with such and the like remainders and limitations over as the same manors and other hereditaments, or any part or share thereof, are or is limited and assured to, or would have become vested in her or him under and by virtue of the limitations hereinbefore contained: and if the case provided for as aforesaid shall, during the period aforesaid, happen more than once, then this provision shall be applicable and operate *toties quoties*."

Then followed the clause which was referred to in the Master's report as the clause giving the Court of Chancery power to alter, vary and explain the limitations of the proposed deed of settlement. It was thus expressed:—

"Provided always that, notwithstanding the uses, trusts, powers and limitations hereinbefore contained, and in order and to the intent that such uses, trusts, powers and limitations as are hereinbefore contained may, under the authority and by the direction of her Majesty's High Court of Chancery, be altered, varied, explained, enlarged or revoked in such manner and to such extent as the said Court shall decree or order in [514] case the same Court shall, upon or according to the true construction of the said recited trust or direction for settlement of the said trust estates, think proper or deem it expedient to decree or order any such alteration, variation, explanation, enlargement or revocation, it is hereby agreed and declared between and by the said parties hereto, that it shall be lawful for the trustees or trustee, at any time or times hereafter during the life of the survivor of the persons hereby made tenants for life, or within 21 years next after his or her death, and under the authority and by the direction of and in obedience to any decree or order of the said Court of Chancery (but not otherwise) by any deed or deeds, instrument or instruments in writing to be sealed and delivered by the same trustees or trustee in the presence of and attested by two or more credible witnesses, to alter, vary, explain, enlarge or revoke all or any of the uses, estates, trusts, powers and limitations hereinbefore limited, created, expressed, declared and contained of and concerning the said manors, hereditaments and premises hereinbefore expressed to be hereby released, or any of them, and by the same or any other deed or deeds, instrument or instruments in writing to be sealed and delivered and attested as aforesaid, to limit, declare, direct or appoint such new or other use or uses, estate or estates, trusts and powers as shall be decreed or ordered by the said Court of Chancery to be limited, declared, directed or appointed."

The cause was now brought on to be heard for further directions. Exceptions were not taken to the Master's report, as it stated the grounds on which the draft of the settlement was objected to.

Mr. Follett appeared for the Plaintiff.

[515] Mr. Anderdon and Mr. Lee, for the Misses Stapleton, the daughters of the late Miles John Stapleton. The mode of settlement which the Master has approved of is subject to this observation, namely, that all the limitations may be speedily defeated: for, as soon as the baroness has a son who shall attain 21, her husband may prevail on her and her son to join in putting an end to the limitations. The

estates ought to be settled so as to put it out of the baroness's power to defeat the limitations. Before the passing of the late Act for Abolishing Fines and Recoveries that object might have been effected by limiting the estates to the baroness for a term of years determinable on her death, and giving the first estate of freehold to trustees. That course was suggested by Sir A. Hart, V.-C., in *Woolmore v. Burrows* (*ante*, vol. i. p. 512). There a testator directed the residue of his fortune to be laid out in land as contiguous as practicable to Stradone in the county of Cavan, Ireland, to be added and closely entailed to the family estate then in the possession of his relative, Thomas Burrows. It appeared that the estate to which the testator alluded was settled on Thomas Burrows for life, with remainder to his first and other sons in tail male: and part of the testator's residuary estate having been laid out in the purchase of lands, it was referred to the Master to approve of a proper settlement of them, upon the uses and trusts, and according to the directions of the will. The Master approved of a settlement by which the purchased estates were limited to Thomas Burrows for life, with remainder to trustees to preserve, &c., with remainder to Robert, the son of Thomas (who was born in the testator's lifetime), for life, with [516] remainder to trustees to preserve, &c., with remainder to his first and other sons in tail male. Some of the parties excepted to the report; and after the exceptions had been argued, Sir A. Hart said: "I do not think the limitations imposed by the Master on Thomas and his issue are more strict than they ought to be; and there is one point in which I think the Master ought to have fettered the power of Thomas to alienate the testator's estate more than he has done. As the limitations stand, Thomas having the estate of freehold in possession, by joining with any tenant in tail, may bar the remainders and alien the estate; which would be obviously inconsistent with the general intent of the testator. If the Master had limited the first estate of freehold to trustees and their heirs, during the life of Thomas, in trust for him (a course now frequently adopted in family settlements), Thomas would be disabled by any act during his life to alien the estate; and so far the testator's estate would remain closely entailed. Such a limitation would effectuate the clear intention of the testator of preventing an alienation of his own estate, which must be implied to have been as much his object as preventing an alienation of the Stradon estate. I therefore think the limitations in favour of Thomas should be varied by vesting the first estate of freehold in trustees during his life in trust for him, without impeachment of waste; and the other limitations are proper." We are, therefore, sanctioned by Sir A. Hart, when we urge the Court to provide against the consequences, which, as we have pointed out, are likely to follow from adopting the mode of settlement which has been approved of by the Master. The plan, however, of making the first taker under the settlement tenant for a term of years determinable on his or her decease would not, as the law now stands, [517] have the desired effect; for the 22d section of the Act for Abolishing Fines and Recoveries makes the termor the protector of the settlement; so that it vests the protectorship in a person whose interest it is not to preserve the limitations of the settlement. But the 32d section of the Act contains a provision by which the object of that plan may be still attained. That section empowers the settlor to appoint any number of persons, not exceeding three, to be protector of the settlement in lieu of the person who, but for that section, would have been the protector, and either for the whole or any part of the period for which such person would have continued protector; and, by means of a power to be inserted in the settlement, to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons *in esse* whom the donee of the power shall think proper to appoint protector in the place of any one person or number of persons who shall die or shall relinquish his or their office of protector; provided that the number of persons composing the protector never exceed three. This provision is in lieu of doing that which Sir A. Hart, in the case referred to, says ought to have been done, and which the Act has rendered impracticable, or, at least, ineffectual. Mr. Fearne, in his *Essay on Contingent Remainders* (p. 117, 6th edit.), says: "In the last cited case, that of *The Earl of Stamford v. Sir John Hobart* (1 Bro. P. C. 288) was resorted to in order to shew that the Court was not tied up to the rules of law in cases of executory trusts; and, though such case does not rank as one of those in which the

Court of Chancery has deviated from the rule in *Shelley's case*, because the limitation to the heirs male of the body there was preceded only by a term of years and not by a life-estate in the ancestor, yet it [518] is one of the cases in which the Court has executed a trust for heirs male in a course of strict settlement on first and other sons successively in tail male. At the same time, it is a strong and leading authority for the corrective interposition of equity in modelling the limitations of executory trusts in wills, no less than in marriage articles, in such a manner as to substantiate the apparent intention." The case alluded to by Mr. Fearne was as follows:—A testator devised his estates, in remainder after his wife's decease, to trustees, and directed them, after his wife's decease, to convey his estates to the use of his granddaughter and her husband for their lives and the life of the survivor of them; remainder to her first son for 99 years, if he should so long live; remainder to the heirs male of the body of such first son; remainder to every other son of his granddaughter for 99 years, if every such son should so long live; remainder to the heirs male of every of them successively; each son to take for 99 years, with immediate remainder to his heirs male. At the testator's death his granddaughter had no issue male. Afterwards an Act of Parliament was obtained, which enacted that the estates should go unto and be held and enjoyed by such person and persons, and for such estates and interests, as in the will expressed; and the trustees were empowered to convey the estates immediately unto such person and persons, and for such estate and estates as the same were, by the will, limited and appointed to be conveyed, as if the testator's widow were dead. After the decease of the granddaughter and her husband, upon a bill filed by their only son, the trustees were directed to convey the lands according to the will and the words of the Act of Parliament. And a draft of conveyance being accordingly settled by the Master to trustees and their heirs to the uses in the will and Act of Parliament expressed, the Plaintiff excepted to it, for [519] that the premises ought, at least, to have been limited to the use of the trustees and their heirs, and only in trust for such person and persons, and such estate and estates, as were by the will and Act of Parliament limited; whereby the legal estate might be vested in the trustees for the better preservation of the contingent limitations, which otherwise, as the draft was prepared, were liable to be destroyed and the testator's intention defeated. Upon hearing the exception, Lord Chancellor Cowper declared that, in matters executory, as in cases of articles or a will directing a conveyance, where the words of the articles or will were improper or informal, the Court would not direct a conveyance according to such improper or informal expressions; but would order the conveyance to be made in a proper and legal manner, so as might best answer the intent of the parties; and in that case his Lordship conceived the true intent of the will to be that the estates should be secured, as far as the rules of law would admit, to the issue male of the devisee, and that it was designed to be as strict a settlement as possible by law. His Lordship therefore decreed that, in the conveyance, where the estates were limited in use to the Plaintiff for 99 years, if he should so long live, there should be a limitation over to trustees and their heirs, during his life, to preserve the contingent uses in remainder, and then to the first and other sons of the Plaintiff in tail male successively. Upon an appeal to the Lords from the last decree, it was contended that the Act of Parliament, which was so very express in confirming the estates appointed by the will, could never intend that a Court of Equity should have power to direct a conveyance to other uses than were mentioned in the will; but the decree complained of did so, and was therefore repugnant both to the will and to the Act of Parliament, as well as to the former [520] decree. To this it was answered that, in cases of executory articles for the settling of estates, it was usual for Courts of Equity to help informalities and supply defects; especially when the things supplied were necessary to support the main intent of the parties, and to carry such articles into execution according to that intent so far as it might agree with law, though not strictly according to the words of the articles; and, *à fortiori*, would Courts of Equity do so in the case of a will where the same was only executory by a conveyance to be made; that the Act of Parliament made no alteration in the will in the point in question; it only hastened the time for the trustees to convey even in the lifetime of the testator's widow; but, in all other respects, it confirmed the will, and, being strictly relative to it, the intent of the will ought

to be the rule of the conveyance. The decree was accordingly affirmed by the Lords.

We now come to the second point in this case. It arises on the trust or direction contained in the indenture of the 8th of August 1826, that, in the settlement thereby directed to be made, there should be inserted a provision that in case the dignity of Le Despencer should, at any time or times within the limits prescribed by law for strict settlements, be suspended or in abeyance, the rents of the estates should, during the continuance of every such suspension or abeyance, be equally divided amongst the co-heirs, *per stirpes*, of the person or persons respectively, by reason of whose death or deaths such suspension or abeyance should be for the time being occasioned. At the former hearing of this cause that trust was attacked as tending to a perpetuity; and it was said that it was impossible to carry it into execution. Your Honor, however, was of a dif-[521]-ferent opinion; and, in answer to the objections, thus expressed yourself: "Suppose that the settlement were to be made in this form: namely, that the estates were to be limited to trustees for a term of 1000 years, determinable at the end of 21 years from the death of the survivor of all the persons *in esse* at the time of the late Lord Le Despencer's death and then capable of succeeding to the dignity, and that, subject thereto, the estates were then limited to the different persons so *in esse* and capable of succeeding to the dignity, for their lives successively, with remainder to their sons in tail, with remainder to their daughters in tail; and that then the trusts of the term of 1000 years were declared to be that, in the event of there being any abeyance such as is here contemplated, the rents should, during the time (which could not exceed the limits fixed by law), be disposed of in the manner prescribed: there can be no doubt that that would be a legal mode of settlement. I do not say that that is the only or the best method of executing the trust: but it is one mode which appears to me to be unobjectionable in point of law. And, when you find that the intention of the parties is to do that only which the rules of law will permit, or, as it is expressed, which may be done within the limits prescribed by law for strict settlements, my firm opinion is that it is the duty of the Court to refer it to the Master to approve of a proper settlement according to the language of the trust." A plan similar to that which your Honor suggested was upheld and carried into execution by Lord Nottingham, C., in *The Duke of Norfolk's case* (3 Ch. Ca. 1); and, with deference to the Master, we think that the draft would have been more consonant to the intention of the parties to the deeds of 1826 [522] if your Honor's suggestion had been adopted. According to that suggestion the clause providing for the suspension or abeyance of the dignity would have been inserted immediately after the limitation to the baroness for her life; and then it would have been safe from the power of the tenant in tail. But the clause, which is called the shifting proviso in the report, and which has been inserted in the draft in lieu of that which your Honor suggested, is placed after all the limitations; and, consequently, it will be in the power of the first tenant in tail to bar it. The case of *Eales v. Conn* (*ante*, vol. iv. p. 65) shews that a term for raising a sum of money within proper limits may be so placed as that it shall not be in the power of the tenant in tail to destroy it. In *Doe v. Lord Scarborough* (3 Adol. & Ell. 2) the Court of King's Bench thought that the power of the tenant in tail was curbed by something that appeared in the settlement: but the Court of Error held that the recovery did destroy the shifting clause. The present case is distinguishable from *Lord Southampton v. The Marquis of Hertford* (2 V. & B. 54), *Phipps v. Kelynge* (2 V. & B. 57, n.), and *Marshall v. Holloway* (2 Swanst. 432); for in those cases there was no limitation to the operation of the trusts.

There are two other matters noticed in the report; but they are not of so great importance as those which we have already discussed. One of them is the insertion of the words "and all other hereditaments which are liable to the trust for settlement," &c., at the end of the parcels. Those words have been properly introduced in order to comprehend any lands that may have [523] been received in exchange or allotted under Inclosure Acts, for or in respect of lands comprised in the deeds of August 1826.

The last matter to be discussed is the proviso in the draft, which gives the trustees, under the direction of the Court of Chancery, power to alter or revoke the

limitations of the settlement. Suppose that a settlement should be executed under your Honor's decree, the legal estate would be gone; and if any of the parties, being dissatisfied with the decree, should appeal from it, and the Court should think that the settlement ought to be altered, the legal estate could not be called back. But, if the proviso in question is allowed to be inserted in the settlement, the Court will have it in its power to order the legal estate to be called back and the estates to be settled according to the final decision of the Court. [THE VICE-CHANCELLOR. Is there any instance of a settlement being prepared under the direction of the Court with such a clause as this in it?] That eminent conveyancer, the late Mr. Sanders, prepared such a settlement.

Mr. Bethell and Mr. Hetherington, for Sir Francis Jarvis Stapleton, the youngest and only surviving son of the late Lord Le Despencer. If a settlement is to be made pursuant to the draft which the Master has approved of, the intention of the late Lord Le Despencer and his son, as expressed in the release of August 1826, will not be carried into effect; for the estates will not be strictly settled, so far as the law will permit, so as to go along with the dignity of Le Despencer, so long as the person possessed of the dignity shall be a lineal descendant of the late lord. His object evidently was that the estates should [524] be rendered inalienable as long as the law would allow: but that object will not be attained if the Court adopts the draft. Why was not the plan of creating, in the first instance, a term for years determinable at the end of twenty-one years after the death of the survivor of all the lineal descendants of the late lord who were *in esse* at his death (which was suggested, by your Honor, at the former hearing) followed by the Master?

Secondly. The draft, in several parts of it, affords grounds for future doubt and litigation. Why are the following words introduced into the abeyance clause: "The object and intent of the settlement hereby made is to limit the entirety of the same manors, &c., as far as the law will permit, so as to accompany the dignity of Le Despencer," &c. Those words throw the parties back to the position in which they were under the deeds of August 1826. The Court ought to be in a condition to declare that what is here stated to be the object and intent of the settlement has been done.

Thirdly. The power of revocation and new appointment given to the trustees, under the direction of the Court, is calculated to create uncertainty as to what has been done. If it has been rightly done, it ought to be final: if it has not been rightly done, the power in question is unnecessary.

Fourthly. The general words inserted at the end of the parcels introduce another element of doubt and uncertainty. It ought to be ascertained whether there are any other hereditaments which are liable to the trust for settlement, if there be any doubt upon that head. But it has never been suggested even that there are any such other hereditaments. The decree, too, directs the [525] Master to approve of a proper settlement of the manors, &c., *comprised in the indentures of August 1826*; and the language of the decree ought not to be departed from. [THE VICE-CHANCELLOR. The word "comprised" means "impressed with the trust for settlement." It must be the object of all parties to have all the hereditaments included which were intended to be comprised in the settlement.]

Mr. Stuart and Mr. Hodgson, for the Baroness Le Despencer. The draft which the Master has settled is perfectly unobjectionable in every particular. It has been said that some person or persons ought to be appointed to protect the limitations of the settlement. But the Act abolishing fines and recoveries says that the settlor is to appoint the protector; consequently the Court cannot make the appointment. The late lord and his eldest son could not mean that a protector should be appointed, for there was no such office known to the law when the deeds of August 1826 were executed. [THE VICE-CHANCELLOR. The words of the release are "so far as the law will permit:" and therefore if the law had allowed, after that deed was executed, a more strict mode of settlement than it permitted when that deed was made, that form of settlement might be now adopted.] The words "strict settlement" mean nothing more than a limitation to a person *in esse*, for life, with remainder to his first and other sons in tail. In *Lord Dorchester v. The Earl of Effingham* (3 Beav. 180, note; and *ante*, vol. x. p. 587, note) Guy Lord Dorchester, by his will, directed all his

landed estates to be attached to his title as closely as possible ; and the conclusion [526] that Sir W. Grant, M.R., came to upon that direction was that all persons in the line of the peerage who were *in esse* at the testator's death ought to be tenants for life, and that all who were not then living ought to be tenants in tail. That model was followed by the counsel who prepared the draft now under consideration. With reference to the objection that a term for years ought to have been limited, it is to be observed that the direction to settle the estates in this case is entire ; it applies to the whole inheritance. What right has the Court to give to any of the lineal descendants of the late lord an estate of a different quality from that which it gives to the other lineal descendants ? A perpetual line of descent cannot be effected otherwise than by creating an estate tail ; and, though that estate may be barred when the tenant in tail comes of age, yet the property may be resettled and the tenant in tail made tenant for life. There is this objection to making the first taker tenant for a term of years instead of for life : the term might be sold under a *fi. fa.*, whereas, under an *elegit*, the debt might be soon paid and the estate preserved.

The protector is an irresponsible person ; and it is not the habit of the Court to appoint irresponsible persons. The settlor may do it ; but it is a very different thing for the Court to do it.

The words in the abeyance clause, which the counsel for Sir F. J. Stapleton have objected to, were inserted because they are contained in the release of August 1826.

It was said, on behalf of the same party, that it was the late lord's intention that the estates should be rendered inalienable as long as the law would allow ; [527] but the release of August 1826 says nothing to that effect.

The revocation clause ought not to be allowed to remain. The settlement must be made once for all, and must then become the absolute law governing the estates comprised in it.

Mr. Follett, in reply, said that the Plaintiff was perfectly satisfied with the draft ; and did not wish to have a protector of the settlement appointed.

Feb. 13. THE VICE-CHANCELLOR [Sir L. Shadwell]. Upon the first question raised by the report, I am of opinion that there ought not to be any protector of the settlement under the 32d sect. of 3 & 4 Will. 4, ch. 74.

In the first place, it was stated to me, at the hearing on further directions, that the Plaintiff who, under the deeds of the 7th and 8th of August 1826, is the trustee upon trust to settle, does not desire to appoint a protector. By being the trustee upon trust to settle, I think he is a settlor within the meaning of that section ; and, though he is to settle in such manner as this Court shall direct, yet, unless there is good reason to the contrary, the Court ought to let him exercise his discretion. In the next place, the Act of Parliament itself furnishes reasons why a protector should not be appointed by the Court, unless upon a special case. By the 36th section a protector is made irresponsible, and is at liberty to act from mere caprice, ill-will or any bad motive. By the 37th section a protector is enabled to take a bribe for giving consent ; and, if two or three persons are [528] made protector, and any one of them incurs a disability under the 33d section, then it is questionable at least whether this Court could act in lieu of such person with the other or others who are not disabled ; and if it could not, there would be no protector capable of acting. I can easily conceive that a case might exist in which it might be advisable to appoint a protector according to the power given by the Act of Parliament. But in the present case no special circumstances are stated : and it is reasonable to presume that the members of the noble family, who will successively enjoy the settled estate, will best understand their own interests ; and I think it better to commit the protection of the estate to them than to strangers, who will have the statutory privilege of being uncontrollably perverse and corrupt, with the chance of rendering the protectorate, by crime or accident, utterly inefficient.

Upon the second question I think it is not necessary to have a term of years limited ; but that the clause in the nature of a limitation of cross-remainders (1) sufficiently answers the intended purpose.

(1) This clause was termed "the shifting proviso" in the Master's report.

Upon the third question I think that the general words should stand: for they may do good and cannot do harm.

And, upon the last question, I think that the proposed clause ought to be omitted: for it is not warranted by the decree, which meant that the settlement should be final: and I think such a clause is wholly unusual and without precedent.

[529] THE ATTORNEY-GENERAL v. NETHERCOTE. Jan. 25, 1841.

[S. C. 10 L. J. Ch. 162. See *In re Marsden's Estate*, 1889, 40 Ch. D. 479; *Taylor v. Roe* [1894], 1 Ch. 417.]

Costs. Interest. Construction of 1 & 2 Vict. c. 110, ss. 17 and 18.

Under 1 & 2 Vict. c. 110, ss. 17 and 18, interest is recoverable on costs which one party is ordered to pay to another, but not on costs directed to be raised out of an estate.

This was a suit relating to a charity. By the decree the costs of one of the Defendants were ordered to be taxed and paid out of the charity estate.

It being probable that some time would elapse before the means of paying the costs could be obtained,

Mr. Knight Bruce, for the Defendant, asked that it might be directed, by the decree, that the amount of the costs when taxed should be paid with interest at four per cent. from the date of the Master's certificate until the time of payment. He said that, under the 1st & 2d Vict. c. 110, s. 17, judgment debts carried interest at four per cent. from the times when they were entered up; and that the 18th section enacted: "That all decrees and orders of Courts of Equity, and all rules of Courts of Common Law, and all orders of the Lord Chancellor or of the Court of Review in matters of bankruptcy, and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money or any costs, charges, or expenses shall be payable to any person, shall have the effect of judgments in the Superior Courts of Common Law, and the persons to whom any such monies or costs, charges or expenses shall be payable, shall be deemed judgment creditors within the meaning of this Act; and all powers hereby given to the Judges of the Superior Courts of Common Law with respect to matters depending in the same Courts, shall and may be exercised by Courts of Equity with respect to matters therein depending, and by the Lord Chancellor and the Court of Review in matters of bankruptcy, and by the Lord Chancellor in matters of lunacy: and all remedies hereby given to judgment creditors are, in like manner, given to persons to whom any monies or costs, charges or expenses are, by such orders or rules respectively, directed to be paid."

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the section of the Act referred to seemed to him to relate to those cases in which one party was directed to pay costs to another party, and not to cases in which costs were directed to be paid out of an estate.

[530] BEDWIN v. ASPREY. Jan. 28, 1841.

[S. C. 5 Jur. 362.]

Infant. Next Friend.

The Court will not remove a next friend merely because he is nearly related to or connected with the Defendant; but it must see that there is a probability that the infant's interest will be prejudiced if the next friend is allowed to remain.

The bill was filed on behalf of an infant, who was an orphan, for the purpose of having the rights and interests of the infant and of his sister, the Defendant Sarah,

the wife of the Defendant Edward Clowser, under a will, ascertained and declared by the Court. The Defendant Asprey was the husband of the infant's aunt; and he and the Defendants Grace and Weller had been in receipt of the rents of the estates in question in the cause; and an account was prayed against them accordingly.

Those three Defendants moved that George Clowser, the infant's next friend, might be removed, and that it might be referred to the Master to appoint a new next friend.

The substance of the affidavit in support of the motion was that the interests of the infant and his sister [531] were adverse to each other; that the next friend was the father of her husband; that the solicitor of the next friend was also the solicitor of the sister and her husband; that the infant, who was 17 years of age, had written a letter to Asprey (which was set forth) strongly disapproving of the suit being conducted by the next friend.

An affidavit in opposition to the motion was made by the next friend and his son, stating that the suit had been instituted in consequence of three gentlemen at the Bar, who had been consulted as to the construction of the will, having differed in opinion on the subject; that the suit had been instituted *bonâ fide*, for the infant's benefit, and was intended to be prosecuted without delay; that the son and his wife had employed the next friend's solicitor, in order to save expense and because they relied on his integrity; and that the infant's interest would be in nowise prejudiced thereby.

Mr. Knight Bruce and Mr. Coleridge, in support of the motion, said that the infant and his sister had interests adverse to each other; that the next friend was the father of the sister's husband; and it was natural that his feelings should be in favour of his son; that it would be in the solicitor's power to injure, materially, the infant's interest by making an imperfect statement of his case to his counsel; and that Asprey, who was the infant's nearest relation except his sister, disapproved of the suit being conducted by the next friend. *Peyton v. Bond* (*ante*, vol. i. p. 390).

Mr. Jacob, Mr. G. Richards, Mr. Cooke and Mr. W. H. Smith opposed the motion. They said that the [532] persons by whom the motion was made were the accounting parties in the suit; and that it was most improper that they should have any voice in the selection of the person who was to prosecute the suit against them; that the question in the cause was merely a question of construction; that no extrinsic facts were to be dealt with; and therefore it was not a case in which the infant could be prejudiced even if the next friend or the solicitor were to take a bias against him; that no misconduct was alleged against the next friend; that in *Peyton v. Bond* the question was not a mere question of construction, and, in that case, the interests of the father and of his daughters were completely adverse to each other; the next friend was the father's brother; and had taken upon himself the office at the father's request, and he, as well as his solicitor (who was the father's solicitor also), had been witnesses for the father in his suit in the Ecclesiastical Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In *Peyton v. Bond* Sir A. Hart, V.-C., says: "The Court will watch, with great jealousy, a solicitor who takes upon himself a double responsibility; and, if it sees a chance of his miscarrying, will take care, where the Plaintiffs are infants, that he shall not be permitted to stand in that relation to an adverse Defendant under circumstances of very adverse interest." I cannot but suppose that, by the word "chance," Sir A. Hart meant, not a mere possible contingency, but something like a probability. And it appears that, in *Peyton v. Bond*, there was strong ground for supposing that the suit would not be conducted properly if the management of it were left to the uncle of the infants and his solicitor; both of whom had been witnesses for the father in his [533] unrighteous suit in the Ecclesiastical Court, and had supported his interest against the interest of his infant daughters. In that case, too, the application was made by a person who had no interest adverse to the interest of the infants.⁽¹⁾ In this case, the application is made on behalf of the Defendants Asprey, Grace, and Weller, who are the three accounting parties in the suit. There are no facts in litigation between the sister and her brother,

(1) The application was made by T. Nelson, who was one of the executors under Mrs. Peyton's will, and a Defendant to the bill of revivor and supplement.

the infant. The only question in the cause is a question of construction, and that of so difficult a nature that the three eminent counsel who were consulted upon it differed in opinion from each other; and, in consequence of that difference, the bill was filed in order to obtain the opinion of the Court upon the meaning of the will. Therefore, there cannot be the slightest danger of any facts being kept back which, if brought forward, might influence the decision of the Court either one way or the other.

If *Peyton v. Bond* is to be the authority on which this case is to be decided, I must see that there is a probability that the interest of the infant will be sacrificed, or, at least, neglected, if the father of the sister's husband is permitted to remain the next friend. I do not, however, see that there is any reasonable probability that the suit will be mismanaged if it remains as it now is.

The consequence is that the motion has been misconceived, and must be refused with costs to be paid by the parties on whose behalf it has been made.

[534] WARD v. BARTON. Jan. 29, 1841.

[S. C. 10 L. J. Ch. 163; 5 Jur. 405.]

Costs. Foreclosure. Mortgagor and Mortgagee.

If a mortgagee of leaseholds, before he files a bill of foreclosure, is under the necessity of citing the next of kin of the deceased mortgagor before the Ecclesiastical Court, in order to compel them to take out administration to the deceased; this Court will not allow him the costs of the citation, unless he states his case for them on his bill.

The bill was filed, by a mortgagee of leaseholds, for a foreclosure of the mortgage.

The mortgagor being dead and no person having taken out administration to his estate, the Plaintiff, before the institution of the suit, cited his next of kin in the Ecclesiastical Court in order to compel them to take out administration. Upon which the Defendant, who was the brother of the mortgagor, took out administration.

The suit having been heard and a decree made in the usual form,

Mr. Teed, for the Plaintiff, asked that the costs which the Plaintiff had incurred in the Ecclesiastical Court might be included in the account directed by the decree. He cited *Hunt v. Fownes* (9 Ves. 70).

Mr. Cockerell, for the Defendant, said that the proceedings in the Ecclesiastical Court did not appear upon the record.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In the case cited, the death of the party to whom the letters of administration were obtained took place pending the suit; but, in this case, the death and the proceedings in the Ecclesiastical Court took place before [535] the suit was commenced: consequently the Plaintiff might and ought to have made his case for the costs of those proceedings on the record.

Mr. Teed then asked for leave to present a petition for the costs in question; but

THE VICE-CHANCELLOR refused to grant it, adding that all that the Plaintiff was entitled to was a decree in the common form.

[536] GRAVES v. HICKS. Jan. 30, Feb. 2, 1841.

[S. C. 10 L. J. Ch. 185; 5 Jur. 674. *Taylor v. Taylor*, 1874, L. R. 17 Eq. 328; *Scottish Widows' Fund v. Craig*, 1882, 20 Ch. D. 215; *Hambro v. Hambro* [1894], 2 Ch. 568; *Blackburne v. Hope-Edwards* [1901], 1 Ch. 423.]

Will. Construction. Revocation. Annuity.

Testator devised lands, subject to an annuity to his wife, to his son for life, with remainder to the son's first and other sons in tail, with remainder, subject to another

annuity to his wife, to his grandson and the grandson's first and other sons in like manner, with remainders over; and he gave his residuary personal estate to his son. The son died without issue; and thereupon the testator, by a codicil, charged the lands with three further annuities, one for his wife, another for his daughter, and the third for her husband; and gave his residuary personal estate to his wife. He afterwards made two other codicils, but they were not duly attested. He then made a fourth, which was duly attested, "revoking several of the dispositions heretofore made by me in my said will and codicils of all my freehold, copyhold and personal estate of every kind; and, instead of such devise, disposition and bequest thereof, I do give all my freehold, copyhold and personal estate of every kind and wheresoever situate unto my daughter for her life; and, after the determination of that estate, unto my grandson *and his heirs in strict entail as in my will directed.*" He then directed that his grandson, who was an infant, should not be put in possession of his estates until he attained thirty-one; and that in the interval the rents should be accumulated for the benefit of his grandson and his heirs; "and, *in failure of issue of my said grandson*, I order that my said estates and effects shall go and descend as is by my said will directed." The testator then confirmed the several annuities and donations bequeathed in his will and former codicils, and gave another annuity to his wife; thereby, in all other respects but what was above mentioned, ratifying and confirming his will and codicils.

Held, that the grandson took, not an estate tail, but only an estate for life in the lands.

If lands are devised in trust to be settled on A. and his heirs in strict entail, the lands ought to be settled on A. for life, and on the persons designated as his heirs, in succession.

The Court refused to order an estate charged by a will with an annuity to be either mortgaged or sold for payment of the annuity, notwithstanding the rents were very inadequate to pay it, and it had become greatly in arrear; the estate being settled on A. for life, with remainders over; the annuitant being still alive, and there being no necessity for the Court to direct the estate to be either sold or mortgaged for payment of the testator's debts.

John Hicks, Esq., being seised in fee of freehold and copyhold estates in Bucks and Cornwall, by his will, dated the 4th of May 1821, gave his copyhold messuage, called Plomer Hill House, in the county of Bucks, unto and to the use of trustees and their heirs, in trust for his wife, Susanna Jemima, for her life or widowhood or until she should cease to reside therein, and on her death, second marriage, or ceasing to reside [537] on the premises, he directed his trustees to stand seised thereof upon the trusts after declared of the residue of his real estates; and he gave to the same trustees his freehold estate called Treravel, in Cornwall, in trust to pay an annuity of £20 for the separate use of his niece for her life, and to dispose of the residue of the rents for the separate use of his daughter, Anna Maria Hearle, and, after the death of his daughter but subject to the annuity of £20, he gave the estate to her children, as tenants in common in tail, with cross-remainders amongst them in tail, with remainder to the uses thereafter declared of the residue of his real estates: and he gave his manor of Bradenham, in the county of Bucks, and all the residue of his real estates to the same trustees and their heirs, to the use that his wife might, during her widowhood, receive thereout a yearly rent-charge of £300 a year, by half-yearly payments, with powers of distress and entry, and, subject thereto, to the use of his son for life, with remainders to his first and other sons successively in tail male, with remainder to the intent that the testator's wife might receive, during her life or widowhood, a further annuity of £100, and that the trustees might, during the term of 99 years, if his daughter should so long live, take a like annuity of £100 in trust for her separate use, with remainder to his grandson, John Graves, for his life, with remainders to the first and other sons of John Graves, successively in tail male, with remainder to the first and other sons of his daughter, in tail male; with remainder to his own right heirs. The testator then bequeathed his money in the funds and certain other chattels to the trustees, in trust for his wife, during her life or widowhood, and, after her death or second marriage, in trust for the person who

under his will should, either as [538] tenant for life or in tail male, be in the actual possession of his residuary real estates thereinbefore devised, or entitled to the rents and profits thereof. The testator then bequeathed certain other chattels to his wife absolutely; and gave the residue of his personal estate to his son.

The testator made five codicils to his will. By the first, which was dated the 10th of May 1822, after reciting that, since the execution of his will, his son had died unmarried and without issue, and that, in consequence thereof and for other reasons, he was desirous of making such additions to and alterations in his will as were after mentioned, he devised his estate of Treravel, after the decease of his daughter, to the use of Francis Hearle, her husband, for his life, and after his decease to the uses limited by his will after the decease of his daughter; and he charged the manor of Bradenham and his other residuary real estates with the payment of a further annuity or rent-charge of £100 to his wife during her life or widowhood; and he gave to her absolutely some of the chattels which, by his will, he had given to her for her life; and he also gave her the residue of his personal estate.

The testator, by his second codicil, dated the 15th of July 1822, appointed his wife sole executrix and residuary legatee of his personal estate.

By his third codicil, dated the 18th of July 1822, he gave the proceeds of five shares in the County Fire Office to his wife for her life, and, after her death, to his daughter and her husband and the survivor of them for their lives, and, after their decease, to the testator's heir in possession of his Bradenham and other estates.

[539] The fourth codicil was dated 14th September 1822, and was as follows: "I do make and add this further codicil to my will, hereby revoking and making null and void several of the dispositions heretofore made by me, in my said will and codicils, of all my freehold, copyhold and personal estate and effects of all and every kind and description; and, instead and in the place of such devise, disposition and bequest thereof, I do give, devise and bequeath all and every my freehold and copyhold and personal estate and effects of every kind and description whatsoever and wheresoever situated unto my daughter, Anna Maria Hearle, for her life, and, from and after the determination of that estate, I give, devise and bequeath the same unto my grandson, John Graves, and his heirs *in strict entail, as in my said will directed*; with this additional clause, especial and positive orders that, in case the said John Graves should not be thirty-one years of age at the time my said estates shall devolve upon him by the death of my daughter, he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years, but that the rents and profits thereof shall accumulate and be in the hands of my trustees for the use and benefit of my said grandson and his heirs; and, *in failure of issue of the said John Graves*, I order that my said estates and effects shall go and descend as is by my said will directed. And I do hereby ratify and confirm the several annuities and donations by me, in my said will and former codicils, given and bequeathed: and I do further give and bequeath, unto my dear wife Jemima, one other annuity of £100, to be paid her in like manner and with the like restrictions as to the former ones given by my will and codicils; hereby, in all other respects but what is above mentioned, confirming my said will and codicils.

[540] The contents of the fifth codicil were wholly irrelevant to the purposes of the present report. The will and all the codicils, except the second and third, were duly executed and attested.

The testator died in June 1825, leaving Susanna Jemima Hicks, who was his second wife, his widow, and Anna Maria Hearle and John Graves (who was an infant) his only issue, his co-heirs at law him surviving.

Several questions arose as to the construction and effect of the will and codicils. One was whether the devise in the will of the Plomer Hill House, in favour of Mrs. Hicks, was revoked by the fourth codicil. That question was tried in an action of ejectment brought in the Court of Exchequer by Mr. and Mrs. Hearle against Mrs. Hicks. The point was reserved at the trial, and was afterwards argued before the Barons, who gave judgment in favour of Mrs. Hearle. Mrs. Hicks brought a writ of error in the Exchequer Chamber, where the judgment of the Court below was reversed. Mrs. Hearle then brought a writ of error in the House of Lords: and that House, after consulting the Judges, affirmed the judgment of the Exchequer Chamber. (See 1 Youn. & Jer. 470; *Doe v. Hicks*, 8 Bing. 475.)

In November 1825 John Graves, who was then an infant, instituted a suit in this Court, by his next friend, against Mrs. Hicks, Mr. and Mrs. Hearle, and the trustees of the will and codicils, to have the trusts of those instruments carried into execution, and the rights of the parties under them ascertained.

The cause having been heard, and the Master having made his report in pursuance of the decree, both the [541] Plaintiff and Mrs. Hicks excepted to the report. The exceptions were argued in December 1833; at the same time the cause was heard for further directions. (See *ante*, vol. vi. p. 391.) The Vice-Chancellor then directed a case to be made for the opinion of the Judges of the Court of King's Bench, upon the following question:—"Whether, under the will and codicils (subject to the preceding estates for life), John Graves took an estate for life, or an estate in tail male, or an estate in tail general, in the real estates of the testator respectively; and what estate he took in each of the estates in Buckinghamshire and Cornwall,(1) under the will and codicils?"

The case was argued, in Michaelmas term 1835, before Patteson, Williams, and Coleridge, Justices; and, on the 2d of February 1836, those learned Judges certified that they were of opinion that J. Graves took an estate for life, in each of the estates in Bucks and Cornwall, under the will and codicils. (5 Adol. & Ell. 38.)

The cause now came on to be heard, a second time, for further directions.

Mr. Jacob and Mr. Koe, for the Plaintiff, John Graves. Three of the Judges of the Court of King's Bench have certified that, under the will and codicils, the Plaintiff takes only an estate for life in the testator's estates. The first question is whether that certificate ought to be confirmed, or whether the case ought not to be sent to another Court of law. We submit that the [542] certificate is erroneous, and that the learned Judges ought to have certified that the Plaintiff, subject to the prior life interests, takes an estate tail in the testator's estates. The question depends upon the effect of the fourth codicil taken in connection with the will.

The testator's son having died in the testator's lifetime without issue, the Plaintiff, under the will, would have taken a life interest in all the estates, with remainders to his first and other sons in tail male, subject, as to the Plomer Hill House, to Mrs. Hicks's interest therein during her life, &c., and subject as to the Treravel estate, to the interests therein of Mrs. Hearle for her life and of her children (if she had had any) as tenants in common in tail. By the first codicil the testator interposed an estate for life in the Treravel estate, in favour of his son-in-law, Mr. Hearle, between the estate for life of his daughter and the estate tail of her children. The second and third codicils have no bearing on the present question. Then comes the fourth codicil, by which the testator revoked and made null and void several of the dispositions theretofore made by him in his will and codicils, of all his freehold, copyhold, and personal estate and effects of all and every kind and description: and then, instead of such devise, disposition and bequest thereof, he gave all and every his freehold, copyhold, and personal estate and effects of every description whatsoever and wheresoever situated, unto his daughter for her life; and after the determination of that estate, to the Plaintiff and his heirs, in strict entail, as in his will directed. The first question that arose on that codicil related to the extent of the revocation. The Court of Exchequer held (as would certainly seem to be the case at first sight), that the revocation was entire, that is, that it extended [543] to all the dispositions in the will. But the Exchequer Chamber, and afterwards the House of Lords, were of a different opinion, and held that the revocation was partial only, and that Mrs. Hicks's interest in the Plomer Hill House was not affected by it. That being so, and the testator having, by this fourth codicil, given all his estates to Mrs. Hearle for her life, the Plaintiff's interest in each of the estates, whatever it may be, is postponed in enjoyment until after the death of Mrs. Hearle; and with respect to the Plomer Hill House, until after the death of Mrs. Hicks, or her marrying again or ceasing to reside in the house. Subject to those prior interests, all the freehold, copyhold, and personal estates are given to the Plaintiff and his heirs, in strict entail, as in the will directed. Now there can be no doubt that, if the devise had been made to the Plaintiff and his heirs in strict entail, he would have taken an estate in tail general; but

(1) The testator had no estate in any other county.

then follow the words "as in my said will directed:" the question then is, whether the words of the will ought to be imported into the codicil? It would be difficult to do that, because the personal estate was not given to John Graves. The codicil then contains a direction that, in case J. Graves should be under the age of 31 at the time when the estates shall devolve upon him, he should not take possession of them until he attained that age; but that the rents should be accumulated by the trustees for the use of him and his heirs. The codicil then directs that, in failure of issue of J. Graves, the testator's estates and effects shall go and descend as by his will directed. The devise over in failure of issue necessarily confers on J. Graves an estate large enough to take in all the issue who are to fail before the gift over is to take effect. The will directs on whom the estates are to devolve on failure of issue *male* of J. Graves, but [544] not on failure of his issue in general; nor does it contain any direction on whom the personal estate is to devolve on failure of his issue. There is no way in which the certificate of the learned Judges can be supported, except by holding that the words "as in my will directed" reiterate the words of the will, and that the words "in failure of issue" mean "in failure of such issue." But there is no case in which a devise to a man and his heirs in strict entail has been cut down to issue male, and the words "failure of issue" to failure of issue male. The effect of those expressions has never been so limited as to exclude the daughters of the devisee or the issue female of his sons. In *Morse v. Lord Ormonde* (5 Madd. 99; and 1 Russ. 382) the testatrix devised estates to her daughter for life, with remainder to the daughter's first and other sons in tail male, with remainder to her daughters as tenants in common in tail, with remainder, in default of all such issue of the daughter, to trustees for one thousand years, upon trust to raise such legacies as the testatrix should give by a codicil, and to pay the same to the persons to be therein named, with remainder to the testatrix's husband in fee. Then, by a codicil, she gave certain legacies, from and immediately after the decease *and failure of issue* of her daughter, to persons therein named. The question was whether the gift of the legacies was not too remote; as the words "failure of issue" described an event which could not take place while there were female issue of the sons, or any of the descendants of such female issue in existence; but the estates were not given to female issue of the sons or to their descendants. In that case, Sir John Leach, V.-C., and afterwards Lord Eldon, C., held that the gift of the legacies was not too remote. Lord Eldon, towards the [545] conclusion of his judgment, says: "I take the question to be this: whether, on the whole contents of *one and the same instrument not referring to another instrument and misreciting the effect of it*, it is not according to the true meaning of the testatrix to construe the words 'failure of issue' in the passage which occasions the doubt to be failure of such issue as were mentioned in the prior limitations? Such is, in my opinion, the true construction of the will." In that case, therefore, the words "failure of issue" were held to exclude the female issue of sons and their descendants, but not to exclude the daughters of the devisee and their sons. Besides, in that case the term was created for the purpose of raising the legacies: and therefore, it was reasonable to infer that the legacies were to be raised as soon as the term (to which the objections of remoteness did not apply) commenced; and that circumstance enabled the Court to modify, as it did, the words in which the gift of the legacies was expressed. (See 5 Madd. 114.) In *Bristow v. Boothby* (2 Sim. & Stu. 465) an estate was settled on the husband and wife for their lives, successively, with remainders to their first and other sons in tail male, with remainder to the daughters in tail, with remainder to the survivor of the husband and wife in fee: and it was provided that, in case there should not be any child or children of the marriage, or, there being such, all of them should die without issue and the husband should survive the wife, the wife should have power to charge the estate with £5000. The question which, it is to be observed, arose on the language of one and the same instrument was whether the power was not too remote; and Sir John Leach held that it was so. His Honor says: "There can be no doubt that, if it had been [546] pointed out to the parties that the estate was not limited to all the issue of the marriage, and that the power expressed was, therefore, too remote, the deed would have been altered, and that the power and the limitations to the issue would have been made to correspond. But there is nothing in this instrument which enables me to say whether this

would have been effected by extending the limitation to the sons in tail general, or by directing that the power should arise upon the failure of the particular issue of the marriage who were inheritable under the settlement as it is now framed. I am compelled, therefore, to construe the deed as I find it, and to say that, the event on which the power is to arise being too remote, the demurrer must be allowed." It is plain, therefore, that in that case Sir John Leach thought that there had been an oversight in preparing the settlement; but that learned Judge did not think that he was at liberty to interpolate the word "such." The concluding observations in the judgment, too, apply to the present time; for, here, it is impossible to say what the testator would have done if he had been told, when he was making the fourth codicil, that the limitations in his will did not include all the issue of his grandson: he might have struck out the reference to his will. In a note to *Morse v. Lord Ormonde*, there is the case of *Bankes v. Holme* (1 Russ. 394), which has a very close application to the present. There lands were settled, after limitations to the husband and wife for their lives, on the first and other sons of the marriage in tail male, remainder to the daughters in tail, remainder to the husband in fee. The husband afterwards made his will, and, after reciting that, under the settlement, he was seised of the reversion in fee of the estates, expectant upon the contingency that there should be no child or children of the marriage, or, there being such, all of them should die without issue, he devised the reversion in case he should die without leaving any children or child, or, there being such, all of them should happen to depart this life without issue lawfully begotten: and it was held that the devise was void, that is, that the failure of issue spoken of in the will could not be confined to the failure of issue provided for by the settlement. That case peculiarly applies to the present. There were two instruments, and the second shewed an inaccurate recollection of the first. In *Wight v. Leigh* (15 Ves. 564) the testatrix devised an estate to the Plaintiff in the cause, and, after his death, to his first and other sons; and, in default of male issue, she gave the estate to his eldest and other daughters in tail male: and it was held that, under the words, "in default of male issue," the Plaintiff took an estate in tail male. *Langley v. Baldwin* (1 Eq. Ab. 185; see 5 Adol. & Ell. 52) is a case to the same effect. We trust that the Court will be of opinion that the certificate in favour of John Graves taking an estate for life only is not satisfactory.

Mr. Koe cited *Robinson v. Robinson* (1 Burr. 38), *Doe v. Smith* (7 T. R. 531), *Doe v. Goldsmith* (7 Taunt. 209), *Gretton v. Haward* (6 Taunt. 94), *Ellicombe v. Gompertz* (3 Myl. & Cr. 127), *Pierson v. Vickers* (5 East, 548), and referred to the opinions expressed by Lord Eldon and Lord Redesdale in *Jesson v. Wright* (2 Bligh, 1; see pp. 49, 56, *et seq.*).

[548] Mr. Knight Bruce, Mr. Wigram, Mr. Girdlestone, Mr. Sharpe, Mr. Bazalgette and Mr. Patch appeared for the Defendants; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: "It very much struck me, when this case was brought before me on Saturday (and, since that time, I have read over the case and all the cases that were cited), and I must now say that there is no sufficient ground for disturbing the certificate of the Court of King's Bench. Because, if the matter had been presented to the notice of the Court, independently of the decision made in the House of Lords, where the judgment of the Exchequer Chamber was affirmed which reversed the judgment of Chief Baron Alexander, I cannot but think that there would have been very strong ground for holding from the words of the fourth codicil (which are untechnical in the highest degree, and which do not fall within the rule that Mr. Koe has cited from the mouth of Lord Redesdale, namely, that technical words shall have their legal effect unless, from subsequent inconsistent words, it is very clear that the testator meant otherwise) that the true intent was to make the variation, such as it is, by giving all the freehold, copyhold and personal estate in the manner in which he made the particular limitation of the real estate in the will.

The expression is, "unto my grandson, John Graves, and his heirs in strict entail." Now those, to be sure, are, to a certain extent, words of a popular nature; but, nevertheless, the words "strict entail" have acquired a certain technical sense; and, *primâ facie*, if a testator talked of settling an estate on a man and his heirs in strict entail, I do not suppose that anyone in the pro-[549]fession would imagine that it was

intended that the first taker should be tenant in tail, but that he should be but tenant for life, and that those persons who were designated as heirs, whoever they might be, should take in succession. Then the testator says, "as in my said will directed." There you have a plain reference, without straining the words at all, to the particular mode of limitation which, by the will, was made applicable to the estates thereby given. Then he directs, "in case the said John Graves shall not be thirty-one years of age at the time my said estates shall devolve on him by the death of my daughter, that he shall not take or be put in possession of the same until he shall have attained such age of thirty-one years; but that the rents and profits shall accumulate." Now, if you hold that the true intent of this is that J. Graves shall take as tenant in tail, that clause becomes void; for J. Graves has nothing to do but to suffer a common recovery and there is an end of it. Whereas it is plain that the testator meant that that should be a part of the provision; and it cannot be made to take effect except by holding that John Graves takes an estate for life. Then the testator directs that the accumulations shall be in the hands of the trustees for the use and benefit of his grandson and his heirs; which seems to imply that the accumulations shall be for the use and benefit of him and his heirs in the same way in which they are to enjoy the estates, that is, that the heirs should take them in remainder after J. Graves. Then the testator says, "and, in failure of the issue of the said John Graves, I order that my said estates and effects shall go and descend as is by my said will directed." Now, if a strict construction were given to the words, "in failure of issue they shall go and [550] descend," the direct effect would be to prevent their going and descending at all as in the will directed; because the limitation over would be void as being too remote; it being made to take effect on a general failure of issue, without there having been in the will a limitation to issue co-extensive with the general expression "issue," found in this particular clause. It appears to me, therefore, that that mode of construction, so far from effecting the intention of the testator, would manifestly defeat it. And, on the whole, and especially when I consider what view was taken of the case with respect to the Plomer Hill estate in the House of Lords, my opinion is that it would be too much to say that the certificate of the Judges of the Court of King's Bench is wrong; and my own opinion is that it is right.

There is only one observation which I have to make on the case in the House of Lords, which is this. It is very remarkable that Lord Chief Justice Tindal, in giving the opinion of all the Judges, states that they were not all agreed on all the parts, but that, though they did not all agree in every particular part of the case, they all agreed in the general result. It is very remarkable that, for the purpose of putting a construction on a devise of real estate, his Lordship expressly refers to the second and third codicils which were not duly attested; (1) and, therefore, there might have been some cavil against some portions of the reasoning. Now, however, that course of reasoning is likely to be established; because all testamentary instruments, [551] whether they relate to real estate or to personal estate only, must have the same attestation.

I think that I ought not to disturb the certificate.

By the order made in the cause on the 9th of December 1833, it was declared that the testator's residuary real estates were charged with the four following annuities, or *yearly rent-charges*, in favour of Mrs. Hicks, namely, one of £300, and another of £100, under the will; one of £100 under the first codicil, and another of the same amount under the fourth codicil; and with an annuity or yearly rent-charge of £100 in favour of Mr. Hearle: and it was further declared that the annuity or yearly rent-charge of £300 was a primary charge to the several other annuities or yearly rent-charges given by the will and codicils, and that those other annuities or yearly rent-charges were charged on the said estates without any priority between them. (See *Graves v. Hicks*, ante, vol. vi. p. 391.)

The testator's general personal estate having proved insufficient for the payment of his debts, and the rents of the residuary real estates, after paying an annuity and

(1) In the report of the case, it is stated that the will and codicils were duly executed to pass real estates. See 8 Bing. 479.

the interest of a sum in gross which the testator had charged on the estates in his lifetime, being inadequate to pay the annuities declared to be charged on the estates by the will and codicils, those annuities became greatly in arrear, and in 1838 the arrears due to Mrs. Hicks amounted to £3479, and had since increased.

It was contended, on behalf of Mrs. Hicks and Mr. Hearle, that, by the will and codicils, the annuities were charged upon the *corpus* of the residuary estates, [552] and, consequently, that the arrears ought to be paid out of a sum of money which had been produced by the sale of timber on the estates, and, if that should not be sufficient, out of money to be raised by sale or mortgage of the estates.

Mr. Girdlestone, Mr. Sharpe and Mr. Patch, for Mrs. Hicks. The annuities of £300 and £100 given to Mrs. Hicks by the will are not merely charged upon the estates, but the estates are devised subject, expressly, to those annuities. Therefore John Graves and his issue take an estate of inheritance subject to annuities which are to be raised and paid, half-yearly, on certain prescribed days. Can it be contended then that Mrs. Hicks is not to receive her annuities half-yearly, but they are to be allowed to run in arrear, and the arrears to go on accumulating, and then, perhaps, doled out, not to her but to her personal representatives? [THE VICE-CHANCELLOR. Is there any trust created for payment of the annuities? Is there anything given but a legal rent-charge? Where an annuity is given to A. for life, with powers of distress and entry, and the estate on which the annuity is charged is devised to B. for life with remainders over, it is not the habit of this Court to direct the annuity to be raised by sale or mortgage of the estate, except in cases where the Court finds it necessary to sell or mortgage the estate for payment of the testator's debts. If the mere grant of an annuity entitles the annuitant to have the estate either sold or mortgaged, why do conveyancers vest a term in trustees in trust to sell, in addition to giving powers of distress and entry to the annuitant?] The decision in *Cupit v. Jackson* (Maclel. 495; and 13 Pri. 721) [553] seems to answer the objection which your Honor has just stated. In that case it was treated as clear that the arrears of the annuity might be raised by sale or mortgage of the property charged, notwithstanding powers of distress and entry were given to the grantee. [THE VICE-CHANCELLOR. There the annuitant was dead, and, consequently, nothing further could become due in respect of the annuity.] It appears, from the report, that Sir W. Alexander, C.B., expressly repudiated that ground of decision.

Mr. Patch said that, by a former order in the cause, the Court had directed money for payment of the costs of the suit to be raised by sale or mortgage of the estates; and, therefore, the case fell within the principle of *Stamper v. Pickering* (*ante*, vol. ix. p. 176).

Mr. Knight Bruce, Mr. Wigram and Mr. Bazalgette, for Mr. Hearle. There is no intention, either expressed in or to be implied from the will and codicils, that the rents of the estates were to be the only fund for payment of the annuities. The object of conveyancers in inserting powers or trusts for sale in annuity deeds is merely to enable the grantee or his trustee to do that which this Court would do for the annuitant. The rents of a mortgaged estate are the primary fund for paying the interest on the mortgage money; but, if they are not sufficient, the mortgagee may resort to the *corpus* of the estate. If a judgment creditor has sued out an *elegit*, Courts of Equity will raise the debt at once, and not compel the judgment creditor to wait until the rents satisfy it.

[554] We trust that, at all events, the Court will direct the arrears of the annuities to be discharged out of the timber-money.

Mr. Jacob and Mr. Koe, for the Plaintiff. In *Stamper v. Pickering* the estates had been sold for payment of the testator's debts, and the income of the proceeds which remained, after payment of the debts, was not sufficient to pay the widow's annuity. Besides, the estates were devised to the children, subject, expressly, to the yearly sum of £50 (which was not given as a rent-charge); and, of course, the widow was entitled to be paid in full before the children could take anything. In *Cupit v. Jackson* the annuitant was dead, and the bill was filed by his executrix. When an annuitant dies the whole amount that can become due in respect of the annuity is ascertained, and, to some extent, there is a change in the character of the charge.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The case of *Cupit v. Jackson* has no

relation whatever to the present case. There John Jackson the elder (who seems to have been seised in fee), on the occasion of the marriage of his daughter, Elizabeth Jackson, with a person of the name of Thomas Brailsford, settled the estate so that there should be a certain annuity payable to himself for life, then an annuity payable to his wife for life, and then an annuity payable to Thomas Brailsford. Hannah Jackson, who was the wife of the settlor, died in the year 1778; and then John Jackson married a second time; and he had issue by that marriage a son, John Jackson, and a daughter, who also was named Elizabeth, against whom, by mistake, the bill seems to have been filed. She had no interest. John Jackson, the settlor, by his will, as stated on the face of [555] the case, devised the tenements charged with the annuity to John Jackson the younger in fee, and died in the year 1808, and Thomas Brailsford then became the sole annuitant, and the annuity was paid to him, with more or less regularity, during his life. Then he died, having, by his will, appointed Mary Cupit his executrix. She filed the bill against John Jackson the younger, who, at that time, was seised in fee of the estate subject to the arrears of the annuity. The whole amount of those arrears was then finally determined; and, in that case, there being but one demand, which, at all events, must, in some manner or other, have been raisable out of the estate, the Lord Chief Baron thought that, in that case, the whole amount of the arrears having been ascertained, and the estate charged with the annuity being in the hands of the Defendant who was seised in fee-simple of it, it was right that the amount of those arrears should be raised by the sale or mortgage of the estate. Consequently, as it appears to me, it has no relation whatever to the present case: because, in the present case, the estate out of which it is proposed that the arrears of the annuity shall be raised happens to be still subject to settlement, as to part, on Mrs. Hicks for life, and subject thereto, on Mrs. Hearle for life, with remainder to John Hicks for life, with certain contingent remainders to the first and other sons in tail, or in some other way (for I do not mean to give any opinion as to what estates his issue take), with certain remainders over. The annuitant being alive, and some arrears having become due, the amount of which arrears I admit is now ascertained, it is proposed that this Court shall order the amount of those arrears to be raised, by sale or mortgage, out of the settled estate. However, no case has been produced as an authority for such a proceeding; and my opinion is that, unless [556] the Court finds it necessary to make a decree for the sale of the estate for some other purpose, there is no ground whatever for making a direction that the amount of those arrears (which, it is true, are now ascertained, but which will be liable, very probably, in the course of a succession of years, to fluctuate), shall be raised in the manner proposed; for I do not understand that it is necessary now to give any direction for the sale or mortgage of the real estate for any other purpose.

My opinion, therefore, is that all that can be done at present is to let the matter go on; and if the future rents increase, the arrears will be diminished, and, for aught I know, may be ultimately paid.

I feel great reluctance to do that which is novel, and which is not supported by any principle that I have heard adduced, or by any case that has been cited.

[557] JONES v. PRICE. Jan. 29, Feb. 2, 1841.

[S. C. 10 L. J. Ch. 195; 5 Jur. 719.]

Will. Construction. Trust for Sale. Power of Sale. Charge of Debts.

Testator appointed three persons and *their respective heirs and assigns* his executors, and gave to them and to their *respective* heirs and assigns all his real and personal estates, in trust for the purposes after set forth; and, first, that they and their *respective* heirs and assigns should sell his real estates; and he empowered them and their *respective* heirs and assigns to convey the estates, and to give receipts for the consideration money. He then requested the executors of his will to sell his farming stock, furniture, &c., and, out of the monies so arising and all other portions of his personal estate, he required them and *their respective heirs and assigns* to pay all his

debts, &c. One of the trustees and executors died. The two survivors agreed to sell the real estates.

The Court, in a suit for a specific performance of the agreement, rejected the word "respective;" and held that the two surviving trustees and executors could sell and convey the estates to the purchaser; and that the debts were charged on the proceeds of the real estates, and, consequently, that the receipt clause was unnecessary.

Richard Willding, by his will, dated the 29th of January 1820, appointed Thomas Longueville Jones, Charles Thomas Jones and James Taylor, *and their respective heirs and assigns*, the executors thereof; and, after devising certain parts of his real estates and giving certain legacies, he expressed himself as follows:—"I do hereby give and devise unto the said Thomas Longueville Jones, Charles Thomas Jones and James Taylor, and to their *respective* heirs and assigns, all and every the residue and remainder of my estates, both real and personal, for ever, in trust for the purposes hereinafter set forth and declared: and, first, that they, the above-named executors and devisees in trust of this my will and their *respective* heirs and assigns, shall and do sell and dispose of all my real estates so devised to them, by public auction or private bargain and in one or more lots, as may appear to them the most advisable, and as soon after my decease as a purchaser or purchasers can be met with possessing the means to pay a fair and marketable price for the same: and I hereby authorise and [558] empower the said T. L. Jones, C. T. Jones and J. Taylor *and their respective heirs and assigns so to sell, release and convey all the real estates herein devised to them, and to give legal receipts for the consideration money* that may be paid to them for the same: and I do hereby declare it to be my will that, after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligation as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will to sell and convert into money all my farming stock, furniture, &c., as soon after my decease as to them may appear proper, but without prejudice as to the furniture to the accommodation hereinbefore given to my affectionate wife, Diana; and, *out of the monies so arising* and all other portions of my personal estate, they, the executors of this my will *and their respective heirs and assigns*, are required to pay *all my just debts*, my funeral and testamentary expenses, and the sums of £3000 and £1000 to my faithful wife, Diana, and the following legacies, namely, to Miss Sophia Harrison £150, to my servant, John Armor, £150, &c., and I hereby will and dispose of all the *residue or surplus proceeds of all my real and personal estates* in manner following, namely, that they, the said T. L. Jones, C. T. Jones, and J. Taylor *and their respective heirs and assigns*, shall place all the said residue and surplus proceeds in some of the public funds, in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper; and all the dividends and interest that may arise and become due therefrom is to be received by the executors and devisees in trust of this my will, *or their respective heirs and assigns*, and the produce by them paid unto my nieces, Margaret Tattersall, Jane Tattersall, &c., &c., [559] equally between them, or equally between the survivors of them, and wholly to the last survivor of them, during the term of her natural life; and, on the demise of such last survivor, I hereby give and bequeath one moiety of such principal sum to all and every the child or children of the said Jane Tattersall, equally between them: and I hereby give and bequeath the other moiety of such principal sum unto all and every the child or children of my nephew, Philip Tattersall, equally between them; and, in case of the failure of issue of the said Jane or Philip, the whole of the said principal unto the child or children of the other: in case the said Jane and Philip shall die issueless, I then give and bequeath one moiety of the said principal sum unto my niece, Margaret Jones, and to her child or children, equally between them: in the case of my said niece, Margaret Jones, dying issueless, I hereby give and bequeath such moiety of the said principal sum unto the heir at law of Elizabeth Willding: and I do hereby give the other moiety of the said principal sum unto the above-named Thomas Longueville Jones, Charles Thomas Jones and James Taylor, or to the heir at law of each of them respectively, and to be equally divided between them: and I do hereby declare it to be my will that my said trustees and executors

respectively, and *their respective heirs, executors and administrators* shall be accountable only for such monies as they shall actually and *bonâ fide* receive, and that the one shall not be answerable for the acts or defaults of the other or others of them, but each of them for his own acts and defaults only."

The will was proved by Thomas Longueville Jones, Charles Thomas Jones, and James Taylor in July 1821. T. L. Jones (who after the testator's death assumed the [560] surname of Longueville) died, having devised all estates vested in him as a trustee to his son and heir, Thomas Longueville.

In March 1839, which was some years after the death of Thomas Longueville, C. T. Jones and J. Taylor, as the surviving trustees of the first testator's will, agreed to sell the testator's residuary real estates to John Price for £57,000. On the title to the estates being investigated, Price was advised that Jones and Taylor alone were not competent to sell the estates and to give a good discharge for the purchase-money: in consequence of which, another agreement for the sale of the estates was entered into between Price, of the one part, and Jones, Taylor and Thomas Longueville, as the heir and devisee of the trust estates of his late father, of the other part. The title was afterwards approved of, subject to the following questions, namely, whether Jones and Taylor alone, or whether they and Thomas Longueville were competent to sell and convey the estates to Price and to give a good discharge for the purchase-money, or whether the parties beneficially interested in the purchase-money ought not to join in giving the discharge?

The bill was filed for a specific performance, by Jones and Taylor, against Price and T. Longueville. Price raised the above-mentioned questions by his answer, and also submitted that, according to the true construction of the will, the purchase-money was not made liable to the payment of the testator's debts.

Mr. Knight Bruce and Mr. Purvis, for the Plaintiffs. The questions in this case have arisen in consequence [561] of the testator having used the word "respective" in his will. It is evident that he did not know the meaning of that word; but we contend that the trustees took as joint-tenants. *Knight v. Gould* (2 Myl. & Keen, 295). If, however, as the purchaser's counsel will insist, the word "respective" had the effect of making the trustees tenants in common, then the two surviving trustees, together with the heir and devisee of the deceased trustee (who is willing to join with them), can make a good conveyance, and give a valid discharge for the purchase-money. Moreover, the testator's debts are clearly charged upon the real estates; and, therefore, it is of no importance whether the surviving trustees alone, or jointly with the heir and devisee of the deceased trustee, are or not enabled under the receipt clause to give a valid discharge for the purchase-money. The testator devises all the residue and remainder of his estates, both real and personal, to the trustees in trust for the purposes afterwards set forth: so that, at the outset, he throws all the property into one mass. He then directs the trustees to sell his real estates, and his farming stock, furniture, &c., and, out of the monies so arising and all other portions of his personal estate (that is, what has become personal by being sold), to pay his debts, funeral and testamentary expenses and legacies; and then he disposes of all the residue or surplus proceeds of all his real and personal estates. The will is so constructed that, if the debts are not payable out of the proceeds of the sale of the real estates, the legacies are not; but that cannot be contended for a moment. There being then a clear charge of debts, there was no necessity for inserting any receipt clause in the will; and the objection which is founded on that clause is of no weight.

[562] Mr. G. Richards, Mr. Hodgson and Mr. Bagshawe, for the Defendant Price. It often happens that a title may be made in one of two ways: but, if they are inconsistent with each other, the Court must decide which of them is the right way. It is very doubtful whether the legal estate is now vested in the Plaintiffs, or in them and the Defendant Longueville. *Doe v. Green* (4 Mees. & Wels. 229). If, on the one hand, the purchaser pays his purchase-money to the Plaintiffs and takes a receipt from them, but ought to have paid it to and taken a receipt from the Defendant Longueville as well as the Plaintiffs, the *cestui que trusts* may make him responsible for it, if it is misapplied. So, on the other hand, if he pays it to the three when he ought to have paid it to the two, the *cestui que trusts* may make him responsible for it. Who are the executors of the will? Not only the three gentle-

men who are named, but they and their respective heirs and assigns; and they and their respective heirs and assigns are to pay the debts. *Townsend v. Wilson* (1 Barn. & Ald. 608), *Bradford v. Belfield* (ante, vol. ii. p. 264), *Hall v. Dewes*.(1)

Mr. Parry, for the Defendant, Longueville, said that his client was ready to join in the conveyance and receipt, if required so to do. He referred to *Fisher v. Wigg* (1 P. W. 14) in order to shew that it was doubtful whether the trustees took as joint-tenants or as tenants in common.

[563] Mr. Knight Bruce, in reply, said that the persons named in the will were the executors, and were the persons by whom the debts were to be paid; and that the superadded words, "their respective heirs and assigns," were surplusage and nonsensical; that the will was to be construed so as to give them an estate commensurate to their office; and that the word "respective" was not inflexible, but admitted of being modified, especially in construing the language of a will.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case must be decided, like many other cases upon wills, by looking at all the language from the beginning to the end of it; and any person who takes the trouble to do so will see that it abounds in nonsense.

Before I comment on the will I will just observe upon the cases of *Townsend v. Wilson*, *Hall v. Dewes* and *Bradford v. Belfield*.

In the case of *Townsend v. Wilson*, a question arose upon the construction of a deed by which a power was given to three trustees and their heirs to sell the estate for such price in money as to them or their heirs should seem meet; and, one of them having died, it was held that a good conveyance could not be made by the two survivors alone.

In the case of *Hall v. Dewes* it was directed, by the articles, that a power should be contained in the settlement to be made, to enable the husband, with the consent of the three persons named, their heirs or assigns, but not otherwise, to make sale of the mes-[564]-suages, &c., for the best price or prices that could or might be obtained, or for such equivalent in lands as should, by the same three persons or the survivor, be thought reasonable; and the articles also provided that any variation might be made in the form and order of the articles and the uses and trusts thereof which would better effectuate the intention of the parties thereto as therein expressed. Then a settlement reciting the articles was made, by which a power of sale was reserved to the husband, to be exercised by him with the consent of the three persons, or the survivors or survivor of them, or of the heirs or assigns of such survivor, or of the trustees or trustee for the time being; and the persons who were to give receipts for the purchase-money were the same as those who were to consent to the sale; and they were also the trustees of the settlement. One of them went abroad, and another trustee was appointed in his place. Then another died; and, before his place was supplied, an agreement was entered into for sale of the estate to the persons under whom the Plaintiffs claimed; and it was conveyed to them by deeds in which one of the original trustees and the new trustee joined. The objection was that the power of sale had not been duly exercised.

The Lord Chancellor observed that, if the intent was that the three persons named in the articles should consent, the clause as to varying the settlement to effectuate the intention would not help the case. And then his Lordship asked a question with respect to *Townsend v. Wilson*, and added that he did not agree with the decision in that case: and I heard him express himself to the same effect, when he was giving an opinion in *Jervoise v. The Duke of Northumberland*, [565] before the case of *Hall v. Dewes* came on for argument before him. But it is to be observed that, in that case, the words were "their heirs or assigns."

In *Bradford v. Belfield* there was a conveyance by way of mortgage made to Whidborne (who was a trustee for the mortgagee, Baker) his heirs and assigns, upon

(1) Jac. 189. On *Townsend v. Wilson* being cited, the Vice-Chancellor said that Lord Eldon always considered that case to have been wrongly decided. Upon which *Hall v. Dewes* was cited, in order to shew that, although Lord Eldon disapproved of the decision, he would not, in consequence of it, compel the purchaser in *Hall v. Dewes* to take the estate which was the subject of that suit.

special trust and confidence in him and his heirs reposed, that he and they should sell; and then it appears that Whidborne's heir, with the consent of the executors of Baker, conveyed to Bradford in fee in trust to sell. Bradford afterwards sold to Belfield: and the question was whether that was proper; and I held that that mode of proceeding was not justifiable under the provisions of the original deed.

Now, in this case we have to put a construction on the language of a will; and the rules of construction which are applicable to such instruments are not applicable to the case of a trust declared in a deed: because the Courts construe wills with more laxity and with more attention to their various passages than are allowable in construing deeds.

The testator, in this case, sets out with nominating and appointing his three friends, T. L. Jones, C. T. Jones and J. Taylor, and their respective heirs and assigns, the executors of his will. Now it is evident that he had a very imperfect notion as to what the words "their respective heirs and assigns" meant; and I rather think that you will see, upon the whole construction of this will, that the word "respective" may be very well rejected without injuring the testator's meaning; and that, in fact, unless you do reject it, you cannot act on the will at all, as far as the real estate is concerned. [566] Then he seems in the subsequent part of the will to have known how to give an estate in fee-simple, for that he does in plain terms.

I should have observed, with respect to the first clause, that, according to my apprehension, the Ecclesiastical Court never would consider that the executorship was to be split and go to the heirs of the three, or to the assigns of the three. The assigns of what? I apprehend that in the event of all these three persons dying, the executor of the surviving executor, if he proved the will in the same Court, would be the personal representative of the testator; so that, in that respect, the words "their respective heirs and assigns" must be rejected as nonsensical. Then he goes on thus: "I do hereby give and devise unto the said Thomas Longueville Jones, Charles Thomas Jones and James Taylor, and to their respective heirs and assigns, all and every the residue and remainder of my estates, both real and personal for ever, in trust for the purposes hereinafter set forth and declared; and, first, that they, the above-named executors and devisees in trust of this my will and (not *or*) their respective heirs and assigns, shall and do sell." Now, if nobody was to sell except the three trustees *and* their heirs and assigns, how could there ever be a sale at all? How was it possible that the heirs could join with the ancestors? How was it possible before any conveyance was made, that there could be any assign to join either with the heirs or with the ancestors? If the words are to be taken as they stand, they are nonsense: because, there being no severance in the execution of the trust, the trust is to be performed by everyone and their respective heirs and assigns. Then he authorizes and empowers the same three gentlemen, "and their respective heirs and as-[567]-signs, so to sell, release and convey all the estates hereby devised to them, and to give legal receipts for the consideration money that shall *be paid to them* for the same:" and, afterwards, he says: "I do hereby declare it to be my will that after such receipts so given, the purchasers respectively shall be exonerated and discharged from all obligation as to the future appropriation of the money under the trusts of this my will: and I further request the executors of this my will, to sell and convert into money all my farming stock, furniture, &c., as soon after my decease as to them may appear proper, but without prejudice, as to the furniture, to the accommodation hereinbefore given to my affectionate wife Diana; and, out of the *monies*"—he has before spoken only of *money*, in the singular number—"and, out of the *monies* so arising and all other portions of my personal estate, they, the executors of this my will, and their respective heirs and assigns are required to pay," &c. It appears to me, therefore, that the fund out of which they are required to make the payments is made up both of the money that was to arise from the sale of the real estates and the money that was to arise from the personal estate; otherwise there would be a useless change of language, and the word "*monies*" would be made applicable only to one sort of money, which was before named: but, as the word "*money*" is used twice before (once with respect to the real estate, and once with respect to the personal estate), it appears to me that the most natural construction is that the word "*monies*" applies to both descriptions

of money. Out of that they are "required to pay all my just debts, funeral and testamentary expenses, and the sums of £3000 and £1000 to my wife," and several other legacies which are mentioned: and the trustees and [568] executors are required to pay those further sums out of the same fund. Then he says, "and I hereby will and dispose of all the residue or surplus proceeds of all my real and personal estates, in manner following." In my opinion, the natural construction of those words is that the subject which he ultimately deals with is the residue or surplus proceeds after paying the debts and making the other payments before directed. The consequence is that no clause making the receipts of the trustees sufficient discharges is necessary, the purchaser not being bound to see to the application of the purchase-money.

Then the testator directs that the three trustees or their respective heirs or assigns (so that he there changes the language) shall place all the said residue and surplus proceeds in some of the public funds in their joint names. Now, supposing the case was that the three trustees had died and had left three heirs, what are they to do? They are to place the surplus proceeds "in some of the public funds, in their joint names, or upon mortgage of some real estates of land, as may appear to them the most proper; and all the dividends and interest that may arise and become due therefrom is to be received by the executors and devisees in trust of this my will, or their respective heirs and assigns." How was that possible? When once the fund was invested in the joint names, those only could receive the dividends who happened in the ordinary course of law to represent the parties in whose joint names the fund was placed. Therefore there is an end, at once, to any meaning in the words "the executors and devisees in trust of this my will or their respective heirs and assigns."

[569] Looking at the whole of this will, the proper course seems to be to omit altogether the word "respective," and to construe the will just in the same manner as if that word was not there, and then it will be all plain and simple; because then the trustees, when they do sell, will invest in their joint names. The words "heirs and assigns" are inapplicable to the public funds: they must mean "executors, administrators and assigns;" that is, the representatives of the joint body; for they alone can, by any possibility, receive the dividends of the joint fund.

Declare that the debts are charged on the proceeds of the sale of the real estates, and that the two Plaintiffs can make a good title.

[569] EEDES v. EEDES. Feb. 17, 18, 1841.

[S. C. 10 L. J. Ch. 199.]

Husband and Wife. Settlement.

A married woman who had left her husband and was living separate from him, but not in a state of adultery, held to be entitled to a settlement out of a sum of stock to which her husband had become entitled in her right.

The bill was filed by a married woman against her husband and the trustees of a sum of stock to which she, or her husband in her right, had become entitled, for a reference to the Master to approve of a proper settlement of the fund, no settlement or agreement for a settlement whatever having been previously made.

The Plaintiff had left her husband in consequence, as the bill alleged, of ill-treatment which she had experienced from him, and was still living separate from him. He did not contribute to her support; but she was endeavouring to maintain herself by keeping a school.

[570] Each party entered into evidence as to the conduct of the other; but there was nothing to shew that the wife had been unchaste.

The question was whether the wife was entitled to a settlement out of the fund, notwithstanding she was living separate from her husband.

Mr. Knight Bruce and Mr. G. L. Russell, for the Plaintiff, cited *Roberts v. Roberts*

(2 Cox, 422), *Watkyns v. Watkyns* (2 Atk. 96), *Carr v. Eastabrooke* (4 Ves. 146), *Ball v. Montgomery* (2 Ves. 191).

Mr. Jacob and Mr. K. Parker, for the Plaintiff's husband, cited *Coster v. Coster* (*ante*, vol. ix. 597), *Bullock v. Menzies* (4 Ves. 798), *De Manneville v. De Manneville* (10 Ves. 52; see 56), *Duncan v. Duncan* (19 Ves. 394).

Mr. Lowndes, for the trustees of the fund.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I take it to be perfectly settled law that, where a wife is entitled to a chose in action which consists of a principal sum and not merely income, she may file a bill against her husband and the trustee for a settlement. Circumstances of conduct on the part of the wife may certainly exist under which the Court would not listen to her case. But that is not so here; for nothing has been shewn to induce the Court to withhold a settlement, to which she is *prima facie* entitled. [571] The amount of the evidence is that the wife has used very provoking language, and that the husband is of an irritable temper, and the effect was that she went from his house on a certain day, and has ever since lived separate from him. There is no evidence that she ever deviated from the conduct of a chaste wife; but, on the contrary, it is shewn that she has lived in a penurious and laborious manner, and has supported herself by her own industry, without any assistance whatever from her husband. So far the husband's conduct is not free from blame. I, however, do not sit here to decide on the merits or demerits of the husband, but having heard no reason why there should not be a decree, I think it ought to be referred to the Master to approve of a proper settlement of the Plaintiff's property.

[571] HILLS v. HILLS. April 20, 1843.

Jurisdiction. Transfer of Cause.

A cause set down before the Vice-Chancellor of England was ordered to be transferred to another branch of the Court. Held, that the Vice-Chancellor of England had, nevertheless, jurisdiction to hear a petition in the cause, presented before the order of transfer was made.

This cause was set down to be heard before the Vice-Chancellor of England. After a petition had been presented in it, the cause was transferred to the Court of Vice-Chancellor Knight Bruce. The question was whether the Vice-Chancellor of England had, nevertheless, jurisdiction to hear the petition.

Upon the point being mentioned by Mr. Rasch, for the Petitioners,

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the order of transfer left untouched everything that had taken place in the cause previous to that order, and, therefore, he was of opinion that he ought to hear the petition.

[572] SWEET v. CATER. Feb. 3, 1841.

[S. C. 5 Jur. 68.]

Piracy. Copyright. Agreement. Construction.

By an agreement between an author and a bookseller, after reciting that the author had prepared a new edition of one of his works, and that the bookseller was desirous of purchasing it; it was agreed that Messrs. H. (printers) should print 2500 copies of the work, in type and page corresponding with another of the author's works, at the sole cost of the bookseller, and that the latter should pay to the former for the said edition a certain sum by instalments, the first to be paid as soon as the edition was ready for publication, &c.; the work to be divided into three volumes, and to be sold to the public at £3.

Held, that the bookseller was not merely a purchaser of 2500 copies of the work,

but was, in equity, an assign of the copyright of it, to the extent that he was to be the sole publisher of it, until the whole edition, consisting of 2500 copies, should be sold; and, consequently, that a bill by him to restrain a piracy of the work was not demurrable.

Held, also, that notwithstanding some of the passages alleged to have been pirated were contained in the prior editions as well as in the new edition of the work, the Plaintiff was entitled to rely upon them, in aid of his title to the relief prayed.

The injunction having been granted on the Plaintiff undertaking to try his right at law, and the author declining to allow the Plaintiff to bring the action in his name, the Defendant was ordered to admit at the trial that the Plaintiff was the legal proprietor of the pirated work.

The bill stated that, for some years past, the Plaintiff had carried on, and still carried on, the business of a law bookseller and publisher in Chancery Lane; that in 1805 the Defendant, the Right Honourable Sir Edward Sugden, composed and caused to be printed and published a work called, "A Practical Treatise of the Law of Vendors and Purchasers of Estates;" that, at different times subsequent to that year, eight successive editions of the work were printed and published, and that Sir E. Sugden made various alterations in and additions to the work, in each of the successive editions; that in 1839 Sir E. Sugden was the owner of and legally entitled to the copyright of the work and of the several [573] editions thereof; that in the beginning of that year he prepared a 10th edition for publication, and in that edition he made very extensive alterations and additions to the work, and increased the same to nearly double the size of the 9th edition; that in March 1839 the Plaintiff agreed with him for the purchase of the right of publishing the 10th edition, for the consideration and upon the terms and conditions after mentioned; that the agreement was reduced into writing, and on the 28th of March 1839 was signed by Sir E. Sugden and the Plaintiff, and was as follows:—"The Right Hon. Sir Edward Sugden having prepared a new edition (the 10th) of the Treatise of the Law of Vendors and Purchasers, and S. Sweet being desirous of purchasing the same, it is agreed that Messrs. Hansard shall print 2500 copies of the work, in type and page corresponding with the 6th edition of the Treatise of Powers, at the sole cost of S. Sweet, and S. Sweet shall pay to Sir E. Sugden for the said 10th edition the sum of (The sum to be paid and the instalments by which it was to be paid were then mentioned. The first instalment was to be paid in cash, as soon as the *edition* was printed and ready for publication; the second instalment by an approved bill payable four months after date; and the last instalment by an approved bill payable eight months after date; and both bills to be dated at the time *the edition* was ready for publication). The work to be divided into three volumes, and to be sold to the public for £3 in boards; but should it exceed 111 sheets or 1776 pages, a proportionate increase is to be made in the charge to the public, and a proportionate addition made to the consideration to be paid by S. Sweet to Sir E. Sugden. Fifteen copies in boards to be delivered to Sir Edward, free from all charge or expence." The bill further stated that, in pursuance of the agreement, the Plaintiff [574] caused 2500 copies of the 10th edition of the work to be printed by Messrs. Hansard, in three volumes, in the type and form specified in the agreement, and the said 10th edition of the work was published by the Plaintiff on the 8th of December 1839; that the Plaintiff had paid to Sir E. Sugden the purchase-money agreed to be paid for the right of publishing the said 10th edition of the work, pursuant to the terms and provisions of the agreement; and had already sold a considerable number of the copies of the said 10th edition, but that a large number of the copies of such edition still remained in his hands unsold; that in November 1840 the Defendants, Cater & Maddox, who were partners as booksellers and publishers at Launceston in Cornwall, published a work intituled: "A Practical Treatise of the Law Relative to the Sale and Conveyance of Real Property, with an Appendix of Precedents, Comprising Contracts, Conditions of Sale, Purchase and Disentailing Deeds, &c., by William Hughes, Esq., of Gray's Inn, Barrister-at-Law;" that the Plaintiff had lately discovered (as the fact was) that the greater part of the last-mentioned work had been copied, word for word or with some colourable alterations, from the 10th edition of

Sir E. Sugden's work, and without Sir Edward's knowledge or consent; that, although some of the passages which had been so copied were acknowledged to have been taken from Sir E. Sugden's work, yet by far the greater portion of them were copied without any such acknowledgment; that the printing and publishing of the passages which had been so copied was a piracy on the part of the Defendants, Cater & Maddox, of the 10th edition of Sir E. Sugden's work published by the Plaintiff: that the Defendants, Saunders & Benning, who were partners as law booksellers and publishers in Fleet Street, were the [575] London agents of Cater & Maddox, and as such agents had published and sold Hughes's work in London; that the legal interest in the copyright of Sir E. Sugden's work so as aforesaid purchased and published by the Plaintiff had never been duly assigned to the Plaintiff, and the same was still vested in Sir E. Sugden as the author: and that Cater & Maddox and Saunders & Benning insisted, as the Plaintiff was advised the fact was, that Sir E. Sugden was, therefore, a necessary party to the suit.

The bill prayed that an account might be taken of all the copies of Hughes's work containing passages copied from the 10th edition of Sir E. Sugden's work published by the Plaintiff, which had been published and sold by Cater & Maddox and Saunders & Benning respectively, and of the loss and injury which had been sustained by the Plaintiff, by the publication and sale by them respectively of the said work; and that the four last-named Defendants might be respectively decreed to make good and pay to the Plaintiff such loss and injury, or at any rate that an account might be taken of the profits which had been made by them respectively by the publication and sale of Hughes's work; and that the same Defendants might be respectively decreed to pay to the Plaintiff the amount of such profits; and that they might be restrained from publishing, selling, or disposing of, or causing to be published, sold or disposed of, any copies or copy of Hughes's work, and that they might be decreed to deliver up to the Plaintiff to be cancelled all such parts of the copies of the work so published by them which had been copied from the 10th edition of Sir E. Sugden's work as were then in their possession or power.

[576] The Defendants Cater & Maddox demurred to the bill for want of equity.

Mr. Jacob and Mr. Willecock, in support of the demurrer. The bill states that the legal interest in the copyright of Sir E. Sugden's work has never been assigned to the Plaintiff, and that the same is still vested in the author: we, however, contend that the equitable as well as the legal interest in the copyright is still vested in Sir Edward; and that all that the Plaintiff has acquired under his agreement is a licence to sell 2500 copies of the work. The Plaintiff has purchased not the copyright, but a mere licence to publish and sell 2500 copies for his own benefit; and there his right ends. He has no exclusive licence for any definite time: there is nothing whatever to preclude Sir E. Sugden from licensing as many more persons as he pleases to sell copies of his work. An author may give an exclusive licence to sell his work for the whole duration of his copyright: which, in substance, would amount to an assignment in equity of the whole interest in the copyright. So an author may grant an exclusive licence to sell his work for two years, or for any other number of years short of the whole term of his copyright: and that would give the licensee the interest in the copyright for the number of years specified. But that is not the case here: the Plaintiff has no exclusive right for any particular term; but only a licence to sell a certain number of copies. He might have had the exclusive right until he had sold the 2500 copies; but he is not entitled even to that under the agreement. If the Plaintiff is supposed to have any exclusive right, for what length of time is that exclusive right to continue? The error in this case has arisen from not distinguishing [577] between a right to copies of a book and a right to the copyright of the book. The Plaintiff, in all probability, has sold copies of the book in question to his customers, and also to other law booksellers; and he has no more right to file this bill than every purchaser of the book has. The language of the Copyright Act (54 Geo. 3, c. 156), makes it quiet clear that no one but the author or the proprietor of the copyright of a book can sue in a case of piracy. In this case, the author has not given to the Plaintiff even the right to print the work; for the name of the person by whom the copies are to be printed, and the type and page in which they are to be printed, are expressly prescribed by the agreement. When the copies have been printed by the

person and in the manner prescribed by the agreement, then, and not till then, does the Plaintiff acquire any right to them.

Mr. Knight Bruce, Mr. Sharpe and Mr. H. Sugden appeared for the Plaintiff; but THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: It certainly would be most extraordinary if after Sir Edward Sugden has been engaged in so many publications, and has filled the office of Lord Chancellor of Ireland, he should not be able to make a contract between himself and his bookseller.

The question is whether it is not manifest, on the face of the contract, that the Plaintiff has a right in the copyright of the 10th edition of the Treatise on the Law of Vendors and Purchasers. The bill states that, in March 1839, an agreement was made by the Plaintiff, with Sir [578] E. Sugden, by which, after reciting that Sir Edward had prepared a new edition (the 10th) of his Treatise of the Law of Vendors and Purchasers, and S. Sweet being desirous of purchasing the same, it was agreed that Messrs. Hansard should print 2500 copies of the work in type and page corresponding with the sixth edition of the Treatise of Powers, at the sole cost of S. Sweet; and S. Sweet should pay to Sir E. Sugden, for the said 10th edition, the consideration therein mentioned. Then follows the way in which the work is to be sold. It is to be divided into three volumes and to be sold to the public for £3 in boards; but should it exceed 111 sheets, or 1776 pages, a proportionate increase is to be made in the charge to the public, and a proportionate increase to be paid to Sir E. Sugden. Now, by this contract there is an obligation which is binding on both parties. Sweet is to sell at a given price; and, therefore, Sir E. Sugden has bound himself to abstain from doing anything which might at all interfere with that act which Sweet was to do. Suppose that before the 2500 copies, which form the 10th edition, are sold, Sir E. Sugden (to put a hypothetical case) should fancy that he had a right to sell another edition to another bookseller, with the immediate right of publication: I apprehend that this Court would certainly restrain him from doing so on this contract. It is not merely optional with Sweet, whether he will sell or not; but he is bound to sell, and to sell in a given manner. It is most probable that, when Sir E. Sugden drew this agreement, he was looking forward to the time when he might think it right to publish some subsequent edition; and he was taking care to impose an obligation on Sweet to sell; and while he imposes that obligation, he is himself bound, [579] at the same time, to perform his part of the contract, which is, not to interfere with the sale of the book.

I think that, upon the plain construction of this contract, Sweet has obtained a right in the copyright of the work, to the extent that he is to be at liberty to be the sole publisher of it until the whole edition, consisting of 2500 copies, shall be sold. He, therefore, is an assign of the copyright in a limited sense. Consequently the demurrer must be overruled.

The demurrer having been overruled,

Mr. Knight Bruce and Mr. Sharpe moved for the injunction. They pointed out several passages in Mr. Hughes's work as having been taken from the tenth edition of Sir E. Sugden's work.

Mr. Jacob and Mr. Wilcock contended that Mr. Hughes's work was of quite a different character from Sir E. Sugden's, and could not be a substitute for it; that treating, as the former work did, of various branches of the law, it was allowable and even necessary to take some parts of it from a standard work like Sir E. Sugden's; and that, in doing so, Mr. Hughes had not transgressed the limits of fair copying; that some of the passages alleged to have been copied were contained in the ninth and other prior editions of Sir E. Sugden's work; and as the Plaintiff sued as proprietor of the tenth edition only, he was not entitled to rely on those passages in support of his case; and that, at all events, the injunction ought not to be granted unless the [580] Plaintiff would undertake to try his right in an action at law.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In cases of this nature, if the pirated matter is not considerable, that is, where passages, which are neither numerous nor long, have been taken from different parts of the original work, this Court will not interfere to restrain the publication of the work complained of; but will leave the Plaintiff to seek his remedy at law. But in this case it is plain that the passages

which have been pointed out have been taken from the Plaintiff's book, and they are so considerable, both in number and length, as to make it right that this Court should interfere.

It was said that, with respect to some of those passages, the Plaintiff had no right to complain, because they were contained in prior editions of Sir E. Sugden's work. But I do not think that that fact at all alters the case; for the entire copyright in all those prior editions was vested in Sir E. Sugden when he made the agreement with the Plaintiff: and my opinion is that the effect of that agreement was to give to the Plaintiff, as against Sir E. Sugden and all persons claiming under him, a right to insist that the matter contained in the 10th edition should not be published whilst he was performing his part of the contract by selling that edition to the public. And, that being my view of the case, I think that, although the passages may be contained in some prior edition, yet, if they are contained in the 10th edition as well, the Court ought to prevent their being copied.

It was said that the injunction ought not to be granted unless the Plaintiff would undertake to try his right at [581] law: and I think, if the Defendants require it, that that term ought to be imposed on the Plaintiff.

Feb. 12. Sir E. Sugden having declined to permit the Plaintiff to bring the action in his name, the Defendants were ordered to admit at the trial that the Plaintiff was the legal proprietor of the copyright in the 10th edition of Sir E. Sugden's work.

[581] SEELEY v. FISHER. *Feb. 5, 1841.*

[S. C. 10 L. J. Ch. 274.]

Injunction. Advertisement. Literary Property.

Where there are two rival works, the Court will restrain the proprietor of one of them from advertising it in terms calculated to induce the public to believe that it is the other work, but will not restrain him from publishing an advertisement tending to disparage that other work.

Four editions of the Rev. Thomas Scott's Commentary on the Bible were published in the author's lifetime. At his death he and another gentleman under his superintendence were engaged in and had nearly completed the revising and improving of the 4th edition, with a view to the publication of a fifth. The 4th edition having been published several years before Scott's death, the copyright in it had expired. After his death the Plaintiff, who was the owner of the copyright in the revised and improved work, published it under the title of "The 5th Edition of Scott's Bible, with the Author's last Corrections and Improvements."

In January 1841 the Defendants, Fisher & Co., began to publish in monthly numbers an illustrated edition of Scott's Bible; and advertised it in the public papers and on the wrappers of the numbers as a new and carefully revised edition of the work, and as intended to contain the whole unadulterated labours of the author, not as re-edited by a different hand and an inferior mind, [582] but precisely as the learned commentator bequeathed them to the world; the edition being printed from the last which the author published in the vigour of life.

The bill alleged, in substance, that the publication of the advertisement was a fraud upon the Plaintiff, inasmuch as it was calculated to induce the public to believe that the Defendant's edition contained the author's last corrections and improvements, the copyright in which belonged to the Plaintiff; whereas it did not contain any of those corrections or improvements, but the letterpress was merely a reprint of the 4th edition.

The bill prayed that the Defendants might be restrained from selling or disposing of any more copies of their publication having, on the wrappers or cover thereof, the advertisement or announcement before mentioned; and from printing or publishing, or causing to be printed or published any advertisement, statement or announce-

ment purporting that their publication did or would contain the whole of the commentary and observations of the author as written by him or as bequeathed by him to the world, or the whole of the last corrections, improvements and additions made by the author to his work.

Mr. Knight Bruce, for the Plaintiff, now moved, *ex parte*, for an injunction as prayed by the bill; and

THE VICE-CHANCELLOR [Sir L. Shadwell] granted it on the ground that the Defendants were selling their publication under a representation that it was the Plaintiff's.

THE LORD CHANCELLOR [Cottenham], however, on the motion to dissolve being made before him, said that the whole terms [583] of the advertisement, and especially the words "this edition being printed from the last which the author published *in the vigour of life*" (which were omitted in the injunction), referred only to the 4th edition, and represented that nothing but what was contained in that edition was comprised or intended to be comprised in the Defendant's publication; and, consequently, that the advertisement complained of did not hold out to the public that the Defendants' work contained any matter which was the exclusive property of the Plaintiff; that although it further alleged that any additional or other matter which was contained in any edition subsequent to the 4th was spurious and of no value, that allegation, if untrue, was no subject for an injunction, although it might be the subject of an action, as being a libel on or disparagement of the Plaintiff's edition.

[584] GIBBS v. GLAMIS. Feb. 18, 1841.

Voluntary Deed. Demurrer. Cestui Que Trust.

A. instituted a suit against B. and C. respecting a sum of £4000. D. also was made a party to the suit; but, having no interest, he disclaimed. A., B. and C. afterwards came to a compromise, in pursuance of which they executed a deed, assigning the £4000 to trustees in trust to pay to D. his costs of the suit, and to divide the rest of the fund amongst A., B. and C. D., though he was not a party either to the compromise or to the deed, filed a bill against A., B. and C. and the trustees, to compel a performance of the trusts and payment of his costs. A demurrer by C., for want of equity, was allowed.

In 1838 a suit was instituted by the late Rev. Selby Hele against E. Fernie and R. Hibbert respecting a sum of £4000, being the arrears of an expired annuity of £400 which had been granted by the Earl of Strathmore. Lady Glamis, S. B. Heming and D. Heming, also claimed to be interested in the £4000. In November 1839 the several claimants came to a compromise; in pursuance of which a deed, dated the 9th of that month, was made between Fernie of the first part, Hele of the second part, Lady Glamis of the third part, the two Hemings of the fourth part, Hibbert of the fifth part, and Alexander Gibbon and Edward Western of the sixth part; and thereby, after reciting, amongst other things, that the parties to the deed of the first five parts had agreed to compromise their claims to the £4000 and to have the same divided in manner thereafter mentioned; those parties assigned the £4000 to Gibbon and Western in trust, in the first place, to defray the costs, charges and expenses of all the parties to the deed, in or about the suit of *Hele v. Fernie* and others, or of the deed, or otherwise relating to their claims on the £4000, as between solicitor and client, and also the costs of Gibbs, who was a Defendant to that suit, and also the costs which Gibbon and Western might be put to in recovering or receiving the £4000; and, in the next place, to pay £800 to Hibbert and £1800 to Hele, and the residue of the £4000 to Lady Glamis in full satisfaction of the irrespective claims on that sum; and the parties thereto of the first five parts released [585] each other from all actions, suits, claims and demands, in respect of the £4000.

The bill in this cause, to which Gibbon, Western, Hele's executors, Lady Glamis and the two Hemings, were Defendants, after stating as above, alleged that the Plaintiff was a Defendant to the suit instituted by Hele, but that he had not any

beneficial interest in any of the matters in question therein ; and that before the date and execution of the deed of the 9th of November 1839 he appeared and put in his answer to the bill in Hele's suit, and disclaimed any beneficial interest in the £4000, the Plaintiff being in fact (if at all a necessary or proper party to the said suit) only a formal party thereto ; but that he incurred costs therein to a considerable amount, all of which still remained unpaid ; that Gibbon and Western had received all or a considerable part of the £4000, and to an amount more than sufficient to pay the costs, charges and expenses of all the parties, in or about the said suit of *Hele v. Fernie* and of the deed, or otherwise relating to their claims on the £4000, as between solicitor and client, and also the Plaintiff's costs provided to be paid by the deed, and also the costs which Gibbon and Western had been put to in recovering or receiving the £4000, and that they had in fact, out of the money received by them, paid all such costs, charges and expenses, except the Plaintiff's costs, and had paid to Hibbert and to the executors of Hele certain sums of money on account of the £800 and £1800 : that on the 19th of February 1840 the Plaintiff gave a written notice to Gibbon and Western that he had sustained considerable costs in the suit of *Hele v. Fernie* and others, and that such costs were unpaid, and that he was ready to have [586] the same taxed : that on the 23d of May 1840 Gibbon and Western sent to the Plaintiff a letter which, after acknowledging the receipt of the notice, was as follows :—"Having received such notice, we think it right to inform you that we are about to carry the trusts of the deed into execution without delay, and, in case you have any claim against us, as such trustees, for costs in the said suit, we request you will forthwith inform us by what right you make such claim and what is the amount of it : " that the Plaintiff being absent from home when the letter was sent to him, his clerk, on the 30th of the same month, sent to Gibbon and Western a letter as follows :—" *Hele v. Fernie and Others.*—Gentlemen,—In answer to your letter of the 23d instant, I must refer you to the deed of the 9th day of November 1839, under which you act as trustees for, amongst other purposes, the payment of Mr. Gibb's costs of this suit, and to the notice, dated the 19th day of February last, which he served on you, and which you admit the receipt of. In his absence from town, I beg to send you herewith his costs of the suit, and which he will be willing to have taxed according to the notice he served on you." The bill further stated that, on the 26th of June 1840, Messrs. Western & Son, the solicitors of Gibbon and Western, sent to the Plaintiff a letter as follows :—"Sir,—Messrs. Alexander Gibbon and Edward Western, as the trustees under the indenture of the 9th day of November 1839, mentioned in your notice to them of the 19th day of February last, having proceeded to carry into execution the trusts of that indenture, submitted your notice and their letter to you of the 23d day of May, and your reply of the 30th, with the bill of costs which accompanied the latter to Lady Glamis, for her directions how to act, considering her as being the *cestui que trust* [587] under the indenture of the 9th day of November 1839, entitled to the residue of the funds therein mentioned, as principally affected by your claim, upon the fund for costs. Lady Glamis, in reply, has given the trustees notice that she objects to your claim, and denies that you are entitled to be paid any such costs out of the fund, and requires the trustees not to pay you any such costs thereout. Under these circumstances, the trustees have for the present set apart and retained in their hands the sum of £99, 12s. 6d., the amount of the bill which accompanied your letter of the 30th day of May, and paid over the remainder of the fund already come to their hands. We have now, on behalf of the trustees, to require you, forthwith, to take such steps as may be requisite or proper to substantiate your claim for costs, and also to give you notice that in the event of your not establishing your claim within a reasonable time from the date hereof, the trustees will pay over the £99, 12s. 6d. to the parties entitled to the residue of the trust fund under the trusts of the deed." The bill charged that all the Defendants had an interest in the execution of the trusts of the deed ; and that if Gibbon and Western had paid out of the trust fund any part of the £800 and £1800 provided to be paid to Hibbert and Hele, without having paid to the Plaintiff his costs of the suit of *Hele v. Fernie*, they had committed a breach of trust. The bill prayed that the trusts of the deed of the 9th of November 1839 might be performed under the direction of the Court ; and that Gibbon and Western might be made answerable in

respect of the trust money under that deed; and that the Plaintiff's costs, thereby provided to be paid, might be paid to him.

Lady Glamis put in a general demurrer.

[588] Mr. Wigram and Mr. Lovat, in support of the demurrer. A person who is not a party to a contract cannot enforce it. Consequently the bill cannot be maintained; for the Plaintiff seeks by it to obtain the benefit of a deed to which he is not a party. If A. contracts with B. to pay money to C., without consideration, it has been decided that C. cannot compel A. to pay the money. It is true that the bill alleges that the £4000 has been received and in part applied by the trustees, pursuant to the directions in the deed. Those circumstances, however, have been relied on in other cases, and have been held to be insufficient to entitle a person not a party to a deed to enforce it. *Garrard v. Lord Lauderdale* (ante, vol. iii. p. 1); *Walwyn v. Coutts* (*Ibid.* 14; and 3 Mer. 707). It is impossible for any case to be more decisive upon the point than *Garrard v. Lord Lauderdale*. There the solicitor of the Defendants and of the Duke of York wrote a letter to the Plaintiff, informing him that the duke had made an assignment of his crops and other effects at Oatlands to the Defendants, for the benefit of the Plaintiff and the other creditors whose names were contained in the schedule to the deed. In the present case, the letters which the Defendants and their solicitors wrote to the Plaintiff were of a totally different character; they were, in fact, a repudiation of the Plaintiff's claim. The deed was made not for the purpose of creating a trust in favour of the Plaintiff, but for the purpose of carrying into effect an arrangement which the parties to it had made for their own benefit. *Acton v. Woodgate* (2 Myl. & Keen, 492); *Bill v. Cureton* (*Ibid.* 503; see 510 and 511); *Ex parte Pye* (18 Ves. 140).

[589] Mr. Lovat said that the subject of the deed, in this case, was a chose in action; that an assignment of a chose in action carried nothing with it at law; that it was nothing more than a contract; and that there was no case in which it had been held that a trust could be created, as to a chose in action, of which a person not a party to the deed could claim the benefit.

Mr. Knight Bruce and Mr. E. Montagu appeared in support of the bill; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: I think that this demurrer ought to be overruled. The case is extremely different from *Walwyn v. Coutts*, *Garrard v. Lord Lauderdale*, and the other cases referred to.

In the first place, though, at the time when the deed was executed, it might be said that the subject of the assignment was a chose in action; yet the character of that subject has since been altered; because the bill states that a considerable part of the £4000 has been received by the trustees, and to an amount more than sufficient to pay the costs intended to be provided for by the deed. Then it is to be observed that the deed was prepared under the following circumstances. A bill had been filed by Mr. Hele against Mr. Fernie and others; and the Plaintiff expressly states upon his bill that he was made a formal party to that suit; and that he had no interest in the £4000: so that he states that he was a party of such a nature that, as a matter of course, he would be entitled, either sooner or later, to have his costs paid by the Plaintiff Hele, in the first instance, by whomsoever they might be ultimately [590] borne. Then the parties to the indenture came to a compromise amongst themselves on the following terms, namely, that the £4000 should be received by the trustees, and that, in the first place, the parties to the deed should be paid their costs of Hele's suit and of the indenture; that the Plaintiff should be paid his costs of the same suit; that £800 should be paid to Mr. Hibbert; £1800 to Mr. Hele, and the residue of the £4000 to Lady Glamis: so that, by the frame of the deed, Lady Glamis has no interest whatever in the £4000, except that she has a right to the surplus which shall remain after payment of the costs and sums of money before mentioned.

Now it is quite plain that Hele's executors have an interest in having the trusts of the indenture performed; because there is plainly a liability upon them to pay the costs incurred by the Plaintiff in the suit of *Hele v. Fernie*.

This then is not like a case where a party has made, of his own accord, a provision for payment of his creditors, and then chooses not to be bound by his own voluntary act: for there are other parties interested. Lady Glamis has not the sole voice in the matter; but Mr. Hele's executors have an interest in it. Indeed it is

stated, on the face of the bill, that all the Defendants to the suit claim an interest in the performance of the trusts of the indenture; and the interest which Hele's executors claim is, in part, that there shall be a performance of the trust for payment of the costs of the suit of *Hele v. Fernie*.

I think, therefore, that the Plaintiff has a sufficient interest to sustain the bill. Demurrer overruled.

[591] Lady Glamis appealed to the Lord Chancellor. The appeal was argued in April in 1841; and, on the 28th of that month, his Lordship reversed the Vice-Chancellor's decision.

His Lordship [Lord Cottenham, L. C.], in the course of his judgment, said that the Plaintiff stated expressly in his bill that he had no interest in the £4000, or any of the matters in question in the suit which had been instituted by Mr. Hele, and that he was merely a formal, if not an unnecessary, party to that suit; that, that suit having been compromised, Hele was, of course, liable to pay to the Plaintiff his costs of it; and, in order to protect him against the consequences of that liability, the parties who were interested in the fund in dispute provided incidentally that the Plaintiff's costs should be paid out of the fund: that the question then was whether that provision gave the party, whose costs were so provided for, a right to institute a suit as a *cestui que trust*, he having no interest in the fund, not having been a party to the arrangement, and the arrangement having been made between the parties interested in the fund for their own benefit or convenience: that the present case was not distinguishable from *Garrard v. Lord Lauderdale* and the other cases which had been cited, in each of which the Plaintiff was as much a *cestui que trust* as the Plaintiff in the present case was. His Lordship added that the objection was one which was open to all the Defendants; and, of course, it was immaterial what interest the party who made the objection had.

[592] THE ATTORNEY-GENERAL v. SHORE. Feb. 14, 15, 16, May 9, 1843.

[For previous proceedings, see 9 Cl. & Fin. 355; 8 E. R. 450 (with note).]

Deed. Construction. Dissenters. Unitarians. Trust. Charity.

In 1704 Lady Hewley, a Protestant Nonconformist, conveyed estates to trustees for the benefit of such poor and godly preachers for the time being of Christ's Holy Gospel, and for such poor and godly widows for the time being of poor and godly preachers of Christ's Holy Gospel, as the trustees for the time being should think fit; for promoting the preaching of Christ's Holy Gospel, in such manner and in such poor places as the trustees for the time being should think fit; for educating such young men designed for the ministry of Christ's Holy Gospel as the trustees for the time being should approve and think fit; and for relieving such godly persons in distress, being fit objects of her own and the trustees' charity, as the trustees for the time being should think fit. At the date of the deed all religious sects tolerated by law believed in the Trinity, but, in the course of time, the estates became vested in trustees, of whom the majority (though called Presbyterians) were Unitarians, and one was a member of the Church of England: and they applied the rents for the benefit of Unitarians. At the hearing of an information filed against the trustees, the Court held that neither Unitarians nor members of the Church of England were entitled to administer or participate in the benefits of the charity; and ordered the trustees to be removed; and afterwards appointed members of three different sects of Trinitarian Dissenters in their place, some of whom were Independents, others Presbyterians in connexion with the Established Church of Scotland, and the rest Presbyterians in connexion with the Secession Church of that country.

By deeds, dated in January 1704, Lady Hewley, the widow of Sir John Hewley, and a Protestant Nonconformist, conveyed estates in Yorkshire to

Richard Stretton, Nathaniel Gould, Thomas Marriott, John Bridges, Thomas Nesbitt, Doctor Coulton and James Winlow, and their heirs, upon trust that they should, after Lady Hewley's death, pay an annuity, &c., out of the rents, and should, from time to time, out of the residuary rents, as well pay and dispose of such sums of money, yearly or otherwise, to such and so many *poor and godly preachers for the time being of [593] Christ's Holy Gospel and to such poor and godly widows, for the time being, of poor and godly preachers of Christ's Holy Gospel*, at such time and times, and for so long time or times, and according to such distributions as the said trustees and managers for the time being should think fit, and employ and dispose of such sums of money, and in such manner, *for the encouraging and promoting of the preaching of Christ's Holy Gospel*, in such poor places as the trustees and managers for the time being should think fit; as also employ and dispose of such sums of money, yearly or otherwise, as and for exhibitions for such or so long time or times, for or towards *educating of such young men designed for the ministry of Christ's Holy Gospel*, never exceeding five such young men at one and the same time, as the trustees and managers for the time being should approve and think fit. And, as to the surplus and remainder of the residuary rents, that the trustees should, from time to time, employ and dispose of the same, *in and for the relieving of such godly persons in distress, being fit objects of Lady Hewley's and the trustees' and managers' charity*, as the trustees and managers for the time being should think fit; provided that the trustees and managers for the time being should, in their dispositions and distributions of the aforesaid charities, having a primary respect to such objects thereof as aforesaid, as were then, or should afterwards be in York, Yorkshire, or other northern counties in England, not excluding those in other places and counties, as the trustees and managers for the time being, from time to time, should think fit; and also that, whatsoever charitable dispositions or allowances by Lady Hewley should have been made to persons or places in York or Yorkshire immediately or shortly before her death should be continued and paid out of [594] the said residuary rents by the trustees and managers for the time being, until they should see just reason to discontinue or alter the same. And it was declared that, from time to time, as and when any one of the trustees for the time being should die, the survivors of them should elect, in the room of every such deceasing trustee, such a person as they, in their judgments and consciences, should think fit and approve of, who should be a manager of the trust estates, together and equally with the surviving trustees, and have, equally with them, the same authority, power, and benefit respecting the trusts thereby declared; and, in case of the death of any such elected manager, to elect, in the like manner, in his room, another like manager; and that the election of every such manager for the time being should be entered and registered in some or one of the books to be provided and kept as therein mentioned; and that, after such time as two or three, at the most, of the trustees should have departed this life, the survivors of them should add to themselves, as co-trustees with them, all and every the manager and managers so elected as aforesaid, to make up the number of trustees completely seven in the whole; and the surviving trustees were thereupon, by the advice of counsel, to convey the trust estates to the persons who, for the time being, should be such elected managers, and to the surviving trustees, so as to complete the number of seven trustees; and Lady Hewley reserved to herself power to revoke, by deed or will, the uses and trusts thereby declared, and to declare new uses or trusts of the estates.

By deeds, dated in April 1707, Lady Hewley conveyed to the same persons as were trustees of the deeds of January 1704 a new erected house, messuage or building, used for a hospital or almshouse for poor [595] people, together with other hereditaments in the city and county of York, upon trust (after her death) to permit the almshouse or hospital to be for ever used and enjoyed as a hospital or habitation for poor people, in such manner as the same then was, or, at the time of her death, should be used or enjoyed, but subject to such orders, regulations, powers, provisos and appointments as were thereafter referred to; and upon trust (after the death of Lady Hewley) that the trustees and managers for the time being should, out of the rents of the residue of the premises, defray the expense of repairing the premises, of providing catechisms for the inmates of the hospital for the time being, and certain other charges; and, upon trust that the trustees and managers for the time being

should, out of the rents of the residue of the premises, raise yearly, for ever, the sum of £60, for the maintenance of such poor people as Lady Hewley, during her life, had or should place, or which the trustees and managers for the time being should, from time to time, place in the hospital, in such proportions, at such times, and to such uses and purposes as Lady Hewley had, or, at any time during her life, should appoint in writing under her hand, or in any book, or collection of rules or orders, which then were or thereafter should be made by Lady Hewley for the better ordering, choosing and government of the poor in the almshouse; and more particularly that the trustees and managers for the time being should, from time to time after the death of Lady Hewley, fill up and place to the number of ten poor persons, qualified according to such collection of rules and orders, in such hospital or almshouse, whereof nine were to be always poor widows or unmarried women, so long as they should continue such, being of the age of 50 years or upwards, and the tenth person to be a sober, discreet and pious poor [596] man, who might be fit to pray daily twice a day (viz., every morning and evening) with the rest of the poor in the almshouse, if such a man could conveniently be found, and, in default thereof, the tenth to be a poor woman, qualified as the other nine; and also that the trustees and managers for the time being should pay to each of the said ten poor persons 10s. upon the first day of every month. And upon further trust that, from time to time, as and when any one of the trustees for the time being should die, Lady Hewley, during her life, and, after her death, and in default of her nomination and election, the survivors of the trustees should elect, in the room of every such deceasing trustee, such person of reputation as they, in their judgments and consciences, should think fit, who should be a manager of the trust estates together and equally with them, and should have the same authority and powers respecting the trusts thereby declared; and upon further trust that they, the trustees and managers for the time being, should, at all times after the death of Lady Hewley, observe the rules, orders and directions and trusts therein and in the book of rules, orders and directions, subscribed by Lady Hewley, contained; and that the trustees and managers for the time being should, after the death of Lady Hewley, be the only special visitors and governors of the almshouse or hospital, and of all the poor persons therein, and that they should have the sole power, from time to time, to govern, order, admit into, or expel from the almshouse all such poor persons as then were or thereafter should be admitted into the same; yet pursuant always to the rules, orders, &c., in the said book contained. And upon further trust that, if any of the trustees should be interrupted or disturbed in their visitation, rule or government of the almshouse or of the poor people therein, by or by reason of any civil [597] or ecclesiastical or other lawful power or authority whatsoever, then and so long as such disturbance or interruption should continue, the trustees and managers should employ the £60 to such other pious uses as Lady Hewley should appoint, by any writing signed by her in the presence of three or more witnesses, and, in default of such appointment, then to employ the same to such or the like charitable uses as were thereafter expressed. The residuary rents were then directed to be applied upon trusts which were a repetition of the trusts of the deeds of January 1704.

Lady Hewley, by a writing under her hand, dated the 10th day of May 1709, declared that the management of the hospital as to the putting in the poor upon any vacancy should be in the power of Doctor Coulton, and also of T. Hodgson, Matthew Baycock, gentleman, Samuel Smith, Robert Rhodes, Martin Hotham, mercer, and William Hotham, and such as should be chosen to succeed any of them when they should die. The rules left by Lady Hewley and referred to by the last-mentioned trust deed were intituled: "A collection or book of rules, orders and directions to be kept and observed as well by the feoffees or trustees of the revenues of the newly-erected hospital, almshouse or habitation for ten poor people, built and settled upon them by Dame Sarah Hewley, of the City of York, widow, for the better government and ordering of the same, as also by the said poor persons placed or to be placed in the same." The following were among the rules left by Lady Hewley and referred to in the deed of April 1707: "Let none of evil fame or report be admitted into the hospital, but such as are poor and piously disposed and of the Protestant religion. Let every almsbody be one that can repeat by heart the Lord's Prayer, the Creed and

Ten Com-[598]-mandments, and Mr. Edward Bowles's Catechism. Let all the alms-people, when not disabled by weakness, duly repair to some religious assembly of the Protestant religion, every Lord's day, forenoon and afternoon, and at other opportunities, to attend the ordinances of God."

It was alleged, and, at the hearing of the cause, evidence was received that Lady Hewley and all the original trustees of the estates whose religious opinions could be ascertained, believed in the doctrine of the Trinity, the Atonement and Original Sin. In the course of time, however, the estates became vested in trustees, the majority of whom, though calling themselves Presbyterians, professed Unitarian opinions; and a considerable portion of the rents had been, for some years, applied by them towards supporting a seminary for the education of Unitarian ministers, and for the benefit of poor preachers and other persons of that denomination. In consequence of which the information was filed, at the relation of certain members of the sect called Independents (which sect still professed the doctrines above mentioned) against the trustees and other persons having the management of the charities, praying (amongst other things) for a declaration that ministers and preachers of Unitarian belief and doctrine, and their widows and members of their congregations, or persons of Unitarian belief and doctrine, were not fit objects of Lady Hewley's charity; that exhibitions to any college or school where Unitarian belief or doctrine was taught or inculcated were not fit exhibitions for promoting the educating of ministers of Christ's Holy Gospel, within the intent and meaning of Lady Hewley's charities; that the allowance of £80 which had been made to the Defendant, Mr. Wellbeloved, as the preacher of St. Saviour's Gate Chapel (in York) was an unfit allowance or distribution of the charity funds, by reason [599] of his not being a godly preacher of Christ's Holy Gospel, within the intent and meaning of Lady Hewley's charity, and by reason of Unitarian belief and doctrine being preached and inculcated in that chapel, and that such allowance might be wholly discontinued in future; and that all the objects of Lady Hewley's charities might be decreed, fairly and in such manner, to participate in the charity funds, as she meant and intended; and, in particular, that a fair and just proportion thereof might be distributed to and amongst poor godly widows of poor and godly preachers of Christ's Holy Gospel; and that a fair and just proportion thereof might be applied for the encouraging and preaching of Christ's Holy Gospel in poor places; and that the rules relating to the almshouse might be enforced; and that it might be declared that such Dissenters alone as were commonly called Orthodox Dissenters, and as would have been within the protection of the Act of Toleration of the 1st of William and Mary (c. 18), at the time of the foundation of the charities, and would not have been subject to the penalties of the 9th and 10th of Will. 3 (c. 32), against blasphemy, could be considered as coming within the intent and meaning of Lady Hewley, and as entitled to participate in the benefit of her charities, and that the Defendants, the then trustees and managers of the charities, or such of them as the Court should think fit, might be removed, and that other trustees and managers might be appointed in their place.

The cause was heard before the Vice-Chancellor in December 1833; and, on the 23d of that month, His Honor declared that ministers or preachers of the Unitarian belief and doctrine and their widows and members of [600] their congregations and persons of that belief and doctrine were not fit objects of and were not entitled to the benefit of the charities; and it was ordered that the Defendants should be removed from being trustees and managers of the charities, and that the Master should appoint proper persons in their place, and approve of a scheme for the future application of the charity funds, having regard to the above declaration.

On the 5th of February 1836 Lord Lyndhurst, assisted by Mr. Justice Patteson and Mr. Baron Alderson, affirmed the above decree.(1)

Two petitions were afterwards presented by persons not parties to the cause; one by the Rev. John Park and others, on behalf of the whole body of Orthodox Presbyterian congregations composing the Presbytery of the North-West of England; the

(1) See *ante*, vol. vii. p. 309, note. A full report of the judgments referred to above will be found in a work intituled "Lady Hewley's Charities," which was kindly lent to the reporter by one of the solicitors engaged in the cause.

other by the Rev. Henry Thomson and others, on behalf of the United Presbyterians of Lancashire, Newcastle and Carlisle, who also were described as Orthodox Presbyterian Dissenters. The congregations on whose behalf the first petition was presented were in connexion with the Established Church of Scotland, and the congregations on whose behalf the second was presented were in connexion with the Secession Church of that country. Each petition stated that the relators were prosecuting the decree in the Master's office; but that, as the Master had refused permission to the Defendants to attend the proceedings before him, such proceedings would be conducted by the relators only; that the [601] relators were Dissenters, belonging to the religious sect called Independents; that Lady Hewley was not a member of that sect, but was a Presbyterian, and was warmly attached to the leading peculiarities of internal polity and discipline by which Presbyterianism had been always distinguished from Independency; that the Petitioners differed from the Church of England in points of discipline only, and were known by the name of Orthodox Dissenters; that the congregations represented by the Petitioners were, as the Petitioners submitted, entitled to be represented in the new trust, many of such congregations having, theretofore, participated in the funds of the charity; that the Petitioners conceived that Lady Hewley, in making the charitable dispositions mentioned, had particularly in view the interest of the Presbyterians in the northern counties of England; and that the Petitioners were desirous that, in the appointment of trustees and the approval of a scheme and the other proceedings to be had in pursuance of the decree, due provision should be made for representing and protecting the interests of such Presbyterians, and that, for that purpose, a due proportion of the trustees and managers should be selected from among Dissenters of the Presbyterian denomination, and that, in such selection, some Scotch Presbyterian clergymen resident in England should be included. The Petitioners prayed that they might be permitted to take part in the proceedings before the Master, and to propose a scheme and submit the names of persons as trustees for the approval of the Master.

The petitions were heard before Lord Cottenham, C., in March 1836; and on the 16th of that month his Lordship ordered that the Petitioners respectively should be at liberty to go in before the Master, and [602] watch the proceedings under the decree, and to propose proper persons as trustees and sub-trustees or managers, of the charities and estates; and that the Master should proceed upon such proposals accordingly. (See 1 Myl. & Cr. 394.) And his Lordship reserved the consideration of the costs of the applications and of the proceedings to be thereupon had until after the Master should have made his report, upon the understanding that there was, in no event, to be more than one bill of costs, as if one petition only had been presented and as if one solicitor only for both petitions attended the Master.

In August 1836 the Defendants appealed from Lord Lyndhurst's judgment to the House of Lords. The appeal was argued in May and June 1839. In August following, the House, after taking the opinion of seven learned Judges of the Courts of Common Law, upon six questions (see *post*, p. 615), dismissed the appeal.

On the 16th of December 1837 the Master made his report in pursuance of the decree; and thereby certified that he approved of seven gentlemen, named in the report, as trustees of the charity estates; and of seven others, who also were named, as sub-trustees or managers of the charity estates. All those gentlemen were resident in England: four of them were members of a Presbyterian congregation in connexion with the Established Church of Scotland; four others were members of a Presbyterian congregation in connexion with the Secession Church of Scotland; and the rest were Independents.

Four petitions were presented, at different times, after the Master had made his report; two by the relators, [603] in the name of the Attorney-General; one of which prayed that the Master's report might be reviewed, and the other that Lord Cottenham's order of the 16th March 1836 might be varied or discharged. The other two petitions were presented by the parties who had obtained the last-mentioned order, and prayed that the report might be confirmed. Those four petitions came on to be heard before the Vice-Chancellor, the Lord Chancellor having directed that the one which sought to vary or discharge Lord Cottenham's order should be heard by his Honor.

Mr. Bethell, Mr. Anderdon and Mr. Romilly appeared in support of the petitions presented by the relators in the name of the Attorney-General.

Mr. Twiss and Mr. Wray appeared for the Attorney-General distinct from the relators, in order to protect the interests of the charity generally.

Sir Charles Wetherell and Mr. Lloyd, and Mr. Swanston and Mr. Malins supported the petitions for confirming the Master's report.

On the 9th of May 1843 the Vice-Chancellor delivered the following judgment, from which the grounds on which the relators opposed the confirmation of the report will appear.

THE VICE-CHANCELLOR [Sir L. Shadwell].(1) In this case the Attorney-General, at the relation of Samuel Shore the younger and others, by amended information, stated that during the times of the religious persecutions of the English Presbyterians and Independents and other persons calling themselves godly dissenters from the Established Church, in the time of Charles the [604] Second, Dame Sarah Hewley stood forward as the protector and supporter, in Yorkshire, of the ejected ministers of St. Bartholomew's Day in 1662, and of the persons calling themselves "godly," who were Nonconformists, and who were subjected to pains and penalties, in those days, for their forms of religious worship: that, by her trust deed of 1704, it was declared that the trustees and managers should, in their dispositions and distributions of the charity, have a primary regard to such objects thereof as were then, or should afterwards be, in York, Yorkshire, or other northern counties in England, not excluding those in other places and counties: that, in the hospital deed of 1707, she directed the surplus rents of the estates comprised in that deed to be distributed and disposed of to poor godly preachers and their widows: that, up to the day of her death, Lady Hewley continued to be satisfied with the persons whom she had appointed to be trustees of her charities; and that Richard Stretton, the trustee first named, was a Nonconformist. The information also stated that Dr. Coulton, the original preacher at St. Saviour's Gate Chapel, in York, whose ministry Lady Hewley attended, and who was her friend and spiritual adviser and the sole executor of her will, is named as another of her original trustees; and that the Rev. Mr. Hodgson, who is named as a manager of the hospital, was one of the attesting witnesses to Sir John Hewley's will, and the private chaplain of Lady Hewley. The information further stated that Lady Hewley died on the 3d of August 1710: that the dissenters from the Established Church within the protection of the Act of Toleration of William and Mary at the time of the foundation of these charities, and for whose sole benefit these charities were originally intended and applied, who are now commonly called [605] Orthodox Dissenters, are, therefore, desirous to have a judicial declaration as to the proper mode of administering and disposing of these charities: that application had been made to the then present trustees, to apply the funds for the sole benefit and advantage of the dissenters from the Established Church, who are now commonly called Orthodox Dissenters, giving a preference to York, Yorkshire and other northern counties: that the great body of Dissenters distinguished in those times by the names of Presbyterians, Independents and Baptists, differed among themselves solely on questions or articles of Church government, and as to its divine origin and power, and as to forms and ceremonies; and that, upon articles of faith and the object of religious adoration and worship, they were all agreed among themselves and with the Established Church.

One part of the prayer was that it might be declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of Dame Sarah Hewley's charities. That part of the prayer, therefore, asked for an exclusive declaration. Another part of the prayer was that it might be declared that such Dissenters alone as are now commonly called Orthodox Dissenters, can now be considered as coming within the intent and meaning of Lady Hewley, and as entitled to participate in the benefit of her charities. That part of the prayer, therefore, asked for an inclusive declaration.

(1) His Honor delivered a written judgment, of which the above is a copy.

It appears, from the full report of the proceedings in the House of Lords,(1) that Dr. John Pye Smith, a wit-[606]-ness for the relators, deposed that he had no doubt and did verily believe that Lady Hewley, Dr. Coulton, Mr. Hotham and Richard Stretton, were Trinitarians, and reputed to be Dissenters: that he could not affirm of what denomination they were; but, as a matter of probability, he had no doubt that they were of the Presbyterian or of the Congregational denomination: that the ordinary sense and meaning of the term Presbyterians or Presbyterian Dissenters, at or about the time of the foundation of Lady Hewley's charities, was a particular class of separatists from the establishment who differed from the two other classes on certain points of external discipline.

The Rev. Thomas Scales, for the relators, deposed that he believed that Lady Hewley, Mr. Bowles, Dr. Coulton, the Rev. Mr. Hotham, Richard Stretton, Nathaniel Gould, Timothy Hodgson, Martin Hotham, and William Hotham, were all Dissenters, and that he believed that Timothy Hodgson, the Rev. Mr. Hotham and Nathaniel Gould, were of the Congregational class, and that the rest were of the class called Presbyterians. Dr. Bennett also deposed that the word or term Presbyterian, at the time referred to, was commonly used as the name or description of a class or denomination of English Protestant Dissenters, and that they were so large and influential a body as to give a name to all Dissenters.(2)

The statements in the information and the evidence that I have noticed all seem as if made for the direct purpose of procuring an inclusive declaration in the de-[607]-cree according to that part of the prayer which I have secondly mentioned, that is, a declaration who were entitled, and not merely a declaration who were not. But it is to be observed that the decree of the 23d December 1833 (the Vice-Chancellor's decree) merely declared that Unitarians were not fit objects of Lady Hewley's charity, and ordered that the Defendant, John P. Heywood, and all the other Defendants, including Mr. Palmes, who was a member of the Church of England, should be removed from being trustees or sub-trustees and managers of the charities; and that it should be referred to the Master to appoint proper persons to be trustees and sub-trustees or managers thereof in the room of the Defendants, and to approve of a proper scheme for the application of the funds therein mentioned; and reserved the consideration of all further directions until after the Master should have made his report.

My impression, which is confirmed by the recollection of His Honor, Vice-Chancellor Knight Bruce, who was second counsel for the relators, is that the declaration was framed in that exclusive form, because the present Lord Chancellor of Ireland, who led the relators, desired that it should be so, and that it should not be made co-extensive with the prayer, which asked, not only an exclusive but an inclusive declaration. However, the removal of all the Defendants from the trusteeship, coupled with the exclusive declaration, shewed with reasonable clearness what the principle of the decree was, namely, that not merely unorthodox Dissenters, but also members of the Church of England should be excluded. It went no further; but entirely left open the question who should be included; which question can only be determined either by a decree upon [608] further directions in this suit, or by a decree in some other suit. The decree was brought by appeal before Lord Lyndhurst, and on the 5th of February 1836 it was affirmed by his Lordship in accordance with the joint opinion of Mr. Baron Alderson and Mr. Justice Patteson. It seems, on referring to the printed account of their judgments, that they came to the conclusion that the exclusive declaration in the decree, and the removal of a Churchman as well as Unitarians from the trusteeship, was right; because none could be included as partakers of the charity except Orthodox Dissenters; and Lord Lyndhurst was satisfied on the evidence that in her religious faith and opinions Lady Hewley was a Presbyterian.

(1) In the work intituled "Lady Hewley's Charities," mentioned *ante*, p. 600, note.

(2) These witnesses deposed to the above facts from "tradition and authentic publications;" and gave *their opinions*, derived from the same sources, as to the meaning, in 1704 and 1707, of "poor godly preachers," &c., &c.

On the 6th of March 1836, upon the petition of Mr. Park and others, ministers of the Presbytery of the North-West of England, and the petition of Mr. Thomson and others, ministers of congregations of Presbyterians at Carlisle and other places, Lord Cottenham, then Lord Chancellor, ordered that the Petitioners, respectively, should be at liberty to go in before the Master and watch the proceedings and propose proper persons as trustees and sub-trustees or managers of the charities and estates in the petitions mentioned; and reserved the consideration of the costs.

The order, as far as it goes, seems to indicate that Lord Cottenham thought that orthodox English Presbyterians might be partakers of Lady Hewley's charities, or, at least, shews that his Lordship did not think that they could not partake: and if we look out of the dry terms of the order to the very words used by his Lordship as they appear in Mr. Sutton Sharpe's note, no doubt can be entertained of what his Lordship thought. [609] The words were: "Something must be done, otherwise this will be an Independent charity; which was not the meaning of the decree."

On the 16th of December 1837 Lord Henley, the Master, made his report in pursuance of the decree. Then followed the appeal to the House of Lords for the purpose of deciding whether Lord Lyndhurst was right. The House directed six questions to be put to the learned Judges. The second was what description of ministers, congregations and poor persons are proper objects of the trusts of the deeds of 1704 and 1707? (1)

Seven of the learned Judges gave their answers to the House. One of them thought that Unitarians were included. Another thought that members of the Church of England were included. Six thought that Unitarians were to be excluded. But, with those exceptions, all agreed; for all seven thought all Orthodox Dissenters were to be included. And, on the 5th of August 1842, the House of Lords affirmed Lord Lyndhurst's decree and the decree of December 1833; Lord Brougham being present, who had partly heard the appeal from the decree of December 1833, and who, according to the written report, concurred in what was said by Lord Cottenham, who proposed to dismiss the appeal with costs.

Lord Cottenham's observations upon moving the judgment of affirmance in the House of Lords (2) are most important: his Lordship says: "The intention of Lady [610] Hewley could only be judged of by the language and terms used in the deeds." If that is the law, no evidence of her feelings and preferences can be regarded.

I consider that, from the proceedings in this cause, it is to be collected that nine Judges of the Common Law, the present Lord Chancellor and the two late Lord Chancellors, Lord Brougham and Lord Cottenham, and the House of Lords, were of opinion that English Orthodox Dissenters may participate in the benefits of Lady Hewley's charities.

But, whether it be their opinion or not, it remains to be decided by decree who are the persons that shall participate; and, before that question has been determined, and while this cause is in such a state that it cannot be determined, the Court is, in effect, by the petition supported by the relators of the 20th of December 1837, asked to determine it.

That petition asks that the Master's report may be reviewed. It was originally the petition of the relators only; but, by an order of 17th December 1842, it was amended so as to become the petition of the Attorney-General at the relation aforesaid. The parties who petitioned Lord Cottenham in March 1836 also presented petitions praying that the report might be confirmed. Another petition was presented on the 17th of December 1842, in the name of the Attorney-General at the relation aforesaid, praying that the order of the 16th of March 1836 might be discharged or varied by adding thereto "that such order is without prejudice to any question which may arise on the Master's report under the same, or otherwise in any proceeding

(1) The questions and extracts from the answers to them are inserted *post*, 615, *et seq.* The answers to the first question seem to comprise nearly the whole of the law relating to the admissibility of extrinsic evidence.

(2) See *post*, 639.

in the cause ; and that, for the purposes aforesaid, all necessary directions may be given."

[611] Upon the hearing of these four petitions the counsel for the Crown (1) appeared and insisted that the Master's finding was right, and that the order of the 16th of March 1836 ought not to be discharged. It appeared in the course of the discussion that the order of the 16th of March 1836 (Lord Cottenham's Order), though it is not in form expressly said to be made by the consent of the counsel for the Crown, yet, in fact, was virtually so made ; and it was agreed by all the counsel for the Crown, the relators and the other Petitioners, that any order which I should make on the petitions, for or against the report, should be prefaced with this statement, which I wrote out with my own hand :—"The counsel for the Crown desiring that the Attorney-General's petition in this cause should be heard upon the merits stated in it in the same manner as if the order of the 16th of March 1836 had been made upon the Attorney-General's consenting that the Petitioners named in that order should be at liberty to go in before the Master, without admitting their right so to do." It appears to me, therefore, that the order of the 16th of March 1836 cannot be set aside for want of form.

The Master has approved of Joshua Wilson, Esq., of Highbury Place, Middlesex, and a member of the Inner Temple, John Clapham, of Leeds, Esq., Joseph Hodgson, of Woodlands, near Halifax, Esq., Thomas Lonsdale, of the City of Carlisle, Esq., Robert Barbour, of Manchester, Esq., James Finlay, of Newcastle-upon-Tyne, Esq., and James Ross, of the City of Carlisle, Esq., to be trustees : and of the Rev. James Parsons, of the City of York, a member of the Congregational Church there, Mr. James Pigot Pritchett, of the City of York, architect and surveyor, James Bowden, of Kingston-upon-Hull, merchant, the Rev. Hugh Ralph, of Liver-[612]-pool, LL.D., the Rev. Charles Thomson, of the borough of Tynemouth, North Shields, Mr. Thomas Fair, of Frenchfield, in Cumberland, gentleman; and the Rev. James Pringle of Clavering Place Chapel, in Newcastle aforesaid, to be sub-trustees or managers.

The questions upon the four petitions were argued at great length and with great ability. But it struck me at the time that the real question before the Court, namely, whether proper persons had been named as trustees and managers, was in a great degree overlooked and confounded with another, namely, who are the persons entitled to participate in the benefit of the trusts? And I therefore thought it right, before I decided the real question, to read over the pleadings and orders made in the cause, as well as the various historical and other authorities referred to by the relators' counsel, and supplied by the relators and all the affidavits. And, having done so, I am of opinion that the Master's report is right, and ought to be confirmed : and, for this reason most especially, that, unless it is confirmed, I do not see how the question, who shall participate in the charities, can be decided. If the report be confirmed and the trustees disagree, then it will be competent to the relators to bring the new trustees before the Court as Defendants in this or some other suit, and have the questions raised on the affidavits decided. But, as the cause stands at present, the former trustees, who are the only Defendants, have no interest in raising any question.

As both sets of Petitioners under Lord Cottenham's order ask to have the report confirmed, it is useless to consider the objections which, in the affidavits, they have made to each other, or which they have made to the relators.

[613] The relators object to Messrs. Ross and Finlay being appointed trustees, and to Messrs. Fair and Pringle being appointed sub-trustees or managers, because they, as the relators state, are members of the Secession Church of Scotland ; and to Messrs. Lonsdale and Barbour being appointed trustees, and to Messrs. Ralph and Thomson being appointed sub-trustees or managers, because they, as the relators also state, are members of the Church of Scotland. Suppose they are ; the decree has not said that they ought not to be trustees, though it has, in effect, said a Unitarian Dissenter or a Church of England man ought not to be a trustee. But, upon the affidavits, I do not understand that Messrs. Ross and others are members of the Secession Church

of Scotland; or that Messrs. Lonsdale and others are members of the Established Church of Scotland.

It is clear, upon the affidavits, that, in Lady Hewley's lifetime, there were congregations of Presbyterians in many places in the northern counties; for instance, Whitehaven, Tynemouth, Aluwick, Long Cramlington, Lewick Etal, Morpeth, Penrith Great Salkeld, Plumpton, Penruddock and Carlisle; and from them have sprung up Presbyterians, some of whom are in amity with the Established Church of Scotland, and some with the Secession Church or the Relief Church. In some of the congregations there are some natives of Scotland, but they are few in proportion. Some of those congregations consist wholly of natives of England. English Presbyterians do not cease to be English Presbyterians, merely because they are in amity with the Established Church of Scotland or with the Secession or Relief Church. Presbyterians in the north of England, of congregations of both kinds, that is, in amity with the Secession Church and the Established [614] Church of Scotland, have actually participated in the benefit of Lady Hewley's charities. Of the orthodoxy of both sets of Presbyterians there is no doubt. There are many passages in the affidavits from which it appears that they hold the Westminster Confession, which substantially agrees with the Articles of the Church of England. And I see no reason why gentlemen belonging to those congregations, or the ministers of them, though Scotch by birth yet resident in England, should not be trustees.

Objections made in respect of distance from York, or of being engaged in business, apply to the relators' trustees as well as to the others, and have nothing substantial in them.

The relators object that the report makes two out of each set of Presbyterians trustees, and only three from the Independents. I do not see how the Master could well have done otherwise. The number seven could not be divided in proportion to the numbers of churches of the different parties, or to the numbers of individuals composing their churches. If four Independents were appointed, they would have a majority of the whole number. The numbers adopted give a preponderance to the larger body over each of the two others, but not an absolute majority of the whole; and, in that respect, I think the Master right.

The real objection, so strongly urged by the relators against the other Petitioners, namely, that persons such as modern Independents are the only persons that Lady Hewley intended to participate in her charity, cannot, in my opinion, be decided upon these petitions. But it is very fit that there should be some persons before the Court likely to argue the question fairly with the re-[615]-lators, which must be judicially decided upon the words of Lady Hewley's deeds, and not by conjectures as to her private opinions.

What Lady Hewley personally or privately did feel or think, or what, if she were now alive, she would feel or think upon the questions discussed before me, it may be difficult to say. But, considering her piety and benevolence, it is probable that she, though an English Presbyterian, would have approved of the exertions which the Established Church of Scotland, more rigidly Presbyterian, has recently made in favour of the Jews, and would have been delighted to ponder upon the details of that interesting narrative which has lately been published by Messrs. Bonar & M'Cheyne two of the missionaries from that Church.

With respect to the petitions of Park and others and Thomson and others, and the amended petition of the Attorney-General, the order must be to confirm the report, and to give all parties their costs out of the estate; Messrs. Park and others and Thomson and others having but one set of costs, according to Lord Cottenham's order. As to the petition of 17th December 1842, no order is to be made upon it, except to give all parties their costs out of the estate in the same manner. One order may be made upon all four petitions, but it must be prefaced with the statement that I have mentioned.

The following are the questions which are stated, *ante*, page 609, to have been propounded to the learned Judges by the House of Lords.

First. Whether the extrinsic evidence adduced in this cause, or what part of it, is admissible for the purpose of determining who are entitled under the terms "godly

preachers of Christ's Holy Gospel," "godly persons," and the [616] other descriptions contained in the deeds of 1704 and 1707, to the benefit of Lady Hewley's bounty?

Secondly. If such evidence be admissible, what description of ministers, congregations and poor persons are proper objects of the trusts of those deeds respectively?

Thirdly. Whether, in putting a construction upon the deed of 1704, any and which of the provisions of the deed of 1707 may be referred to?

Fourthly. Whether, upon the true construction of the deed of 1704, ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, and persons of what are commonly called Unitarian belief and doctrine, are excluded from being objects of the charities of that deed?

Fifthly. The same question as to the deed of 1707? And,

Sixthly. Whether such ministers, preachers, widows and persons are, in the present state of the law, incapable of partaking of such charities, or any and which of them?

May 10, 1842.

Deed. Construction. Extrinsic Evidence. Evidence.

Opinions delivered by the Judges to the House of Lords, as to the admissibility of extrinsic evidence, for the purpose of determining who were entitled to the benefit of a charity founded by Lady Hewley in 1704, for the benefit of "poor and godly preachers, for the time being, of Christ's Holy Gospel," "godly persons in distress, being fit objects of the foundress's and the trustees' bounty," &c.; and as to who were the proper objects of the charity, supposing the evidence to be admissible; whether Unitarians were excluded, and whether a deed of 1707, between the same parties, and containing the same and other charitable purposes, could be referred to for the purpose of construing the deed of 1704.

All the learned Judges answered the sixth question in the negative.

The following are extracts from their opinions upon the other questions.(1)

Mr. Justice Maule. The evidence which is the subject of this (the first) question may be arranged in two classes. First, that offered in order to prove the belief of Lady Hewley with respect to certain points of theology: secondly, evidence of the opinion of witnesses as to the meaning of certain words; some being words used in the deeds and some not. I think that none of this evidence is admissible for the purpose mentioned in the question. With respect to the first class: if the most perfect certainty could be obtained with regard to Lady Hewley's belief on the points in question, it ought not to influence the construction to be put on language in which she makes [617] no reference to her opinions or belief. But, even if the belief of this lady were the proper subject of evidence, much, if not all, the evidence adduced ought not to be admitted, as not being fit for the purpose of proving it; for example, the extracts from Lady Hewley's will and from Dr. Coulton's will, and from his funeral sermon.(2) The other class of evidence adduced for the purpose mentioned in the first question is the evidence of the opinions of persons describing themselves as conversant with the history and language of the time when the deeds were executed. If the evidence in question were admissible, it would follow that, in a Court of Common Law, the construction of deeds would be left to the jury; for inferences to be drawn from evidence are for the jury and not for the Court. When the meaning

(1) The opinions were delivered at considerable length; and occupied 32 printed folio pages: but, as they related to difficult and important points, and, as there are several other charities similarly circumstanced to Lady Hewley's (as to some of which suits are about to be instituted), it was deemed advisable not to omit them. Some pains have been taken to condense their contents, faithfully.

(2) These wills, and also Sir John Hewley's and Dr. Coulton's sermon (preached at Lady Hewley's funeral), contained passages shewing that the parties believed in the Trinity, the Atonement, and Original Sin.

of the words of a written instrument in the English language is the subject of controversy, historical and other works may, with propriety, be referred to in the argument addressed by the Bar to the Court, as was done largely in the present case. In this way the Court, judging for itself of the weight of the authorities cited, is as likely to arrive at a just conclusion as it would be by the assistance of witnesses, though they should respectively depose, each of them, to his own knowledge of history and theology.

As to the second question. Having, in answer to the first question, stated my opinion that the belief of Lady Hewley is not material, it follows that the supposition of its admission will not, in my opinion, affect the answer to this question. The other class of evidence, the opinion of the witnesses as to the meaning of certain words, being to be rejected, not because it goes to shew what is not material, but because it is not a proper mode of proving what is material, might, if its weight and quality were sufficient, have an effect on the construction of the deeds and on the answer to this question: but it wholly fails to lead my mind to any different conclusion from that at which I have arrived by considering the words of the deeds with the assistance of the arguments and authorities furnished in the discussion at the Bar.

In my opinion, the ministers who are proper objects of the trusts of the deeds of 1704 and of the residuary trusts of that of 1707 are those of all sects of Protestant Nonconformists tolerated by the law for the time being; that the congregations to be benefited under the trust for promoting the preaching of the Gospel in the deed of 1704 and the residuary trusts in that of 1707 are congregations of the same sects; and the poor persons who are proper objects of the [618] residuary trust in the deed of 1704, "for godly persons in distress," are all poor persons, whatever, belonging to religions of which the worship of the true God is the object; and that the poor women and men who are proper objects of the trusts relating to the almshouse in the deed of 1707 are Protestant, poor persons, whether Nonconformists or conforming to the Church of England.

With respect to the ministers and congregations intended, who they are depends on the meaning of the words "preachers of the Gospel" and "preaching of the Gospel;" and, though those expressions may, in a large sense, comprehend the ministers and services of the Established Church, they are not, according to their common use both at present and at the date of the deeds in question, to be so understood, but are ordinarily taken to mean Protestant Nonconformists. The trust for godly persons in distress being fit objects, &c., seems to be intended to give the trustees, in the administration of so much of the funds as should remain after the special objects had been fulfilled, a discretion to apply it to the relief of all such distressed persons as should appear to them deserving, and to be worshippers of the true God, and not living in wilful neglect or defiance of His laws. The objects of the trust relating to the almshouse are so defined by the rules and orders referred to in the deed of 1707 as to leave no doubt on my mind that all Protestants, whether conforming or not to the Established Church, are included.

I do not think the deed can properly be considered as confining the trusts to objects which were lawful at the time of the deed. There is no such restriction expressed, nor is there any ground for implying it: nothing, indeed, to my mind, appears more improbable than an intention that, whatever alterations might take place in the law by increasing or diminishing the amount of toleration, the trusts were to be administered as if the law existing at the time of the deed had remained unvaried. Such alterations had recently happened and were likely to happen again; and, if this had been intended, it could easily have been said. It is not said; on the contrary, the repeated expression "for the time being" seems to point out expressly to the trustees that they are to look to what may be lawfully done at the time it is done.

The third question is, &c., &c. I am of opinion that in putting a construction on the deed of 1704 none of the provisions of the deeds of 1707 may be referred to. If the deed of 1707 referred to or mentioned that of 1704, and contained any declaration of the sense in which Lady Hewley understood the deed of 1704, it would only amount to a declaration of the meaning in which, in 1707, she understood the deed of 1704, and

would not, even then, be admissible. But, in fact, the deed of 1707 does not refer to that of [619] 1704, and, therefore, it could be only admissible on grounds which would admit anything that Lady Hewley said or did at any time after the first deed.

The fourth question is, &c., &c. The fifth is the same question as to the deed of 1707.

I am of opinion that the ministers and preachers, widows, members of congregations and persons mentioned in these questions are not excluded from being objects of the charities mentioned in the questions. It appears to me that if such exclusion were intended it would have been expressed, as it is in the Toleration Act (1 W. & M. c. 18), and that the reasons which have been suggested for implying it wholly fail. These reasons are, principally, that the terms "godly" and "Gospel" were not applied to persons of the sentiments in question; that, at the time of the deeds, it was unlawful and liable to penalty to preach such doctrines; and, chiefly, that the Unitarian doctrines are repugnant to the essence of Christianity, and, consequently, that those who hold them could not be comprehended within any charity for Christian purposes. But it seems to me that all those may be said, and, according to the common use of language, are said to preach the Gospel, who profess the name of Christ and preach a religion avowedly founded on the Scripture; that "godly" is to be considered as having the sense mentioned in the answer to the second question. The circumstance of the preaching of these doctrines being unlawful at the time of the deed is, I think, in itself quite immaterial, unless it can be supposed that those who framed the deed intended that the trustees should be regulated, not by the law for the time being, but by that in force at the time the deeds were executed: a supposition contrary, as it seems to me, to every probability arising from the language of the deeds and the history of the law. With regard to the amount of error of the Unitarian doctrines excluding those who preach and profess them, I cannot think that temporal Courts can conveniently entertain the question of more or less of theological error. I think that those who framed the deeds endeavoured, and, on a true construction, successfully endeavoured, to exclude such an inquiry; my opinion being, first, that, according to the use of the words under consideration in the deeds in question, they are not exclusive of any class of Christian, Protestant Nonconformists, and that Unitarians are commonly, and always have been, considered as forming a part of the Christian community.

Mr. Justice Erskine, in answer to the first question, said that no part of the evidence adduced in the cause was admissible for the purpose mentioned in that question; but [620] that it was for the House to determine, by reference to history and to the public writings of known contemporary authors, what was the sense in which the terms to which the question related were generally used and understood at the date of the deeds of 1707 and 1704.

In answer to the second question he said that, in his opinion, all descriptions of Protestant ministers, congregations, and poor persons, whether Churchmen or Dissenters, were objects of the trusts of the deeds, except those who professed, or (being preachers) purposely or systematically suppressed in their preaching any doctrines at variance with the doctrines then generally received and understood as fundamental and essential doctrines of the Gospel.

He answered the third question in the negative. With respect to the fourth and fifth questions, he said that his answer to them had been given, in effect, in his answer to the first and second. He added that the words in the deeds were not "preachers of Christ's Holy Gospel for the time being," but "preachers for the time being of Christ's Holy Gospel," that is, preachers at the time of their selection as the objects of the trust: and, as he did not consider that Unitarians were excluded merely by their incapacity at the time to take the benefit of the trusts; so he did not consider that the removal of their incapacity brought them within the purview of the deeds.

Mr. Justice Coleridge. It seems to me that the will of Sir John Hewley and Dr. Coulton's funeral sermon were, in strictness, admissible: not as declarations by them, either of what Lady Hewley was or they were; but as acts done by them shewing what they were with whom she lived in most confidence, and her belonging to whose class of religionists may be fairly presumed. I, therefore, answer your Lordship's first question by saying that, in my opinion, the extrinsic evidence was admissible for

the purpose of determining who are entitled, under the terms stated in that question, to the benefit of Lady Hewley's charity. Of course, I must be understood as speaking of the evidence in classes, and in its more important details. I do not undertake to say there may not be some unimportant particulars in the large mass received that may not fall in with the principles on which I think the general body admissible. I may mention, as instances, such sentences as are to be found here and there in the depositions of witnesses speaking merely of belief, founded on tradition and report, of the Trinitarian opinions of Lady Hewley.

The same learned Judge, in answer to the second, fourth and fifth questions, said that none but Protestant, Trinitarian Dissenters were proper objects of any of the trusts, except the [621] trust for poor godly persons in distress, which, he thought, included members of the Established Church and Unitarians as well.

His answer to the third question (which he gave, incidentally, in answering the first) was, that the deed of 1707 might be referred to, for the purpose of shewing that Lady Hewley was one of a large class by whom certain words, used in the deed of 1704, were commonly used in a particular sense, the words, by the hypothesis, being capable of that meaning.

Mr. Justice Williams said that the words "pious and godly preachers of Christ's Holy Gospel," &c., were so general and extensive that they raised a doubt in his mind whether Lady Hewley did not use them in a limited sense; and that, therefore, the evidence was admissible in order to shew the *status* of Lady Hewley as to religious opinions, and therefore to lead to some inference as to the sense in which she employed the indefinite and ambiguous words in the deed of 1704; and that the deed of 1707 might be referred to for the purpose of putting a construction on the deed of 1704; that Nonconformist ministers to whom the description of "godly preachers of Christ's Holy Gospel" could be properly applied, and persons of their persuasion, were the proper objects of the trusts of the deeds; and that Unitarians were excluded from being objects of those trusts.

Mr. Baron Gurney. In answering the questions propounded by your Lordships, I will take together the first and second. Although the term "godly" is too plain to be misunderstood, yet the phraseology employed in describing the first and principal object of the founder's bounty, "poor and godly preachers of Christ's Holy Gospel," appears to me not to be, at the present time, in that general use which enables the reader of the deed to ascertain, with precision, the sense and meaning of the founder, except as it may be collected from the state of the law at that time; which is another consideration. If the founder was connected with a religious party by which this phraseology was employed in a certain sense, I think that it is admissible to inquire what was that party, and in what sense they used this phraseology; and, if it can be ascertained in what particular sense the term "godly preachers of Christ's Holy Gospel" was used, *that* may assist in ascertaining the meaning of the term "godly" in other parts of the deeds. There are parts of these deeds, and of the rules and regulations for the hospital, from which, I think, it may be inferred that Lady Hewley was not a member of the Church of England, and that she did not, by the term "godly preachers of Christ's Holy Gospel," intend clergymen of the Church of England to be the objects of her bounty. The term [622] "preachers" is not one which is applied to clergymen of the Church of England. Another provision is for the preaching of Christ's Holy Gospel in such poor places as the trustees shall think fit. The provisions for the almspeople; their qualifications to be nine poor widows or unmarried persons of a certain age, and a tenth person, who is to be a sober, discreet and pious poor person, who may be fit to pray, daily twice a day, with the rest of the poor in the almshouse, if such a man can conveniently be found.⁽¹⁾ There is no direction for any form of prayer; and I think it must be understood to speak of extemporary prayer. The almspeople are to attend some Protestant place of worship, and the almspeople are to be such as can repeat by heart the Lord's Prayer, the Creed, the Commandments and (not the Church Catechism, but) the Catechism of Mr. Edward Bowles, who is admitted, in the answer of Mr. Wellbeloved, to have been

(1) This sentence seems to be incomplete; it was, however, correctly copied from the printed answers.

a person of note in his day, to have resided at York, and with whom Lady Hewley, in the early part of her life, had been acquainted. All these provisions combined appear to me to indicate a foundation, not for ministers and members of the Church of England, but for ministers and other persons who were Protestant Dissenters. Still, I think it is allowable to throw further light upon the intentions of the founder, if that can be done, by evidence respecting herself and the particular religious party with which she was connected; and, if the phraseology of the deed was that which was in use in that party, to ascertain the sense in which it was used. We do not require any evidence to inform us that there did exist, at the time of these deeds, a large religious party denominated Protestant Dissenters. I think that it is a legitimate inquiry whether Lady Hewley belonged to that party, and whether this was the phraseology of that party, and in what sense it was used, to what description of persons these terms were applied. It is in evidence, and it is uncontradicted, that the terms "godly ministers," "godly preachers" and "godly persons," were in common use by Protestant Dissenters of that time, as applied to their ministers and preachers and members who were considered to be devoted to religion. There is no evidence that at that time this phraseology was employed to designate any other description of persons. There is further evidence that Lady Hewley was a Protestant Dissenter; and I think that she must be considered as sincerely attached to the party of which she was a member; that she was zealously affected to religion itself is evident. Piety and benevolence pervade [623] the whole of the dispositions of her deeds. I think that it is further allowable to shew, by extrinsic evidence, what description of persons could not have been, and what description of persons must have been, the objects of Lady Hewley's bounty; and here it is difficult, if not impossible, to distinguish between evidence and history; they run into each other, and they both concur. We learn, equally from the evidence and from history, that, at that time, there did exist, as there do now, three denominations of Protestant Dissenters; Presbyterian, Independent (or Congregational) and Baptist; that, at that time, all the three were partakers of one common faith on those great points of doctrine which theologians have generally considered as fundamental (for the only difference which existed was that of infant baptism), and that those doctrines which were so generally received were irreconcilable with the faith of those who are now commonly denominated Unitarians. There is no trace in the evidence, neither is there any in history or biography, of any minister or preacher of any congregation of Protestant Dissenters in England who professed a belief in the doctrines of Unitarianism until nearly, if not quite, half a century after the execution of these deeds.

In the argument at your Lordships' Bar, the learned counsel took a wide range of theological and historical discussion. It was contended that, Lady Hewley being of the denomination called Presbyterian, she must be considered as averse from subscription to a test, because that was the prevalent opinion among Presbyterians at that period. If that was so respecting the denomination of Presbyterians, it is remarkable that it is the only point in which Lady Hewley appears to have differed from them; for, by prescribing the use of Bowles's Catechism, she manifested her opinion of the propriety of subscription to a test. It was further contended that she could never have intended to have benefited the members of the sect of Independents by her bounty, because, between the Independents and the Presbyterians, there had been fierce contentions upon the subject of Church government; the Presbyterians having held with government by a presbytery, and the Independents the independence of every separate congregation of which their body was composed. The learned counsel who used this argument did not, I think, advert very correctly to the history of the times. Between the time of those differences and the execution of these deeds half a century had elapsed, which teemed with important events. The contentions upon the subject of Church government, which divided the Presbyterians and Independents and inflamed them against each other, existed during the latter part of the reign of Charles the First and during the time of the Commonwealth. Each [624] was then struggling for ascendancy. After the passing of the Act of Uniformity, when the Presbyterians had failed in obtaining a comprehension with the Church of England, and when all Protestant Dissenters had failed in obtaining toleration, they were all made subject to the same severe laws; they became all sufferers in the same

cause ; many of them were fellow-prisoners in the same gaols. They learned to know each other better, and to love each other more ; they learned to think less of the points of difference and more of the points of agreement. When the revolution had been accomplished, and the Toleration Act (1 W. & M. c. 18) passed, they received one and the same protection, on condition of subscribing the Thirty-nine Articles of the Church of England, with the exception of those which related to church discipline and infant baptism ; and, from that time, there is not a trace of those differences upon Church government which had divided them so widely in the times to which I have adverted. The Presbyterians indeed, although they retained the name of Presbyterians, became, substantially, Independents. They did not subject themselves to the rule of any presbytery (as the Presbyterians of Scotland, with whom they had at one time united themselves, still do) ; their congregations became, and were, and remain, each independent of every other ; and, to this day, this is the case with all congregations of Protestant Dissenters. At the time of the execution of these deeds, the three denominations of Protestant Dissenters were united, as I have said before, in one common faith ; and that was, so far as the doctrines in question were concerned, the same as the Church of England. The answer, therefore, which I humbly give to the first and second questions is that that part of the evidence adduced in this cause, which goes to shew the existence of a religious party by which this phraseology was used, and the manner in which it was used, and that Lady Hewley was a member of that party, is admissible for the purpose of determining who are the persons entitled under the descriptions in these deeds, and that the persons described are ministers, congregations and pious persons who are Protestant Dissenters, and not Unitarians.

The third question propounded by your Lordships is, &c. I do not think that it is necessary to refer to the provisions of the deed of 1707, for the purpose of putting a construction upon the deed of 1704 ; but, if it were necessary, I should think that they may be referred to ; as it appears to me that the deed of 1707 is neither more nor less than the completion of the plan of Lady Hewley for the application of her property to pious uses. I consider the whole as one transaction. The persons who were to carry into execution the trusts of the deed of 1707 were [625] the same, with the addition of subordinate trustees. The deed conveys a hospital then "*recently erected*," and which probably was in contemplation at the time of the execution of the deed of 1704, if not then commenced.

The 4th question is, &c. I am of opinion that ministers and preachers of what is called Unitarian belief and doctrine are excluded, not on account of any opinion of my own respecting the soundness or unsoundness of their belief and doctrine, for I utterly disclaim founding any judgment upon any such basis ; but on account of the state of the law at the time this charity was founded.

The learned Judge here referred to the Toleration Act (1 W. & M. c. 18, sec. 17), and to 9 & 10 W. 3, c. 32.

So the law stood when these deeds were executed. There is nothing in the deeds which gives the least countenance to the supposition that Lady Hewley intended to give to persons who could not legally receive. Preachers of Unitarian belief and doctrine, if there had been any such at the time (which there were not) would not have been tolerated, and could not, in my opinion, have been the object of Lady Hewley's bounty. The objects of her bounty I consider to be such Protestant dissenting preachers as were, at that time, within the protection of the Toleration Act. It would be most extravagant to suppose that Lady Hewley, by her description of "godly preachers of Christ's Holy Gospel," meant to describe persons who were considered by the law at that time as guilty of blasphemy.

The fifth question propounded by your Lordships is the same as to the deed of 1707. I am of opinion that persons of Unitarian belief and doctrine are excluded from being objects of the charities of this deed. The rules and regulations established by Lady Hewley require that the almspeople shall be able to repeat by heart (which I understand to mean to repeat believingly) the Lord's Prayer, the Commandments, the Creed and Bowles's Catechism. Bowles's Catechism is inconsistent with the belief and doctrine of the Unitarians.

It has, however, been contended that, however incapable persons of Unitarian belief and doctrine were at the time of the execution of these deeds, yet, as the law

now stands, they are not incapacitated, and that it is all in the discretion of the trustees. The statutes which have passed since are the 19 Geo. 3, c. 44, and the 53 Geo. 3, c. 160. By the 19 Geo. 3 the Legislature relaxed the terms of subscription for Protestant dissenting ministers. Instead of subscribing the Articles of the Church of England, they were allowed to subscribe a general declaration of their belief that the Scriptures of the Old and New Testament, as commonly received among Protestant churches, contain the revealed will of [626] God, and that they receive the same as the rule of their doctrine and practice; and, on subscribing this declaration, they became entitled to all the exemptions, benefits, privileges and advantages granted to Protestant dissenting ministers by the Toleration Act. But this statute left the exception of those who denied the doctrine of the Trinity unrepealed. This exception, however, and the penal enactment in 9 & 10 Will. 3, have both been repealed by 19 Geo. 3; and the law as respecting all Protestant Dissenters is now the same. I cannot see how this removal of incapacity from taking the benefit of such charities as may now be founded for their benefit can make them the objects of a charity which was not founded for their benefit, and which could not then be legally founded for their benefit. I think the investing of the trustees with the power of applying this trust to the promotion of Unitarian worship would be the greatest possible perversion of the trust. I have always considered the intention of the founder to be the principle to be established—the rule to be abided by; and I think the language of Lord Eldon in *The Attorney-General v. Pearson* gives the rule very distinctly. 3 Mer. 410. “From this deed, &c. . . . who founded it?”

Mr. Baron Parke. I apprehend that there are two descriptions of evidence (the only two which bear upon the subject of the present inquiry) which are clearly admissible in every case, for the purpose of enabling a Court to construe any written instrument and to apply it practically. In the first place, there is no doubt that not only where the language of the instrument is such as the Court does not understand is it competent to receive evidence of the proper meaning of that language, as, when it is written in a foreign tongue; but it is also competent where technical words or peculiar terms, or, indeed, any expressions are used, which, at the time the instrument was written, had acquired any appropriate meaning, either generally or by local usage or amongst particular classes. This description of evidence is admissible in order to enable the Court to understand the meaning of the words contained in the instrument itself, by themselves, and without reference to the extrinsic facts on which the instrument is intended to operate. For the purpose of applying the instrument to the facts, and determining what passes by it, and who take an interest under it, a second description of evidence is admissible, viz., every *material* fact that will enable the Court to identify the person or thing mentioned in the instrument, and to place the Court, whose province it is to declare the meaning of the words of the instrument, as near as may be, in the situation of the parties to it. From the context of the instrument and from these two descriptions of evidence, with such circumstances [627] as, by law, the Court, without evidence, may, of itself, notice, it is its duty to construe and apply the words of that instrument; and no extrinsic evidence of the intention of the party to the deed from his declarations, whether at the time of his executing the instrument, or before or after that time, is admissible, the duty of the Court being to declare the meaning of what is written in the instrument, not of what was intended to have been written. The excepted cases in which such evidence is admissible, if indeed there be more than one excepted case (that is, where there are two subjects or two objects, both described in the instrument, and each equally agreeing with it), having no bearing whatever on the present question.

These being, I conceive, the only rules applicable to the present inquiry, I proceed to the question whether the extrinsic evidence adduced in this case, or what part of it, was admissible? In the first place, though the words “godly preachers of Christ’s Gospel” are, without any evidence, intelligible, yet according to the first rule above referred to, extrinsic evidence was by law admissible to shew that these terms had acquired, by usage, a peculiar meaning, either amongst a particular class to which Lady Hewley belonged, or in the particular locality where she dwelt, or perhaps, generally, throughout the kingdom, at the particular time the deed was executed; or the Court might have informed itself from history and other general sources of

information of the meaning of the language used at that particular time. Evidence was therefore admissible that, amongst Protestant Dissenters, or a peculiar sect of them, or generally amongst all persons, these words, though of a general nature, and applicable *primâ facie* to all poor and godly preachers of Christ's Holy Gospel, and of course including the ministers of the Established Church, had acquired a more limited meaning, and were confined to a certain description only of such preachers; and supposing it to have been proved that a particular class had always used and understood these words in a restricted sense, it would have been unquestionably permitted to prove that Lady Hewley belonged to that class. When the appropriate meaning of these expressions has been established by competent evidence, then the deed is to be read as if the equivalent expressions were substituted: and no further evidence of the peculiar sect or religious opinions, or any other circumstance attending the parties to the deed, is admissible to control or limit their meaning. Such evidence is not, in my judgment, material to enable the Court to construe the deed within the meaning of the second rule. . . . In this case, if it had been established by conclusive evidence or from other legitimate sources that the words "godly preachers" [628] had meant "Protestant dissenting ministers," no parol declaration of Lady Hewley, that she intended only a particular class or sect or individuals with particular opinions, would have been admissible; nor could evidence of her conduct, character, habits or opinions, have been receivable to raise an inference of such intention. The deed must speak for itself, no matter what she intended to have done, even though it should be proved from her own mouth; still less what it may be supposed she would have wished to have done. The sole question is, what is the meaning of the words in the deed? and if these, of themselves or with the aid of evidence of a peculiar signification attached by usage, mean all of a certain class, for instance, all such Protestant dissenting ministers as the trustees should from time to time select, it matters not that her own religious opinions would make such a disposition unlikely; it is a case of "*quod voluit non dixit*." This observation applies equally wherever general terms are used in a deed; their meaning cannot be limited by proof of any intention of the individual party, whether expressed in words or implied from conduct, habit or character; and if they be not limited on the face of the deed itself, the general words must be carried into effect, and their construction must be the same whoever the parties to the deed may be. . . .

Having made these observations, I proceed to give my answer to the first question proposed by your Lordships. I must own that I much doubt whether any of the evidence offered in the case to explain the meaning of the general words used was admissible. The sermon of Dr. Coulton, and the will of Sir John Hewley, were clearly inadmissible to prove the religious opinions of Lady Hewley; and the parol testimony of Dr. Pye Smith, Dr. Bennett, and Mr. Walker to the 17th interrogatory, which they found upon their acquaintance with various publications of that day, I hardly think can range itself within the class of cases in which the opinion of men of science or skill is admitted on a question of science or art. But this inquiry would not be very material if, from the above-mentioned sources of information (which are equally open to the Court as to the witnesses), it appeared that the general terms, "godly preachers of Christ's Holy Gospel," had acquired a peculiar meaning when used by Protestant Dissenters. I am inclined to think that it does so appear; and that these words used by Dissenters do not comprise members of the Church of England; and, if so, I am of opinion that evidence of Lady Hewley being a Protestant Dissenter was properly admitted, though some of it was not of an admissible character; but not the evidence offered for the purpose of shewing that she was a Trinitarian Dissenter.

[629] The second question proposed by your Lordships is, &c. It appears to me that, coupling the evidence which I have before stated to be admissible, of Lady Hewley being a Protestant Dissenter and the usage since the time that the deed of 1704 came into operation, by which members of the Church of England have uniformly been excluded, the term "godly preachers," &c., used by her, meant a class of persons not of the Church of England; and I infer this partly from the use of the term *godly*, partly from that of the word *poor*, which may have been used in the sense of unendowed, principally because the term preachers was not usually applied to the

ministers of the Church of England, who had their liturgy and homilies, but rather to those who looked on preaching as the principal and the most effectual means of extending the influence of religion. I have no doubt also that ministers of the Roman Catholic faith were not included in that term. Protestant Dissenters, therefore, alone are the proper objects of the charity: but who are the class of Protestant Dissenters who are entitled under this provision is a question I feel no small difficulty in determining after much consideration of the case. Is the charity to be confined to those persons who should, "*from time to time*," belong to the class who, in 1704, answered the description of poor and godly preachers of Christ's Holy Gospel; or is it to be extended to all such, then or at any future time, answering the description of godly preachers of the Gospel; and, if the former be the true construction, who are the Protestant Dissenters that, in 1704, were designated by the deed as godly preachers of Christ's Holy Gospel? Did that description comprise all, not within the pale of the Church, who, being Protestants and pious and poor, preached the Gospel of Jesus Christ as containing the revealed will of God and the rule of doctrine and practice, expounding it according to their own opinions; or is it to be confined to one class only of these, or extended to all with the exception of a particular class? It is on this part of the case I have felt and still feel much doubt; but I incline to think that the former is the true construction, and that it is more reasonable to hold that the founder had the true state of religious opinions in her view, and did not contemplate any change, and meant, therefore, to bestow her bounty on all that should, *from time to time*, belong to the class which was then designated as godly preachers of Christ's Holy Gospel, or such as should be, from time to time, poor and godly preachers of what was then understood by the term of "Christ's Holy Gospel." And, if we so read the words of the instrument, I can have very little difficulty in saying that those who impugned the doctrine of the Holy [630] Trinity did not, at the date of the deed, answer this description, as it was then generally understood in the Christian world; and I need no better evidence of that fact than the recital in the statute of 9 & 10 Will. 3, passed in the year 1698, which states such opinions to be blasphemous and impious and contrary to the doctrines and principles of the Christian religion, and greatly tending to the dishonour of Almighty God. Proceeding then on this ground, that the words of the deed, as we may presume they were then generally understood, did not comprise those who impugned the doctrine of the Holy Trinity (not because they were not then tolerated by the law), I concur in the opinion already expressed on this question by the majority of my brethren, and think that the charity is to be confined to Protestant Trinitarian Dissenters. . . .

The meaning of the term "poor and godly preachers" having been settled, it does not appear to me that there is much difficulty in ascertaining the other objects of Lady Hewley's bounty. The widows must be those of Protestant dissenting ministers as above described. The preaching of Christ's Holy Gospel which the trustees are to promote, and the ministry of Christ's Holy Gospel for which young men are to be educated, would seem to have the same meaning, that is, the preaching and ministry by Protestant Trinitarian Dissenters; and godly persons, generally, being fit objects of the charity, must, I rather think, by reason of these last words, be those of the same persuasion. The poor persons who are to be admitted into the almshouse are clearly defined by the terms of the deed of 1707 and the rules made by Lady Hewley pursuant thereto. They must be Protestants. They must be able to repeat the Lord's Prayer, Creed, Ten Commandments, and Mr. Edward Bowles's Catechism, and they must, of course, believe in the doctrines contained in the Creed and Catechism. If they are Protestants, though they may be of the Church of England, who do conscientiously believe in those doctrines, they are admissible; if they do not, they are incapable of partaking of this branch of the charity.

In answer to the third question, I am of opinion that, as the deed of 1704 was complete in itself, and no power reserved to alter or vary the trusts of it,⁽¹⁾ that deed must be construed by itself, and without any aid from the deed of 1707, and

(1) This is a mistake: the deed of 1704, as set forth in the appendix to the Respondent's case, did contain a power to revoke the trusts and to declare new ones

therefore that none of the provisions of the latter deed can be referred to for this purpose.

[631] My answer to the fourth question proposed by your Lordships is already given in assigning my reasons for the answer to the second.

In answer to the fifth question, I have to state that I am of opinion that Unitarians who do not conscientiously believe the doctrines in the Creed and Edward Bowles's Catechism are excluded from the benefit of the charities of the deed of 1707; and I collect from the answer and evidence in the case that the generality of that body do not believe in the doctrine of original sin and the Atonement, in the sense in which these terms are used in that Catechism, and therefore are not proper objects of this branch of the charity.

Lord Chief Justice Tindal. My Lords, before I proceed to state what appears to me, on the best consideration I can give to this important case, the proper answers to be given to the several questions proposed, I think it desirable, for the purpose of making those answers more intelligible and precise, and of avoiding, at the same time, needless repetition, to state generally upon what grounds and within what limits I conceive parol evidence admissible to explain the meaning of the words used in a written instrument, so far, at least, as the consideration of that question applies to the circumstances of the present case. The general rule I take to be that, where the words of any written instrument are free from ambiguity in themselves, and where external circumstances do not create any doubt or difficulty as to the proper application of those words, to claimants under the instrument or the subject-matter to which the instrument relates, such instrument is always to be construed according to the strict, plain, common meaning of the words themselves; and that, in such case, evidence *dehors* the instrument for the purpose of explaining it according to the surmised or alleged intention of the parties to the instrument is utterly inadmissible. If it were otherwise, no lawyer would be safe in advising upon the construction of a written instrument, nor any party in taking under it; for the ablest advice might be controlled, and the clearest title undermined, if, at some future period, parol evidence of the particular meaning which the party affixed to his words, or of his secret intention in making the instrument, or of the objects he meant to take benefit under it, might be set up to contradict or vary the plain language of the instrument itself. The true interpretation, however, of every instrument being manifestly that which will make the instrument speak the intention of the party at the time it was made, it has always been considered as an exception, or perhaps, to speak more precisely, not so much an exception from as a corollary to the general rule above stated, that [632] where any doubt arises upon the true sense and meaning of the words themselves, or any difficulty as to their application under the surrounding circumstances, the sense and meaning of the language may be investigated and ascertained by evidence *dehors* the instrument itself; for both reason and common sense agree that by no other means can the language of the instrument be made to speak the real mind of the party. Such investigation does of necessity take place in the interpretation of instruments written in a foreign language; in the case of ancient instruments, where, by the lapse of time and change of manners, the words have acquired, in the present age, a different meaning from that which they bore when originally employed; in cases where terms of art or science occur; in mercantile contracts which, in many instances, use a peculiar language employed by those only who are conversant in trade and commerce; and in other instances in which the words, besides their general common meaning, have acquired by custom or otherwise a well-known, peculiar, idiomatic meaning in the particular country in which the party using them was dwelling, or in the particular society of which he formed a member, and in which he passed his life. In all these cases evidence is admitted to expound the real meaning of the language used in the instrument, in order to enable the Court or Judge to construe the instrument and to carry such real meaning into effect. But, whilst evidence is admissible, in these instances, for the purpose of making the written instrument speak for itself, which, without such evidence, would be either a dead letter, or would use a doubtful tongue, or convey a false impression of the meaning of the party, I conceive the exception to be strictly limited to cases of the description above given, and to evidence of the nature above detailed; and that in

no case whatever is it permitted to explain the language of a deed by evidence of the private views, the secret intentions, or the known principles of the party to the instrument, whether religious, political or otherwise, any more than by express parol declarations made by the party himself, which are universally excluded; for the admitting of such evidence would let in all the uncertainty before adverted to: it would be evidence which, in most instances, could not be met or countervailed by any of an opposite bearing or tendency, and would, in effect, cause the secret undeclared intention of the party to control and predominate over the open intention expressed in the deed. And I conceive it is upon the proper application of this rule to the facts of the present case that the answers to the several questions proposed by your Lordships ought to be founded; all of which appear to be framed for the purpose of solving the general problem, [633] what was Lady Hewley's intention as expressed in the deeds of 1704 and 1707, and what description or classes of persons were the objects of her bounty at the time those deeds were respectively executed? For, whatever was her intention *then*, whoever were the persons intended to take at the time of the execution of those deeds, the same must be the construction of her intention *now*, and the same her objects at the present day.

Keeping in view these general observations, I would beg to state, in answer to the first question, that I conceive, when a doubt has been once raised as to the meaning of these words, that is, in the present case, as to the persons intended by Lady Hewley under the terms "godly preachers of Christ's Holy Gospel," "godly persons," and the other expressions, the Court, by which that doubt is to be decided, has a right to inform itself and is bound, if possible, to learn what was the acknowledged and received sense and meaning which those expressions bore at the time when Lady Hewley lived, and, as near as may be, at the time of the execution of those deeds; and, for that purpose, that all extrinsic evidence calculated to throw light upon the meaning of those words at that time is clearly admissible. Of that description are public records and documents throwing light upon the religious history of the times; the language of the statute-book and every enactment relating to the state and condition of the Church and of the religious sects then known in England; contemporary history; contemporary treatises and tracts upon the religious tenets held by the different sects; the works of men of acknowledged eminence and weight in their respective persuasions and published and circulated at that period; and the early and contemporaneous application of the funds of the charity itself by the original trustees under the deeds. All extrinsic evidence of this nature, which must be considered, both from the arguments of counsel at your Lordship's Bar, and from the reference made thereto in their judgments, by the learned Judges in the Courts below, to have been actually applied in the determination of the case, though not formally tendered, was strictly and properly admissible for the purpose of explaining the sense in which the language contained in the deeds was used at the time, and in which it is now to be construed. But as the evidence which I have just described is evidence which is presumed to be in the mind of the Judge or Court, it is evidence which they furnish to themselves by reading, research and reflection, not that which they receive from the mouth of witnesses; and on this account I think all the extrinsic evidence which was actually given in the cause, for the purpose of determining who were entitled under [634] the terms "godly preachers of Christ's Holy Gospel," and other expressions used in the deeds was inadmissible.⁽¹⁾ Such, for instance, as the evidence of Dr. Pye Smith and Dr. Bennett as to the religious opinions of the Presbyterians and of other Protestant Dissenters in the time of Lady Hewley; their interpretation of the terms used in the deeds; and their evidence of the religious opinions of Lady Hewley herself. The production also of the will of Sir John Hewley and of Lady Hewley, in proof of the private religious opinions of Lady Hewley, appears to me, both in respect to the point to which they were produced and to the character of the evidence itself, not admissible by law. It is unnecessary, however, to specify each particular article of the evidence produced, after having traced out the general

(1) The other Judges stated the rules as to the admissibility of extrinsic evidence to explain written instruments in much the same terms.

nature of the evidence on which alone I think the construction of the deeds ought to depend.

In answer to the second question, and applying to that question no other evidence than that which I conceive to be admissible for the construction of the trust deeds, I think it may be satisfactorily concluded that, at the time of the execution of those deeds, the words, "godly preachers of Christ's Holy Gospel" and "godly ministers" had acquired, generally in England, a particular and limited meaning, and were used to point out and designate those acknowledged classes of Protestant Dissenters from the Established Church who were, at that time, tolerated by law. The words indeed, if taken separately and singly, would undoubtedly, in their literal meaning, be large enough to comprehend all men of pious and godly habits of life who preached the true doctrine of the Holy Gospel, of whatever church or persuasion they might be, whether priests of the Church of Rome, or beneficial clergy of the Established Church in England, or Dissenters from that church of every denomination; provided only they possessed the two requisities or conditions, viz., that they were men of godly habits of life and preached the true Gospel of Christ; and the words themselves, taken singly and separately, do not appear to have varied in any degree from their original meaning. The word "godly," for some centuries before the time of Lady Hewley, had been used in many passages in the translation of the Bible, and had been read daily in the confession of sins set forth in the Liturgy, precisely in the same sense which it bore in the times of Lady Hewley; and in the same sense has it continued to be read down to the present day; and again, "the [635] Holy Gospel of Christ," it is unnecessary to observe is, in its own nature, unchanged and unchangeable. But, notwithstanding that the original sense of the separate words is retained to the present day, it appears beyond doubt, on reference to the public history of former times, that the phrases above referred to had obtained generally in England, long before the date of the foundation deeds, a less extensive signification. The term "godly" had been originally applied by the Puritans to the preachers approved by them; and, at the time of Lady Hewley, had descended to those who, at that time, formed the body of Nonconformist Dissenters from the Established Church. "Preachers," again, was a term which, in Lady Hewley's time, was afflicted by the Dissenters from the Established Church, who considered themselves rather as persons whose mission was to preach the Gospel, than to minister the ordinances and lead the devotion of the people; and indeed, in the Act of Toleration, those very persons are described as "preachers and teachers." And, lastly, the word "poor" did, in a most especial manner, point at those for whom no public provision was made by the State, but who subsisted on the voluntary contributions of their respective flocks. I consider, therefore, at the time of the execution of these deeds, the phrase "godly preachers of Christ's Holy Gospel" had acquired the new and particular sense of preachers of the different classes of Protestant Dissenters from the Established Church, who professed and preached what were generally acknowledged, at that time, to be the doctrines of the Holy Gospel of Christ, and who were then tolerated by the law of the land; and which classes, it is well known, were, at that time, divided amongst themselves into the Presbyterians, the Independents or Congregationalists, and the Baptists, all of whom were believers in the doctrine of the Holy Trinity. It is possible also that, at the precise period of the execution of these deeds, there might be some members of the Church of England still existing who had either voluntarily quitted their benefices, or had been ejected from them on account of scruples of conscience, first during the reign of Charles the 2d, on the ground of non-conformity, and afterwards at the period of the Revolution, on account of their refusal to take the oaths to the new government; and that these persons might also, at that time, be held to fall within the scope of Lady Hewley's bounty. But it is obviously unnecessary, at the present time, to enter into any minute discussion on that point.

After this explanation of the words "godly preachers," I cannot conceive any doubt can exist as to the description of the widows and young men intended for the ministry, who [636] are mentioned in the deeds; and, with respect to the persons described in the deed of 1704, under the terms of "such godly persons in distress, being fit

objects of the said charity,(1) as the said trustees shall think fit,"(1) I should think that these words, accompanying and following the former, would be construed in conformity with them, and be intended to mean persons of the same persuasion, or professing the same religious principles with the more immediate objects of the trust; or, at the least, that such persons would be entitled to a preference before others in the administration of the funds. And, lastly, as to the persons entitled to receive the bounty of Lady Hewley's deed of 1707, namely, persons placed in the almshouse founded by her, I think those persons are marked out, more clearly and definitely, to be such as, at that time, were members of some of the bodies of Protestant Dissenters from the Established Church before described; for the test which is prescribed by the rules of Lady Hewley as to their admission, "that every almsbody must be able to repeat by heart the Lord's Prayer, the Creed, the Ten Commandments and Mr. Edward Bowles's Catechism;" and the direction that the inmates were duly to repair to "some religious assembly of the Protestant religion every Lord's day, forenoon and afternoon," lead to the necessary conclusion that, on the one hand, the foundation was not intended for persons of the Established Church, and, on the other, that it was confined to the members of the bodies of Dissenters which were known and acknowledged in fact as such bodies, and recognized and tolerated by law.

In answer to the third question, I beg to state my opinion to be that, in putting a construction upon the deed of 1704, the provisions of the deed of 1707 cannot be referred to. By the deed of 1704 the property contained in it is conveyed, absolutely, to trustees upon certain trusts therein contained. The deed of 1707 conveys property of Lady Hewley to the same persons indeed as are named in the deed of 1704; but other and different property, and upon other and different trusts. If the latter deed had recited or, in any manner whatever, referred to the deed of 1704, the two deeds might then have been considered as made *in pari materia*, or, in effect, as forming one deed; and the deed of 1707 might then have been directly and immediately appealed to, as explaining the intention of the foundress of the charity under the first deed. But the second deed is so far from containing any recital or reference to the first, that, in the provision for applying the residue of the rents, the deed of 1707, instead of referring to the trusts of the [637] deed of 1704, repeats them again in terms. I therefore conceive them to be perfectly independent deeds, and can see no legal principle of construction by which the provisions of the latter deed can be called in aid of the construction of the former, which is the only point to which your Lordships' third question adverts.

In answer to the fourth and fifth questions, I beg to state that the opinion at which I have arrived, founded upon that which appears to me to be the true principle of construction of those deeds, is that ministers and preachers of what is commonly called Unitarian belief and doctrine, and their widows, and members of their congregations, and persons of what is commonly called Unitarian belief and doctrine, are excluded from being the objects of the charities of both those deeds. First, taking the deed of 1704 by itself, I think the objects of it are limited to the ministers and others of the several bodies of Protestant Dissenters from the Established Church, which were generally known, established and tolerated at the time the deed took effect; and I am unable to find any proof, from any authentic source, that the Unitarians did form, in fact, at that time, a body or class of Protestant Dissenters known and established in the kingdom. On the contrary, so far as can be inferred from the evidence produced or any other evidence of an historical nature, the Unitarians, as a body of persons of known religious tenets in England, were unknown until a period much later than the execution of either of the deeds in question: but further, so far were the persons who preached Unitarian doctrines from forming a religious body then known and acknowledged in the kingdom, that, at the time of the execution of these very deeds, such persons could not avail themselves of the benefit of the Toleration Act, 1 William & Mary, c. 18, on the ground of their being persons who denied the doctrine of the Trinity; and, under the statute 9 & 10 Will. 3, c. 32, were, at that time, liable to certain penalties and disabilities, if, by

(1) So in original.

writing or teaching, they denied the doctrine of the Trinity. When, therefore, in the deed of 1704, provision is made for "godly preachers of Christ's Holy Gospel," I think the answer to your Lordship's fourth question must be in the affirmative; first, because there were existing, at the time, certain bodies of Protestant Dissenters well known and ascertained, who preached doctrines which had been generally understood and believed in all ages of the Church, and were also generally acknowledged, at the time of the execution of the deed of 1704, to be the Holy Gospel of Christ, of which bodies the Unitarians did not, at that time, constitute one: and, as the deed was so framed that the trusts were to take immediate effect and [638] operation,⁽¹⁾ it must be held to apply to the preachers and others of such bodies only which did then actually exist, and, at that time, answer the description in the deed. And, secondly, because the deed describes the persons who are to take to be the preachers of "the Holy Gospel of Christ;" and it is undeniable that, at the time of the execution of this deed, both the Church of England as by law established, and all the known classes or bodies into which Protestant Dissenters were divided, held the doctrine of the Trinity to be a fundamental part of their faith, that is, of the Holy Gospel of Christ; and that, at the time of the execution of that deed, the Legislature also considered the belief in the doctrine of the Trinity as essential to the description of a preacher of Christ's Holy Gospel, punishing those who preached doctrines which denied it.

If the persons who believe and preach Unitarian doctrines are excluded from the benefit of the deed of 1704, I think they are more clearly and unequivocally excluded by the deed of 1707; for, by the rules and orders given by Lady Hewley for the regulation of the poor persons to be placed in the almshouse, which rules, being made by Lady Hewley under a power reserved by her in the deed itself and therein expressly referred to, may, beyond doubt, be called in aid in the interpretation of the meaning of that deed, it is directed that "every almsbody is required to be one who can repeat by heart the Lord's Prayer, the Creed, the Ten Commandments, and Mr. Edward Bowles's Catechism;" which regulations appear to my mind to prove, beyond any doubt, that the foundress intended the inmates of the hospital and the other objects of her charity under that deed to be persons who believed in the doctrine of the Holy Trinity. And, referring myself to the evidence given in this cause of the Unitarian belief and doctrine as to the Divinity of Christ, I cannot understand that any person professing those doctrines could honestly or conscientiously repeat by heart, that is, express his belief in the doctrines contained in the Catechism of Mr. E. Bowles. And, if it had been necessary to determine the intentions of Lady Hewley as to the doctrinal belief of the inmates of her hospital without reference to the Catechism of Bowles, it must not be forgotten that, upon the authority of two eminent persons well known at the time in question, I mean Dr. Barrow and Mr. Baxter, the doctrine of the Divinity of Christ was held to be sufficiently acknowledged, as a matter of belief, by those who received the Apostles' Creed alone. (See Barrow's Treatise on [639] the Creed, under the clause, "His only Son," and Baxter, in his treatise, "Directions for Weak Christians," part 2, sec. 53, 1.) And the weight of the observation, for the present purpose, consists, not so much in the consideration of the truth of the conclusion at which Barrow and Baxter have arrived, as in the proof it affords of the fact that, by all bodies of Christians by whom the Apostles' Creed was received, that is, in England, by the members of the Established Church, and of all the dissenting communities then known, the doctrine of the Holy Trinity was also received and believed: and it is by the current acknowledged use of language at that time that this deed is to be construed. In the latter deed, therefore, I think Lady Hewley expresses her clear and undoubted intention that no Protestant Dissenter who denies the divinity of Christ, that is, no Unitarian, shall partake of her bounty.

The learned Judges having delivered their opinions, the further consideration of the case was postponed, in order that the House might have time to review the arguments therein contained.

August 5, 1842. The following opinion was delivered by Lord Cottenham, C., on moving the judgment of the House of Lords.

(1) The trusts were not to come into operation until Lady Hewley's death.

My Lords, the opinions which have been delivered by the learned Judges have so far exhausted this case in all the most material parts of it, that I do not deem it necessary to enter at large into the very interesting and important matters which were discussed at the Bar.

The principal object of the suit was to have it declared that ministers or preachers of what is commonly called Unitarian belief and doctrine, and their widows and members of their congregations, or persons of what is commonly called Unitarian belief and doctrine, are not fit objects of the charity. The decree appealed from established the affirmative of that proposition : and of the seven Judges who attended the hearing at the Bar of this House six concurred in it. I cannot suppose that your Lordships will think that there is ground for differing from this opinion ; and if that should be your Lordships' feeling upon it, the result will necessarily be an affirmance of the decree.

I cannot, however, omit to make some observations as to the media through which this conclusion has been arrived at by the different authorities by whom this subject has been considered. Your Lordships will have observed that, [640] in the discussion in the Court of Chancery, a very large range of evidence was admitted with a view of coming to a decision as to what was the intention of Lady Hewley : which could, after all, only be judged of by the language and terms used in the deeds. In what respect and for what purposes this evidence was properly received was the subject of one of the questions put to the learned Judges, and has been the subject of some difference in their opinions. It does not appear to me necessary to consider minutely those differences : because I conceive that, keeping strictly within those rules which all the opinions recognize, there is sufficient, upon the view taken by the great majority, to support the conclusion to which they have come upon the main point in the case. It was very clearly and shortly laid down by Mr. Baron Gurney, "that that part of the evidence which goes to shew the existence of a religious party by which the phraseology found in the deeds was used, and the manner in which it was used, and that Lady Hewley was a member of that party, is admissible." That being in effect no more than receiving evidence of the circumstances by which the author of the instrument was surrounded at the time. Much evidence indeed appears to have been received which, if of a nature to be received, might fall under the rule, but which was objectionable upon other grounds : such as the opinions of living witnesses. But, rejecting all such evidence, enough appears to me to remain unobjectionable in itself, and properly received for the above purpose, to support the conclusion to which a great majority of the learned Judges have come. I have thought it right to make these observations upon this matter of evidence, as, otherwise, the affirmance of the decree might seem to sanction the receiving all the evidence received below, which might tend to introduce much doubt and confusion in other cases.

It may be thought that this opportunity should be taken of specifying what description of persons are hereafter to be considered as proper objects of the charity. I think that any attempt to do this would be dangerous, and would be more likely to promote than to prevent future litigation ; as it is impossible, *à priori*, to foresee the consequences of any such declaration, or to have sufficient information as to the various interests upon which it may operate, and which are not represented in this suit. What has passed in this cause, and the valuable opinions which the Judges have delivered, will, it may be hoped, afford such light to the trustees as to enable them satisfactorily to administer the funds for the future.

It was made part of the complaint upon this appeal that [641] some of the trustees had been removed, as to whom it had not been proved that they entertained opinions inconsistent with the declared purposes of the trust. I do not consider the removal of any of the trustees as implying any reflection upon their moral conduct. But as, by the decision of the Court, it was found that the application of the funds for the time past had not been consistent with what appeared to the Court to be the real object of the charity, and as a large discretion must necessarily be left to the trustees for the future, I think that, as a matter of discretion, it was right to select others for the future management of the funds ; and if that was right in 1833, it certainly would be indiscreet to adopt a different course in 1842. I cannot, therefore, think that it will be right to alter this part of the decree.

I propose, therefore, to your Lordships to dismiss this appeal; and I see no ground for departing from the usual course of giving to the Respondents the costs.

[642] PAPILLON v. PAPILLON. Feb. 18, 19, 1841.

[S. C. 10 L. J. Ch. 184.]

Portions. Satisfaction.

Estates were settled on A. for life, remainder to trustees for 1000 years, to raise £5000 for the portions of his daughters and younger sons, and subject thereto to A. in fee: provided that, if A. in his lifetime or by his will should give to any of his children entitled to portions under the trusts of the term any sum of money, &c., for or towards their advancement in marriage or otherwise, the same should be taken in part or in full satisfaction (according to its amount) of the portion thereby provided for that child; unless A. should, by writing under his hand, declare to the contrary. A. had eight daughters and two younger sons. By his will, after reciting the limitations and trusts of the settlement, he devised the estates, subject to the £5000, to trustees in trust by sale or mortgage, to raise money to supply the deficiency of his personal estate for payment of his debts and legacies, and in the next place to pay £2000 to each of his younger sons; and he declared that after payment of his debts and legacies, *and the sums of £2000, the estates or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made by the trustees in pursuance of the power thereinbefore given to them for that purpose),* should go to his eldest son. Held, that the will did not contain anything that was equivalent to a declaration that the legacies of £2000 should not be a satisfaction for the portions of the two younger sons, and, consequently, that they were not entitled to their legacies, and also to their shares of the £5000.

Thomas Papillon, Esq., by his marriage settlement, dated in 1791, conveyed estates to the use of himself for his life, with remainder to the use of trustees for the term of 1000 years to commence from his death, upon the trusts after mentioned, and subject thereto to the use of himself in fee. The trusts of the term were for raising £5000 for the portions of the daughters and younger sons of the marriage; the portions to be vested at the usual times, but not to be raised and paid until after T. Papillon's death; and the settlement contained a provision for the maintenance and education of the children in case their father should die before portions became vested. It provided also that, if the father should die in his lifetime, or by his will settle, give, [643] devise or bequeath to or upon any of his children entitled, or who might become entitled to portions under the trusts of the term, any sum or sums of money, lands, goods or chattels for or towards his, her or their advancement or preferment in marriage or otherwise, then such money, lands, goods or chattels should be accounted as part, if less, or if as much or more, as and for the whole of the portion or portions thereby provided for him, her or them, *unless the father should, by writing under his hand, signify and declare to the contrary;* and that in case the father should, to the satisfaction of the trustees, secure the payment of the £5000 and such maintenance as aforesaid, upon or out of any other manors, messuages, &c., not thereinbefore granted and released, of sufficient estate and value for that purpose, then the term and the trusts thereof should cease.

There was issue of the marriage three sons and eight daughters, all of whom attained 21 before the bill was filed.

By a deed-poll, dated the 30th of October 1811, T. Papillon substituted estates in Kent, which he had purchased of W. Bennett and Sir John Honynwood, for the estates comprised in the term.

By his will, dated the 10th of September 1825, after reciting that, by his marriage settlement, the estates therein comprised were limited, after his decease, to trustees for a term of 1000 years, upon trust to raise £5000 for the portions of his daughters

and younger sons, to be equally divided amongst them, and to be paid at such time and with such benefit of survivorship, and with such maintenance in the meantime as therein were mentioned, and, subject thereto, to the use of himself [644] and his heirs and assigns, and, after reciting also that the last-mentioned estates had been discharged from, and other estates subjected to, the term and the trusts thereof by the deed-poll of the 30th of October 1811, he gave, amongst other legacies, £50 to each of his daughters for mourning, and devised the farms and lands purchased by him from William Bennett and Sir John Honeywood, and the estates comprised in his marriage settlement (subject, nevertheless, as to the premises *purchased from Wm. Bennett and Sir John Honeywood, to the £5000 charged thereon as aforesaid*) to trustees, in trust, by mortgage or sale, or out of the rents, to raise money to pay such of his debts and legacies as his personal estate should fall short of paying; and, *in the next place, to pay £2000 to each of his younger sons, John Papillon and Alexander Fred. Wm. Papillon* (who were the Plaintiffs in the cause), when and as they should respectively attain the age of 21 years, with interest, from the day of his decease, at £4 per cent. per annum; and he declared that, after payment of the debts and legacies, and the sum of £2000 to each of his younger sons, the hereditaments and premises devised to his trustees, or such part thereof as should remain unsold for any of the purposes aforesaid (subject, nevertheless, to any mortgage or mortgages which should be made by the trustees in pursuance of the power thereinbefore given to them for that purpose), should go to certain uses therein referred to, being uses in favour of the Defendant Thomas Papillon, the testator's eldest son: provided that if the Plaintiffs or either of them should die before they or he should attain 21, then the £2000 thereinbefore directed to be raised for the son so dying should sink into the estates from which it was thereinbefore directed to be raised, for the benefit of the [645] persons who should become entitled to the estates. The testator added that he thought it right to declare that it was not from any want of affection to his daughters that he did not make any larger provision for them under his will; but because the kindness of other relations had rendered it unnecessary for him to do so.

The testator died in April 1838. The Plaintiffs had received their legacies of £2000, but had not been paid any part of the £5000.

The bill alleged that the Defendant Thomas Papillon refused to allow the Plaintiffs' shares of the last-mentioned sum to be raised, pretending that the legacies were to be accounted as and for the whole of the portions provided for the Plaintiffs by the settlement, and in full satisfaction thereof. The bill prayed that the principal and interest due to the Plaintiffs in respect of their shares of the £5000 might be raised by sale of the premises comprised in the term, or otherwise by an exercise and in pursuance of the trusts thereof.

The Defendant put in a general demurrer.

Mr. Jacob and Mr. Freeling, in support of the demurrer. Under the settlement the legacies given to the Plaintiffs must be taken to be a satisfaction of their shares of the £5000, unless the testator has, by writing under his hand, declared to the contrary. It will be contended that, as the testator has devised the premises comprised in the term of 1000 years, subject to the £5000, he has done that which is equivalent to de-[646]-claring that the legacies shall not be a satisfaction of the Plaintiffs' shares of the £5000. He has devised the farms in the only way in which he could devise them, namely, subject to the charge thereon. *Fazakerley v. Gillibrand* (*ante*, vol. vi. p. 591). In *Leake v. Leake* (10 Ves. 477) (which will be relied on by the Plaintiffs' counsel) the testator directed that the settlement by which the portions were provided for his younger children should be punctually complied with: but here the testator has given no such direction.

Mr. Knight Bruce and Mr. Simpson, in support of the bill. It is laid down by Lord Eldon, C., in *Leake v. Leake*, that it is not necessary that a testator should declare, in express terms, that the legacies which he gives by his will to his children shall not be a satisfaction of their portions; but that it is sufficient if it appears on the will that the testator did not intend the legacies to be a satisfaction of the portions. We contend that, in this case, it plainly appears on the will that the testator did not intend that the legacies given to the Plaintiffs should be a satisfaction of their shares of the £5000.

The recitals in the will shew that the settlement, and the provision thereby made for the younger children, and the substitution which the testator had made of the estates purchased from Bennett and Sir John Honeywood for the estates comprised in the settlement, were present to the testator's mind when he made his will: and he devises those purchased estates subject, specifically, to the £5000 to the trustees in trust to raise [647] the legacies of £2000; so that he has directed the trustees, specifically, to raise the legacies out of the fund subject to the £5000. It may be said that, where an estate is devised subject to a mortgage, the latter words are merely words of description; but the answer to that argument is that the mortgagee is not the person who is intended to be provided for by the devise, or take any benefit under it.

The words of the will shew that the testator intended that the state of his property, as it existed at the date of his will, should not be altered; but that all the incumbrances upon it should remain as they then were (3 Swans. 210, note).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that, *prima facie*, the portions are discharged by payment of the legacies of £2000; and it is incumbent on those who say that they are not to shew that the testator has done something which is equivalent to declaring, by a writing under his hand, that they shall not be discharged.

The testator, in his will, recites that the estates comprised in his settlement were limited after his decease to trustees, for a term of 1000 years, in trust to raise £5000 for the portions of his daughters and younger sons, and, subject thereto, to himself in fee; and that those estates had been discharged from the term and the trusts thereof, and other estates substituted for them. That is nothing more than a general review of the state of his property. Then, after giving certain legacies, he devises a leasehold estate, and certain pieces of land in Romney Marsh, and also certain advowsons, which he [648] names, to trustees, in trust to sell and to pay the proceeds, together with the general residue of his personal estate, in or towards payment of his debts and funeral and testamentary expenses and legacies, and to pay over the surplus, if any, to his eldest son. Then he devises the messuages, farms and lands, purchased by him of W. Bennett and Sir John Honeywood, and the advowson of the Rectory of Bonnington in Kent, and all other his freehold, leasehold and copyhold estates whatsoever and wheresoever not thereinbefore devised and bequeathed (subject, nevertheless, as to farms and lands thereinbefore mentioned to have been purchased of Bennett and Sir J. Honeywood, to the sum of £5000 charged thereon as aforesaid), that is, as they then stood, to the same trustees, their heirs, &c., to the use, as to the advowson, of the trustees for the term of 99 years upon certain trusts, and, as to the rest of the hereditaments and premises lastly thereinbefore devised, and, as to the advowson (after the expiration of the term of 99 years), to the use of the trustees, their heirs, &c., in trust to raise, by sale or mortgage, so much money to be applied in payment of such of his debts and legacies as the leasehold estate, marsh land and advowsons firstly before devised to them should fall short of paying; and, in the next place, to pay £2000 to each of his younger sons who are the Plaintiffs in this cause. Then he declares that, after payment of his debts and legacies and the sum of £2000 to each of his said younger sons, the hereditaments and premises lastly devised to his trustees, or such parts thereof as should remain unsold for any of the purposes aforesaid, subject nevertheless to any mortgages or mortgage which should be made by his trustees, in pursuance of the power thereinbefore for that purpose given to them, should go, remain and be and that his trustees should stand seised [649] thereof to the uses under which the Defendant claims to be entitled. So that, when he declares the uses of his residuary real estates, he omits to mention the term of 1000 years, and seems to suppose that the last-mentioned estates will go to his eldest son, subject only to any mortgage or mortgages which the trustees might find it necessary to make in order to enable them to pay his debts and legacies in full, and the legacies of £2000 to each of his two younger sons.

I am of opinion, therefore, that there is nothing in this will which is equivalent to a declaration that the legacies given to the Plaintiffs shall not be a satisfaction of their shares of the £5000.

Demurrer allowed.

Reports of CASES DECIDED in the HIGH COURT
OF CHANCERY by the Right Honorable Sir
LANCELOT SHADWELL, Vice-Chancellor of
England. Containing Cases in 1841 and 1842,
with a few in 1843 and 1844. By NICHOLAS
SIMONS, of Lincoln's Inn, Esqr., Barrister-at-Law.
Vol. XII. 1844.

[1] D'AGLIE *v.* FRYER. *Feb.* 19, 1841.

[A note on page 328 of this volume states that this decision was affirmed by the
Lord Chancellor.]

Will. Construction. Legacy. Long Annuities.

A testatrix, having £115 long annuities standing in her name at her death, of which £65 like annuities had been purchased for her by T. B., bequeathed her residuary estate to trustees, to be invested or continued by them in the public funds or at interest, the stocks, funds or securities to be varied at discretion, in trust to pay certain annuities out of the interest, dividends, &c., and, subject thereto, to pay the income of the said trust monies, stocks, funds and securities to S. N. for life: and, subject thereto, she gave all the residue of her estate to the trustees absolutely. By a codicil she gave all the money funded by T. B. in her name in the long annuities (which she mentioned to be £50 per annum) to C. D. after S. N.'s death. Held, that £50 of the long annuities were specifically bequeathed to C. D.

The Countess de Front, at the date of her will and at her death, had £115 long annuities standing in her name, of which £65 long annuities had been purchased and funded in her name by T. D. Boswell, in three separate sums and at three different times in the years 1822, 1823 and 1824. On the 19th of February 1824 she made her will, and, without having mentioned her long annuities, disposed of her residuary estate in the following words:—

"I bequeath the residue of my personal estate to W. V. Fryer, Anthony George Wright and John Wright, to be invested or continued by them in the [2] public funds or at interest: the stocks, funds or securities to be varied at discretion: and my will is that the said W. V. Fryer, A. G. Wright and John Wright do stand and be possessed of and interested in the said stocks, funds and securities, and the interest, dividends, and annual produce thereof, upon trust to pay, out of such interest or dividends or annual produce, to the said W. V. Fryer and his assigns, an annual sum of £100, during his life; the said annual sum to be payable by quarterly payments, the first quarterly payment to be made at the expiration of three calendar months next after my decease, and a proportional part of the said annual sum to be payable from the last day of payment preceding the death of the said W. V. Fryer up to the day of his decease: and upon trust to pay the whole of the income of the said trust monies, stocks, funds and securities (subject to the payment of the said annuity to the said

William V. Fryer so long as the same shall continue payable) to Sarah, the wife of Charles Neve, for her separate use, free from the control of her present or any future husband; and upon trust, if the said Charles Neve shall survive the said Sarah Neve, to pay to the said Charles Neve and his assigns the annual sum of £300, during his life, the said annual sum of £300 to be payable by quarterly payments, the first quarterly payment to be made at the expiration of three calendar months from the decease of the said Sarah Neve, and a proportional part of the said annual sum to be payable from the last day of payment preceding the death of the said Charles Neve up to the day of his decease." After the death of Sarah Neve, and subject to the payment of the annual sums of £100 and £300, the testatrix gave all the residue of her estate to W. V. Fryer, A. G. Wright and John Wright absolutely.

[3] The testatrix made a codicil, dated the 17th of October 1826, which contained the following bequest:—"All the money funded by the late Thomas David Boswell, Esq., in my name in the long annuities, £50 per annum, I give to my godson Charles, the son of Count D'Aglie, the Sardinian ambassador at this Court, after the decease of my sister, Mrs. Sarah Neve."

The testatrix died in January 1835.

The bill was filed by Charles D'Aglie against the trustees of the will and Mrs. Neve (Charles Neve being dead), insisting that, according to the true construction of the codicil, the Plaintiff was entitled, in reversion expectant on Mrs. Neve's death, not merely to £50 long annuities, but to all the money which Boswell had funded in that stock, in the testatrix's name, that is, the money which he had invested in the purchase of the £65 long annuities; and that the trustees, instead of suffering that sum of stock, as they had done, to remain unconverted, ought to have sold it immediately after the testatrix's death and invested the proceeds in the three per cents. The bill prayed that the trustees might be decreed to invest in the three per cents. such a sum of money as would have been produced by the sale of the £65 long annuities if the same had been sold immediately upon the testatrix's death, and that the dividends might be paid to Mrs. Neve for her life, and that, after her death, the capital might be transferred to the Plaintiff.

Mr. Knight Bruce and Mr. Beavan, for the Plaintiff, said that, under the will, the whole of the testatrix's residuary estate ought to have been converted into permanent securities; that the codicil contained a bequest, not of the long annuities which Boswell had purchased [4] in the testatrix's name, but of the money which he had invested in the purchase of that stock in the testatrix's name; and, consequently, that the trustees ought to have converted the long annuities as well as the other parts of the testatrix's residuary estate: that, the words in the codicil, "fifty pounds per annum," were an erroneous description of the amount of the long annuities purchased by Boswell, and that it was a rule of law that *falsa designatio non nocet*; and, therefore, the Plaintiff was entitled to the relief prayed by his bill.

Mr. Jacob, Mr. Parry, and Mr. Tillotson appeared for the Defendants: but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: it seems to me to be a specific gift of £50 per annum long annuities.

The testatrix first uses the expression, "all the money:" then she shews what she means by those words, namely, £50 per annum.

The proposition is true that *falsa descriptio non nocet*; but then it must be connected with a *clara descriptio*, that is, what is clear shall not be cut down by something erroneous; but this lady seems to have expressly declared what she does mean. It seems to me to be a clear expression of intention to give £50 per annum long annuities.

[5] TRAIL v. KIBBLEWHITE. Feb. 19, 1841.

Will. Construction. Legacy.

Testator bequeathed to J. W. £1000; to his sister M. W. £200; to their mother £200; and to the three aunts of J. W. and his sister M. W. £100 each. Held, that the last bequest included the aunts, but not the sister.

The testator in this cause bequeathed as follows:—"To Captain James Wemyss

£1000: to his sister Mary Wemyss £200: to their mother £200: and to the three aunts of Captain James Wemyss and his sister Mary Wemyss £100 each." The question was whether Mary Wemyss was entitled to a legacy of £100, as well as to a legacy of £200.

Mr. Knight Bruce contended that the clause in the will on which the question arose ought to be read thus: "To the three aunts of Captain James Wemyss, and to his sister Mary Wemyss, £100 each:" that no reason could be suggested for giving so lengthened a description of the aunts of the two prior legatees; and that the Court ought to construe the will as making a bequest, and not as enunciating a proposition.

Mr. Baily, for the executors, said that it was not probable that the testator could have intended to give a legacy to an individual, to whom he had, so shortly before, given another legacy; and that the construction which he contended for did not require any word to be supplied. He cited *Weld v. Bradbury* (2 Vern. 705), and *Lugar v. Harman* (1 Cox, 250).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Take the whole of the will together.

The testator first of all says: "To Captain James Wemyss £1000; to his sister Mary Wemyss £200." [6] Then he says, not to *her*, but "to *their* mother £200." So that he does not refer to the last antecedent; but describes the legatee by the relationship which she bears to *both* the preceding legatees. Then, in the bequest to the aunts, he says: "And, to the three aunts of Captain James Wemyss and his sister Mary Wemyss £100 each;" which is exactly the same sort of phrase as he had before used in describing the mother. As he had before described the mother by the relationship which she bore both to her son and to her daughter; so he describes the aunts by the relationship which they bore both to their nephew and to their niece.

Declare that Mary Wemyss is entitled only to a legacy of £200.

[6] BROWN v. WEATHERBY. Feb. 19, 1841.

[Overruled on point as to parties, *Bridges v. Hinxman*, 1847, 16 Sim. 71.]

Pleading. Multifariousness. Heir. Creditor. Parties.

A. was a creditor of a firm consisting of M. N. O. P. and others, and also of a firm consisting of M. and N. M. and O. died, and afterwards, N. P. & Co. became bankrupt. A. then filed a bill on behalf of himself and all the other creditors of M. and O. against the executors and devisees of M. & O., and the assignees of N. P. & Co., for payment of his debt out of the real and personal assets of M. and O. N. demurred to the bill for multifariousness, and, *ore tenus*, because neither the heir of M. nor of O. was a party to the suit. The Court overruled the first ground of demurrer, but allowed the second.

After the demurrer of Ann Douglas and J. H. Douglas had been allowed for want of parties (see *ante*, vol. xi. p. 283), the bill was amended by making Sedgwick's widow a Defendant, and stating that she was the devisee of her husband's real estates; that Stanton had proved his will; and that Ann Douglas alone had proved her husband's will; and by praying, in addition [7] to the relief sought by the original bill, that Sedgwick's real estates might be sold and the proceeds applied in payment of his debts in a due course of administration.

Weatherby demurred for want of equity and for multifariousness, and, *ore tenus*, because Sedgwick's heir was not a party to the suit.

Mr. Jacob and Mr. James Russell, in support of the demurrer. The amended bill is more multifarious than the original bill was; for, in addition to the relief prayed by that bill, it seeks to make Sedgwick's real estates made available to the payment of the debts due to the banking company and the other creditors on whose behalf the Plaintiff sues. Consequently, the objection in respect of multifariousness applies with greater force to the present bill than it did to the former one.

The bill is filed on behalf of the bank and the other creditors of Douglas, and on

behalf of the bank and the other creditors of Sedgwick ; not on behalf of the bank and the other joint creditors of Douglas and Sedgwick, for there were no joint creditors of those two persons. In *Wilkinson v. Henderson* (1 Myl. & Keen, 582) the bill was filed by one joint creditor on behalf of himself and the other joint creditors of the firm of Shepherd & Hartley ; and it was alleged and admitted that all the separate creditors had been paid, and that there was a surplus. So, too, in *Devaynes v. Noble* (1 Mer. 528. The bill in *Baring v. Noble* was filed on behalf of the joint creditors) the bill was filed on behalf of the joint creditors of Devaynes & Co. In this case [8] there is no allegation that either the separate creditors of Douglas, or the separate creditors of Sedgwick, have been paid their debts. There is no joint estate of Douglas and of Sedgwick ; and there is no community of interest between the Plaintiff and their separate creditors. What pretence is there for saying that, because two individuals have some joint liabilities, their estates shall be administered in one and the same suit ? It is clear that, on account of the character in which the Plaintiff sues, the bill is multifarious. *Salvidge v. Hyde* (1 Jacob's Rep. 151).

The amended bill asks that Sedgwick's real estates may be sold and the proceeds applied in payment of his debts. The Court cannot give effect to that part of the prayer without having his heir at law before the Court. Mitford on Pleading, 3d edition, page 171 ; *Graham v. Graham* (1 Ves. jun. 272) ; *Anon.* (*Ibid.* 29) ; *Williams v. Whinyates* (2 Bro. C. C. 399).

Mr. Knight Bruce and Mr. Teed, in support of the bill. Sedgwick's heir at law is not a necessary party to this suit. *Weeks v. Evans* (*ante*, vol. vii. p. 546). An objection to a sale by a devisee out of Court is never made, because the heir is not a party to the conveyance. Nor is the heir a necessary party to a suit, the object of which is to have the trusts of the will carried into execution, unless the Plaintiff wishes to have the will established.

Next. In order to entitle a creditor of a partnership to obtain payment of his debt out of the assets of a [9] deceased member of the firm, it is not necessary for him to shew that the firm is insolvent. *Winter v. Innes* (4 Myl. & Cr. 101). If A. and B. execute a joint and several bond, and both of them afterwards die, the bond creditor has a right to bring both their estates before the Court in one suit. Here the Plaintiff has a claim upon the estates both of Sedgwick and of Douglas ; has he not then a right to unite their estates in one and the same suit ? He sues on behalf of all their creditors, because a creditor cannot pursue real estate unless he sues on behalf of himself and all the other creditors who are entitled to come on the real estate. How then could the bill have been framed otherwise than it is ? The record was, substantially, in the same state when it was brought before the Court on the argument of the former demurrer, as it is now ; and all the objections which have been made to it on the present occasion were then submitted to your Honor's consideration.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to multifariousness, the case stands, in substance, as it did when it came before me on the former demurrer ; and I must say that it was then, and still is, my opinion that if the case of *Wilkinson v. Henderson* is to stand, the objection on the ground of multifariousness ought not to be allowed to prevail.

In that case the creditor of a partnership consisting of two individuals, one of whom was dead, filed his bill against the surviving partner and the personal representative of the deceased partner for payment of the debts due to himself and the other creditors of the firm, out of [10] the estate of the deceased partner ; and Sir John Leach, M.R., held that the Plaintiff was entitled to the relief which he asked, notwithstanding the surviving partner was not insolvent, and that the surviving partner was properly made a Co-defendant to the suit, as he was interested in contesting the demand of the Plaintiff and of all other persons claiming to be creditors of the firm.

The principle of that case applies to a case constituted as this is. Here a creditor of the partnership of the seven, who is also a creditor of the partnership of the two (those two being two of the seven), has filed his bill against the personal representatives and devisees of the two deceased partners and the assignees of the surviving partners, alleging that the joint estate is insufficient to pay the joint debts. Taking

that to be the case, the Plaintiff, who represents the joint creditors, has a right to have the surplus of the separate estate of each of the deceased partners which may remain after payment of their separate debts applied to pay such part of the partnership debts as the joint estate may not be sufficient to satisfy. Now it seems to me that, for the purpose of ascertaining what is the surplus of the separate estate of A., one of the deceased partners, the suit must be conducted in such a manner as that the persons interested in the separate estate of B., the other deceased partner, shall know what is the true surplus. Because it is of very little use to have a suit, in order to ascertain what is the surplus of the separate estate of A., conducted in such a manner as not to bind those who are interested in the separate estate of B. And it appears to me that, inasmuch as if those interested in the surplus of the separate estate of B. are not present in a suit which is instituted for the purpose of ascertaining what is the surplus of the separate estate of A., as against the persons [11] interested in the surplus of the separate estate of B., nothing is done. Because, if you filed a separate bill for the purpose of ascertaining what was the surplus of the separate estate of B., you would have to do all over again in that suit that which was before done in the suit filed for the purpose of ascertaining what was the surplus of the separate estate of A.: and I apprehend that it was upon that principle that Sir John Leach decided in the case of *Wilkinson v. Henderson*. And though I admit that there may be some inconvenience resulting from making all the parties interested in the different separate estate parties to the same suit: yet I am far from thinking that all inconvenience is avoided by instituting separate suits against the parties interested in the several separate estates. The result of which would be that you would have, as against the parties interested in each of the separate estates, to make out that you have duly administered the separate estate of every other partner. So that, as it appears to me, unless you do it all at once by one suit, you may have to do four or five times over that which you have done once already.

I must say that, in my opinion, the case of *Wilkinson v. Henderson* applies; and that the demurrer ought not to be allowed on the ground of multifariousness.

With respect to the question about the heir at law, I remember very well that, at the time when I had to prepare the bill in *Baring v. Noble* (1 Mer. 529) I considered the point; and it was distinctly impressed on my mind then and has been ever since that, to a bill filed under Sir [12] Samuel Romilly's Act (47 Geo. 3, sess. 2, c. 74) for the purpose of administering real assets devised, the heir ought to be a party.(1)

[12] JACKSON v. WOOLLEY. WOOLLEY v. JACKSON. Feb. 20, 1841.

[S. C. 10 L. J. Ch. 197.]

Costs. Executor. Residuary Legatee. Creditor.

A married woman being entitled to a share of a residue for her life, with remainder to her children, who were infants, a bill was filed by her and her husband and their children, by their father as their next friend, against the executor and the co-residuary legatees, for the administration and distribution of the testator's estate. When the executor put in his answer, a balance was due from him, and he paid it into Court. Afterwards, he paid the whole of testator's debts remaining unsatisfied, some of them before and the rest after the usual decree; whereby a balance greater than the fund in Court became due to him: and the Master so found. After the report had been absolutely confirmed, the husband died, and his widow having declined to take any step towards the further prosecution of the suit, the executor filed a supplemental bill, praying to have the fund in Court, exempt from all costs, paid to him, in part of the balance found due by the Master. The Court ordered the executor's costs of both suits, as between solicitor and client, to

(1) On the 20th of February 1841 His Honor delivered his judgment at length, upon the question regarding the heir; for which see *ante*, vol. x. p. 125.

be first paid out of the fund, then the costs of the Defendants, the co-residuary legatees of both suits, and, lastly, the costs of the widow and children of the supplemental suit, but not of the original suit.

Mary, the wife of Thomas Jackson, being entitled, for her life, to a share of a testator's residuary estate, with remainder to her children, who were infants, the original bill was filed by Jackson and wife and their children, by their father as their next friend, against Woolley and Johnson, the executors of the will, and the [13] other parties interested in the residue, for the administration and distribution of the estate. Woolley, who was the principal acting executor, having admitted in his answer that a balance was due from him, an order was made, in obedience to which he paid the balance into Court. Some of the testator's debts were paid before the commencement of the suit. Woolley paid the rest pending the suit, some before and some after the usual decree had been made. After the confirmation of the Master's report, from which it appeared that all the debts had been paid and that a balance considerably exceeding the fund in Court was due to Woolley, T. Jackson died; and his widow having declined to take any step towards the further prosecution of the suit, Woolley filed a supplemental bill against her and her children and the Defendants to the original suit, stating the proceedings in that suit, the death of Jackson and the refusal of his widow to prosecute the suit, and praying that he might have the benefit of the suit and the proceedings therein, and that the *whole* of the fund in Court might be paid to him in part satisfaction of the balance found due to him.

Mr. Knight Bruce and Mr. Wilbraham, for Woolley. Our client had a right to file a bill to get his own fund out of Court; and he is entitled to have the fund paid to him exempt from the costs of all the parties, except his co-executor, Johnson. Johnson, we admit, is entitled to be paid his costs out of the fund; as they are an expense which his character of executor has brought upon him: but the other parties, not having any fiduciary character, must bear their own costs. The surviving Plaintiffs in the original suit rendered the supplemental suit necessary, by refusing to appoint a new [14] next friend. Besides, they were informed by Woolley's answer to the original suit that the estate was insolvent; and consequently your Honor cannot give them their costs, unless you are prepared to lay down that a residuary legatee of an estate, however insolvent, has a right to file a bill for an account at the expense of the executor. The suit has not been of the slightest benefit to any person whatever, as no creditor has come in under the decree. The report having been confirmed absolutely before Jackson died, the object of the supplemental suit was, clearly, to get the Plaintiff's own fund out of Court, and the Defendants ought not to have offered any opposition to it, but ought to have disclaimed; and, as they did not think proper to take that course, they ought to pay their own costs.

Mr. G. Richards and Mr. K. Parker, for Mrs. Jackson and her children, said that Woolley ought to pay the costs of the original suit and proceedings, of which he sought to have the benefit; and that, besides, he had acted improperly in paying the testator's debts, some of which he had paid after putting in his answer admitting a balance to be due from him, and the rest, after the decree had been made. *Mitchelson v. Piper* (*ante*, vol. viii. p. 64); *Larkins v. Parton* (2 Myl. & Keen, 320); *Barker v. Wardle* (*Ibid.* 818).

THE VICE-CHANCELLOR. The Master has allowed those payments. If they were improper, you ought to have excepted to the report.

Mr. Cooper, Mr. Piggott and Mr. Prendergast, for the Defendants to the original suit, who were in the same interest as the Plaintiffs in that suit, said that, in a suit by residuary legatees as well as in a suit by creditors, the costs of the suit were the primary charge upon the fund in Court; and that Woolley could not stand in a better situation than the creditors whose debts he had paid would have done.

Mr. Knight Bruce, in reply, said that the costs of the original suit were incurred by Jackson, and not by his widow and children; that, if they had incurred any costs, they had lost their right to be repaid them by their not having procured a new next friend to be appointed; and that the other Defendants must abide by the consequences of the next friend having died.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The first question is, what is the

general rule with respect to the costs of a suit instituted by creditors or by residuary legatees where there is a fund in Court. I apprehend the rule to be that, in general, the costs of the suit must be first paid out of the fund. Therefore, *prima facie*, if the original suit had been brought to a hearing for further directions, the Plaintiffs' costs and also the Defendants' costs would have been paid out of the fund. But in this case the surviving Plaintiffs did not bring on the cause for further directions. After the report had been confirmed, Jackson died; and then Woolley filed a supplemental bill which set forth the death of Jackson; that he had no interest; that, by his death, the suit was without a next friend, and no further proceedings could be had in it unless a new next friend was appointed. The supplemental bill then stated that Mrs. Jackson had refused to become or to procure any other person to become the next friend of the infants: and the answer admits that an application had been made to her on the subject by Mr. Woolley's solicitor, to which she did not give any answer: and the result [16] was that she did not put the suit in a situation in which it could go on. She might have named herself to be the next friend of the infant Plaintiffs; or she might have prevailed on some other person to be the next friend: but she took no step to carry on the original suit. The effect was that Woolley was obliged to file a supplemental bill; and, in the answer, it is admitted that that necessity was imposed on him by those who might have carried on the original suit. Then they now appear only because Woolley has brought forward the suit; and they ask for the costs of the original suit up to the time of Jackson's death. Those costs, if due at all, could be payable to no one but his personal representative; but there is no person before me in that character. If Mrs. Jackson does not carry on the suit, and there is no personal representative of her husband before the Court, there is no person to whom I can direct the payment of the costs up to the time of the death of Jackson. Woolley alone has brought forward the matter by filing the supplemental bill; and, therefore, I cannot give the surviving Plaintiffs in the original suit their costs of that suit.

The Defendants in that suit are in no fault; and, consequently, they must be paid their costs; and, as there is a fund in Court, their costs must be paid out of it.

In the course of the argument it was contended that, where there is a creditor's suit, the executor has no right to pay a debt after decree; but that observation must be taken with some qualification. If an executor, after decree, makes payment of a debt, with a view to be reimbursed out of a fund in Court, he must be reimbursed out of the fund, but not till after payment of [17] the costs of the suit; that is, he must run the risk of the fund not being sufficient to pay the costs and also to reimburse him.

Then with respect to the costs of the supplemental cause. If I deprive the surviving Plaintiffs of their costs of the original suit, I cannot deprive them of the costs of the supplemental suit: for some machinery was necessary to be put in motion, in order to determine what was to be done with the fund in Court. And my opinion is that that fund must be applied, *in the first instance*, in paying, as between solicitor and client, the costs of Woolley and Johnson of both suits; then the other Defendants in the original suit must be paid their costs of both suits out of it; and Mrs. Jackson and her children must be paid the costs of the supplemental suit only.

[17] SMITH v. POOLE. Feb. 24, 1841.

[S. C. 10 L. J. Ch. 192.]

Statute of Limitations. Debt. Debtor and Creditor. Acknowledgment of Debt.

In 1835 A. filed a creditor's bill, against the administrator of his debtor, founded on a debt due on a promissory note, but in respect of which no payment of either principal or interest had been made since 1823. In 1832 the administrator, on the citation of a third person, signed and exhibited, in the Ecclesiastical Court, an inventory and account of the late debtor's assets and debts, in which A.'s debt was

entered. Held that that entry was a sufficient acknowledgment, within Lord Tenterden's Act (9 Geo. 4, c. 14), to take the debt out of the Statute of Limitations (21 Jas. 1, c. 16).

This was a creditor's suit.

The Plaintiff was the surviving executor of Phœbe Smith. He sued in respect of a debt of £200 and interest which he alleged to be due to her estate, on a promissory note, from the estate of James Poole, whose [18] administrator the Defendant, Daniel Poole, was. Phœbe Smith had appointed James Poole one of her executors, but he had neither proved nor acted.

The debt had become irrecoverable by lapse of time, unless the after-mentioned inventory and account was a sufficient acknowledgment of it, within Lord Tenterden's Act (9 Geo. 4, c. 14, s. 1), to take it out of the operation of the Statute of Limitations (21 Jas. 1, c. 16).

The inventory and account was signed by Daniel Poole, and was exhibited by him on oath, in May 1832, in a suit intituled "*Poole v. Poole*," which had been instituted against him in the Consistory Court of Lichfield. The character in which the Plaintiff in *Poole v. Poole* sued did not appear; but he was, of course, interested in James Poole's personal estate, and was, probably, one of his next of kin.

The document exhibited consisted of two parts, the inventory and the account. The inventory purported to be a full, perfect and particular inventory of all and singular the goods, chattels and credits of James Poole which had, at any time since his death, come to the hands, possession or knowledge of Daniel Poole, his administrator: and it set forth the particulars of which the assets consisted, and the amount or value of each of them. The second part of the document purported to be a true, full and particular account of all payments and disbursements necessarily made and paid by Daniel Poole on account of debts due and owing from James Poole, and other expenses connected with the administration of his personal estate and effects. Its contents were partly as follows:—"This exhibitant declares that he hath paid for the expenses of the letters of admi-[19]-nistration granted to this exhibitant, by the Court of Lichfield, the sum of £138, 10s. This exhibitant further declares that he hath paid for the expenses of the funeral of the deceased, £86, 0s. 9d. This exhibitant further declares that he hath paid the following sums to the several persons under mentioned, for debts on simple contract, rent, taxes, wages, &c. This exhibitant farther declares that he hath paid the following sums to the under-mentioned persons, in discharge of the principal and interest on the several bonds and notes due to them respectively from the deceased, &c., &c. This exhibitant further declares that he hath retained to himself, for principal due to him from the deceased on note of hand, the sum of £495; and he further declares that he hath retained, for interest on the same from the 16th of November 1818 to the present time, the sum of £332, 1s. 3d. This exhibitant also declares that he hath also retained to himself, for monies received by the said deceased on his account, the sum of £213, 6s. 7d.; to twelve years' interest thereon, £126, 6s. 7d. This exhibitant further declares that there are still outstanding and owing the following sums and claims against the estate of the said deceased from the several persons undermentioned, viz.:—Executors of the late Mr. James Cope, on bond, £200; three years' interest thereon, £30; executors of the late Phœbe Smith, on note, £200; interest thereon from the 1st October 1823 to 1st April 1832, £85; balance of principal due to Mr. Moses Booth of Keel, on note, about £30; to Mr. J. Grocott, schoolmaster, £63, 15s. 3d., &c., &c.; amount claimed by Daniel Poole and others as due to them for or in respect of four-fifth shares of the rents and profits of certain coal mines received by the deceased for six years preceding his decease, £3360; principal claimed by Messrs. John Wood and John Gardner as executors [20] of the late Thomas Beech, deceased, as due to them on a promissory note given them by the deceased, £826, 10s.; amount claimed by the Rev. W. Clark for dilapidations and costs, £70; amount claimed to be due to Mr. Joseph Illidge of Newcastle, £50."

Mr. Jacob and Mr. Lovat, for the Plaintiff, said that the document exhibited in the Consistory Court of Lichfield was signed by the Defendant in May 1832; that the bill was filed in September 1835; and that the amount due to the estate of

Phœbe Smith on James Poole's note was entered in the document as a debt remaining due from James Poole's estate; and, consequently, that entry was a sufficient acknowledgment to take the amount due on the note out of the operation of the Statute of Limitations. *Mounstephen v. Brooke* (3 Barn. & Ald. 141); *Freakley v. Fox* (9 Barn. & Cress. 130).

Mr. Knight Bruce and Mr. Anderdon, for the Defendant. The question whether the signature of the document in the Consistory Court is sufficient to exempt the debt in respect of which the Plaintiff sues from the operation of the Statute of Limitations is a legal question: and before this cause proceeds any further, the Court ought to direct the Plaintiff to bring an action for the debt against the Defendant, and to restrain the Defendant from availing himself, in his defence to the action, of the fact that James Poole was one of the executors of Phœbe Smith. When the Plaintiff shall have established his debt by the verdict of a jury, then and not before, he will be entitled to the decree which he asks by his bill.

In order to take a debt out of the operation of the Statute of Limitations under Lord Tenterden's Act, it [21] must have been acknowledged by or in some writing to be signed by the party *chargeable thereby*. Now, the Defendant made out and signed the inventory and account in his representative character; but in that character he was not the party chargeable thereby. The words, "chargeable thereby" mean a party against whom a verdict may be recovered for the debt, whether he has or has not assets to pay the debt. It is not even alleged that the Defendant has done any act whereby he has made himself personally responsible for the debt; nor has he admitted assets. Indeed, it appears by the inventory and account, that if he is allowed to retain the debts due to himself (which he has a right to do), the assets will not be sufficient to pay the intestate's debts. The case of a debtor's personal representative is quite different from the case of the debtor himself. The debtor is dealing with his own rights and property; but his representative is dealing with the rights and property of others. An acknowledgment by the debtor is considered by the Courts of law as evidence of a new or an implied promise to pay the debt: but an acknowledgment by an executor or administrator cannot be held to be a promise by him to pay the debt.

The case of *Tullock v. Dunn and Another*, executors of Hanley (Ryan & Moody, N. P. C. 416), which came before Lord Tenterden about two years before the passing of the Act called Lord Tenterden's Act, was as follows:—The declaration contained the usual money counts, stating promises both by the testator and the executors. The Defendants pleaded the Statute of Limitations and other matters. The testator died more than six years before the action brought; and both the executors had, within six years, acknowledged that the Plaintiff's demand of £230 was due, and one of them expressly promised that it should be paid. The other had made no such promise. Lord Tenterden non-suited the Plaintiff, saying that the only count on which the Plaintiff could pretend to recover was on the account stated and promise to pay by the executor; that, as against an executor, an acknowledgment merely was not sufficient to take the case out of the statute; but there must be an *express promise*; that the promise by one only was not enough to entitle the Plaintiff to recover; but there must be a promise by both. The good sense of the rule laid down by Lord Tenterden in *Tullock v. Dunn* is evident; for, if an acknowledgment of a debt were held to bind an executor, the consequence would be that it would bind him after he had parted with all the assets. *Atkins v. Tredgold* (2 Barn. & Cress. 23).

Besides, the entry in the account which has been relied on by the counsel on the other side was simply an acknowledgment of the debt, unaccompanied by any promise, and made in a proceeding to which the person who now seeks to avail himself of it was not a party. The proceeding in which it was made was *res inter alios acta*. Moreover, it is ambiguous. How do you identify the note mentioned in it with the note referred to in the bill; and how do you identify the Phœbe Smith mentioned in the account, with the Phœbe Smith whom the Plaintiff represents? What judicial ground is there for saying that this note is included in the debts and not in the claims?

We trust that, on the authority of *Tullock v. Dunn*, the bill will be dismissed; but if the Court thinks [23] that there is anything to be investigated, then we insist on

our right to defend ourselves at law against a legal demand; more especially as the acknowledgment is of a dubious nature: in which case it has been always held to be the province of a jury to draw the inference as to the nature of the acknowledgment. *Lloyd v. Maund* (2 T. R. 760).

Mr. Jacob, in reply, said that the account was rendered to the Consistory Court in 1832; and, therefore, the Plaintiff was then able to state the amount of principal and interest due on the note; that it was put in, by the Defendant, as shewing how he meant to administer the assets; that the entry in the account was an acknowledgment made, not to a stranger, but to the Judge of the Ecclesiastical Court, for the benefit of all persons interested in the estate who were or might be suitors in the Court; and that it amounted to a promise to pay the debt, in case there should be a sufficiency of assets; that the decision in *Tullock v. Dunn* had reference merely to the particular form of pleading adopted in that case.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The only question is whether I ought, in this case, to direct the usual accounts to be taken to be intestate's estate. That depends upon the question whether the entry in the account which the Defendant rendered to the Consistory Court of Lichfield was a sufficient acknowledgment of the debt by the Defendant to take it out of the operation of the Statute of Limitations.

The Defendant having been called upon, in the Consistory Court, to give a statement of the intestate's [24] assets and of the demands upon them, carried into that Court two documents, one of which is the exhibit marked A., and the other the exhibit marked B. The exhibit A. is intitled: "A true, full, perfect and particular inventory of all and singular the goods, chattels and credits of James Poole, late of Finney Green, in the parish of Keel in the county of Stafford, gent., deceased, which have, at any time since his death, come to the hands, possession or knowledge of Daniel Poole, the administrator of the goods and personal estate of the said deceased, made and given in by virtue of the corporal oath of the said Daniel Poole." It sets forth the particulars of assets, both got in and outstanding. The amount of the former is £2601, and the amount of the latter is £803, besides £794, the estimated value of a steam-engine which belonged to the intestate. The exhibit B. is headed thus: "A true, full and particular account of all payments and disbursements necessarily made and paid by Daniel Poole, the administrator of the estate and effects of James Poole, the party deceased, on account of debts due and owing from the said deceased, and other expenses connected with the administration of his personal estate and effects, exhibited and given in by virtue of the corporal oath of the said Daniel Poole." It contains, first, an account of the expenses of the deceased's funeral, and of procuring letters of administration to his estate and of certain expenses which the Defendant had been put to; and the total amount of them is £412. Next, it contains a list of payments made by the Defendant in discharge of the debts, rents, taxes and wages due from the deceased; the amount of which is £3577. Then it sets forth an account of sums retained by the Defendant, on account of debts due to him from the deceased, amounting to £1166. Then it proceeds [25] thus: "This exhibitant further declares that there are still outstanding and owing the following sums and claims against the estate of the said deceased from the several persons undermentioned." Then follow several items, amounting together to £914, amongst which are the following:—"Executors of the late Phœbe Smith, on note, £200. Interest thereon from the 1st of October 1823 to the 1st of April 1832, £85." Next come five or six items, each commencing with the words, "amount claimed;" and they amount to £5884. Then follows the Defendant's signature.

It appears to me, on the face of this document, that no human being can fail to distinguish the claims, nor can anyone reasonably doubt that the note mentioned in the bill is the note alluded to in the account. I have then distinct evidence that, in 1832, the party now sued admitted that the debt on which the present suit is founded was then due.

It was said that the question in this case, being a question of fact, it ought to be submitted to the decision of a jury; but I see no necessity for taking that course. This Court is in the habit of deciding questions of fact every day.

From the expressions used by Lord Tenterden in *Tullock v. Dunn*, I think that his Lordship must have considered that what was proved in that case as an acknowledg-

ment of the debt by both the executors, did not amount to evidence of a promise by both of them to pay the debt ; but here I have the case of a clear written acknowledgment of the debt made by a sole personal representative, and signed by him ; and, therefore, I think that I ought to make the common decree in a creditor's suit.

[26] PIGGOTT v. JEFFERSON. Feb. 26, 27, 1841.

[S. C. 5 Jur. 796.]

Legacy. Statute of Limitations. 3 & 4 Will. 4, c. 27.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such was barred by lapse of time. Held, that it could not be claimed under the charge of debts.

A testatrix who died in 1808 gave a legacy of £200 to Mrs. Piggott, the daughter of General Jefferson, and appointed the general her executor and residuary legatee. Mrs. Piggott came of age in 1815. Her father possessed assets of the testatrix sufficient to pay the legacy, and died in 1824, having by his will charged his real estates with payment of his debts. Mrs. Piggott died in 1838, without having been paid her legacy. Her personal representative now claimed it, with interest from a year after the testatrix's death, *as a debt* due from the general and payable out of his real estates under the charge contained in his will, his personal estate being insufficient to pay it.

Mr. Knight Bruce and Mr. Shadwell, for the Plaintiff.

Mr. Russell and Mr. Bacon, for the Defendant, contended that, as Mrs. Piggott was capable of giving a discharge for the legacy in 1815, when she attained 21, the Plaintiff's claim was barred by 3d & 4th Will. 4th, c. 27, sect. 40, which enacts that no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent at law or in equity, *or any legacy*, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless, in the meantime, some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto shall have been given in [27] writing, signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto or his agent ; and in such case no such action or suit or proceeding shall be brought but within 20 years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

Mr. Knight Bruce, in reply, said that the charge of debts in General Jefferson's will created a trust, and that no length of time would bar a trust.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the Plaintiff's demand is barred by length of time.

Taking it to be now admitted that General Jefferson possessed assets of the testatrix sufficient to pay the legacy, the Plaintiff must, in the first instance, shew his right to sue for payment of it, as a legacy, out of the testatrix's personal estate. By the 40th section of the Act of Will. 4th, the 20 years began to run from the time when Mrs. Piggott attained 21, which was in 1815 ; and if the right to sue for the legacy is barred by lapse of time, how can you revive that right in another form ? By possessing assets of the testatrix, General Jefferson became liable to pay the legacy, that is, he became in a certain sense a debtor to the legatee for the amount of it ; but you cannot say that he or his estate continues liable, unless you shew that the party claiming the legacy has come in time to demand it out of the assets possessed by him. You cannot, by treating him as a debtor, prolong the time for claiming the legacy. Consequently, the claim made by his bill cannot be sustained.

[28] WILSON v. BEDDARD. Feb. 26, 27, March 1, April 15, 1841.

New Trial. Issue Devisavit Vel Non. Heir. Will. Signature. Execution.

An heir at law is not entitled, as a matter of course, to have a second trial of an issue *devisavit vel non*.

If a testator, who is unable from illness to sign his will, has his hand guided in making his mark, it is a sufficient signature within the Statute of Frauds.

On the trial of an issue *devisavit vel non*, directed in a suit to establish a will, the jury found in favour of the will. A motion for a new trial was now made on behalf of the Defendant Richard Powell Williams, the husband of Mary Williams the testator's heiress at law, on whose application the issue had been granted. The testator died in September 1826. The will was made the day preceding his death and when he was extremely ill. He signed it, not with his name but with his mark; in doing which his hand was guided. The depositions of two of the attesting witnesses taken in the suit tended to impeach the testator's competency. Those witnesses having died, their depositions were read at the trial.

The motion was supported on the above grounds, and also on the ground that no medical persons had been examined as to the testator's competency. It was further alleged that there was a misdirection and omission in the summing up of the learned Judge who tried the issue; and that, in a case like the present, where the inheritance was to be bound, it was a matter of course to direct a second trial, if the heir or a person claiming under him applied for it.

On the other hand, it appeared that Mr. and Mrs. Williams had acquiesced in the will for several years after the testator's death.

Mr. Knight Bruce and Mr. Bethell, in support of the motion, cited *Lord Darlington v. Bowes* (1 Eden, 270); *Sherborne* [29] v. *Naper* (2 Ridg. P. C. 224); *Matthews v. Warner* (4 Ves. 186); *Pemberton v. Pemberton* (13 Ves. 290); *Winchilsea v. Wauchope* (3 Russ. 441); *Tatham v. Wright* (2 Russ. & Myl. 1); *Slaney v. Wade* (1 M. & Cr. 338); *Locke v. Colman* (2 M. & Cr. 42); *Gibbs v. Hooper* (2 M. & K. 353); *Cleeve v. Gascoigne* (Amb. 323); *Stace v. Mabbot* (2 Vez. 553); *Edwin v. Thomas* (2 Vern. 75); *Attorney-General v. Montgomery* (2 Atk. 378); *Warden, &c., of St. Paul's v. Morris* (9 Ves. 169); *O'Connor v. Malone* (1 Maclean & Robinson's Rep. (Irish) 468).

Mr. Serjeant Talfourd, Mr. Jacob and Mr. Armstrong, in opposition to the motion, contended that the granting of a new trial of an issue *devisavit vel non* was not a matter of course, but rested in the discretion of the Court. They cited *White v. Wilson* (13 Ves. 87), *Bootle v. Blundell* (19 Ves. 494), *Lorton v. Lord Kingston* (5 Clar. & Finn. 269), and *Locke v. Colman* (2 Myl. & Cr. 42; see also *Ibid.* 635), where Lord Cottenham says: "In this Court it is matter of discretion whether any second trial shall be had."

Mr. Knight Bruce, in reply, said that there was no case in which a new trial of an issue *devisavit vel non* was asked for by the heir and refused by the Court, except *White v. Wilson*; that that case was decided by Lord Erskine, who was not familiar with the principles and practice of the Court: that in *Bootle v. Blundell* the heir gave up the case: that in *Locke* [30] v. *Colman* Lord Cottenham, in the passage that had been referred to, was speaking of issues which it was in the discretion of the Court either to grant or to refuse: that in ordinary cases, such as questions of legitimacy, the Court might decide without directing an issue; but an heir had a right to demand an issue to try the validity of a will by which he was disinherited, notwithstanding the will had been clearly proved by evidence taken in the suit: that the object in directing an issue *devisavit vel non* was not, as in other cases, to inform the conscience of the Court; for the conscience of the Court had nothing to do with it: that what distinguished the issue *devisavit vel non* from all other issues whatever was that this Court had no power, by itself, to declare what was the will of an individual, but was enabled so to do in consequence only of what had taken place in a Court of law: that the heir had a right to have the will considered with reference, exclusively, to what had passed in the Court of law: and this Court had no power to look either at the pleadings or the evidence in the cause, or at anything whatever which had not been

before the jury : that the present case was a very doubtful one ; and, therefore, the Court ought not to refuse a new trial of the issue, even if it had power so to do.

April 15. THE VICE-CHANCELLOR [Sir L. Shadwell]. This case came before me on a motion for a new trial of an issue *devisavit vel non*.

It appears that a person of the name of John Parker Wilson made a will (or is said to have made a will), dated the 7th of September 1826, and died the following day, leaving Mary, the wife of Richard Powell Williams, his heiress at law. The will was made on the day before [31] he died, and when he was extremely ill. The three witnesses to it were Mr. Wood, an attorney who prepared it, Durant, a boy of 14 years of age, and a person of the name of Noake. The will was signed with the deceased's mark, and not with his name. The nature of it was this, that with respect to the real estate in question there was a devise to the testator's nephew, John Wilson Williams (who was the only child of John Powell Williams and Mary, his wife), with an executory devise over to the Plaintiff, on the nephew dying under 25 without leaving issue who should attain 21. It appears that, on the 2d of October 1826, some agreement was made between the parties, the effect of which was that John Powell Williams was to have a lease of a portion of the estate at the yearly rent of £87 ; and it also appears that Mrs. Williams, the heiress at law, was in the house of the deceased when his will was made, and that there was no dispute whatever about it so long as her son, the younger Williams, lived. He died in 1830, under 21 and without issue. In 1831 the bill was filed by Mr. Wilson to establish the will. As a matter of course, the witnesses to the will were examined in the cause. Mr. Wood's evidence was in favour of the will. Durant deposed that he did not think that the testator was competent to make a will ; and Noake stated to the same effect. Under these circumstances the only order that could be made at the hearing of the cause was an order for an issue *devisavit vel non*, and an order to that effect was made accordingly. The issue was tried before Mr. Baron Parke, at the last Summer Assizes for the county of Stafford ; and the jury found in favour of the will. A motion was then made before me for a new trial of the issue.

[32] In support of the motion it was said, in the first place, that in a case where the inheritance is to be bound and a bill is filed to establish a will it is almost a matter of course, although the verdict is in favour of the will, that there should be a second trial. In the second place, it was said that there was a misdirection in what the learned Judge said with respect to the conduct of Mrs. Williams, the heiress at law. In the last place, it was contended that the law was wrongly laid down by the Judge, that the signature of a testator is good, where his hand is guided by another person.

With regard to the first ground, I think that there is no foundation for it. It is true that in the earlier cases a strong disposition was manifested to favour the heir ; but that tendency has not been pursued in the later cases. In *White v. Wilson* it was not so. All that I collect from that case is that the Lord Chancellor of the day said that he should be sorry to find a rule in this Court that there must be a second trial of an issue if desired, whether the Court was satisfied with the verdict or not. Allusion was also made to something that fell from Lord Eldon in *Pemberton v. Pemberton*. I do not, however, understand that his Lordship meant to say that, on an application for a new trial, the Court is not to consider all the circumstances of the case ; and I understand, from what Lord Cottenham laid down in *Locke v. Colman*, that the Court ought to look at all the circumstances of the case and see whether they warrant the Court in granting the new trial. I am of opinion, therefore, that in the case now before me, I ought not blindly to direct a new trial merely because it is asked for.

[33] Next, with respect to what fell from the learned Judge at the trial.

[His Honor here read, from the shorthand writer's notes of the summing up to the jury, a passage relating to the acquiescence in the will on the part of Mrs. Williams ; and said that, although it might not be quite correct in point of law (Mrs. Williams being a *feme covert*), yet the learned Judge might have stated the case to the jury much more forcibly than he had done, if he had impressed on their minds the taking of the lease by Mr. Williams, and certain declarations which he had made. His Honor then said :]—

I am of opinion, however, that for the purpose of determining whether a new trial ought or ought not to be granted, I am at liberty to look not only at the facts which were presented to the jury, but also at the facts which might have been but were not presented to them.

Next, it was contended that what the learned Judge said with reference to the testator's hand being guided when he made his mark to his will was not law. The Judge said that it was necessary that the will should be signed by the testator, not with his name, for his mark was sufficient if made by his hand, though that hand might be guided by another person; and, in my opinion, that proposition is correct in point of law. For the Statute of Frauds requires that a will should be signed by the testator or by some other person in his presence and by his direction; and I wish to know if a dumb man, who could not write, were to hold out his hand for some person to guide it, and were then to make his mark, whether that would not be a sufficient signature of his will. In order to constitute a direc-[34]-tion, it is not necessary that anything should be said. If a testator, in making his mark, is assisted by some other person and acquiesces and adopts it; it is just the same as if he had made it without any assistance. It is observable, too, that, before the mark was made, the testator made some faint strokes on each of the sheets. My opinion, therefore, is that the observation made by the learned Judge, on this part of the case, was quite correct in point of law; and therefore it affords no ground for granting a new trial.

Then, with respect to the remaining circumstances of the case; I mean the evidence of the attesting witnesses. Two of them died before the trial, but their depositions were laid before the jury. I have always thought that if any attention at all ought to be paid to the testimony of witnesses who deny a solemn act which they have attested, it ought to be the slightest possible. Perhaps the best way would be to disregard it altogether. And I confess that my mind is very little affected by their evidence. If the testimony of Wood is to be believed, as I think it is, there is no fault whatever to be found with the finding of the jury; and, consequently, I shall refuse the motion for a new trial.

If the motion had been made merely on the ground that the heir had a right to have a second trial, I should have refused the motion without costs, as was done in *White v. Wilson*; but as statements have been made in the affidavits tending to discredit the testimony of Cooper, who was one of the Plaintiff's witnesses at the trial of the issue, and as it appears that no credit ought to be given to those statements, I shall refuse the motion with costs.

[35] CROSSE v. BEDINGFIELD. March 1, 2, 1841.

Evidence. Declarations. Lost Instrument. Affidavit. Practice. Interest. Annuity.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged) to one of the co-obligors, to recover the amount due on it. The joint answer of the co-obligors admitted the delivery of the bond, and that one of them had destroyed it; but traversed the allegation as to mistake. Held that declarations made by the obligor to whom the bond had been delivered, tending to prove the Plaintiff's allegation, were admissible against the co-obligor.

Bill by the obligee in a bond, who had delivered it up, by mistake (as he alleged), to the Defendant, the obligor, to recover the amount due on it. The answer admitted the delivery of the bond, and that the Defendant had destroyed it, but traversed the allegation as to mistake. Held, at the hearing, that, as the answer admitted the bond to have been destroyed, the Court had jurisdiction; notwithstanding there was not annexed to the bill an affidavit that the bond was lost or not in the Plaintiff's custody.

Payment decreed of the arrears of an annuity secured by bond, with interest; not exceeding, however, in the whole, the penalty of the bond.

In May 1818, T. Bayly, a medical practitioner, agreed to take James Bedingfield

into partnership with him for a premium of £500, and to retire from business at the end of five years, in consideration of Bedingfield paying him an annuity of £50 for his life. Susan Bedingfield, the mother of James Bedingfield, gave Bayly her promissory note for securing the payment of the premium by instalments. Bayly retired from business a few months before the five years expired, and, thereupon, J. Bedingfield and his mother gave Bayly their joint and several bond, dated the 31st of August 1822, in the penalty of £500, for securing to him the annuity. No payment was made in respect of the annuity after the 11th of November 1842. In November 1825 Mrs. Bedingfield called on Bayly and paid him the last instal-[36]-ment of the premium; and then he, intending, as it was alleged, to give her the promissory note, gave her the bond and told her to burn it when she got home; which she accordingly did.

On the 11th of March 1834 Bayly died; and, in June 1837, the bill was filed by his personal representative, against James and Susan Bedingfield, alleging that Bayly gave the bond to Susan Bedingfield, by mistake, instead of the promissory note; and praying that, if not destroyed, it might be delivered up to the Plaintiff; or that the Defendants might pay to him the arrears of the annuity with interest.

James and Susan Bedingfield put in a joint and several answer, stating that Bayly delivered the bond to the latter on the occasion before mentioned, and said, emphatically, and with a peculiar meaning in the expression of his countenance: "Mrs. Bedingfield, as soon as you get home, burn this;" and that immediately on her return home she did, accordingly, burn the bond, in the full persuasion that Bayly had determined to perform a just act and to relieve herself and her son from the payment of the annuity, to the granting whereof they had been induced by Bayly's having represented the business to be more profitable than it really was: that the bond, being a paper of considerable size and indorsed on the back, could not, by any reasonable possibility, have been mistaken by Bayly in the open way in which the same was delivered by him to her for a promissory note; that, a few days after Bayly had delivered the bond to her, he and his solicitor, W. Ransom, called upon her, and, to her great surprise, pretended that the bond had been given to her by mistake, and requested her to give another in its place; to which [37] request she refused to accede; that she never informed her son of the delivering up and destruction of the bond *until some time in the year 1836*.

In support of the bill, Mr. Ransom deposed as follows: that, in November 1825, Bayly informed him that, having had occasion recently to search amongst his papers, he had found, to his great surprise, Mrs. Bedingfield's note of hand, which ought to have been given to her when she paid him the last money due upon it, and that, upon searching for her annuity bond, he was not able to find it, and was therefore apprehensive that he had given it to her by mistake, instead of the note. In consequence of which Ransom, at Bayly's request, called with him upon Mrs. Bedingfield on or about the 15th of November 1825, and Bayly then requested her to let him see the paper which he had delivered to her upon the occasion of her paying him the last instalment of the premium. To which request Mrs. Bedingfield made answer that she could not do so, as she had burnt it. Whereupon Bayly said he was sorry to hear her say so, as that paper was the annuity bond which he had delivered to her by mistake, instead of her note of hand: that Mrs. Bedingfield then declared that immediately on her return home she had thrown it into the fire, and burnt it without looking at it, under the impression that it was the promissory note, adding that, if she had been aware that it was the bond, she would have returned it: that upon her saying this, Bayly requested her to remedy the mistake by executing another bond; but which she declined doing. A letter also of the 3d of December 1825, from Mrs. Bedingfield to Ransom, was proved. It contained the following passage: "Since you and Mr. Bayly called upon me, I have reflected on the business, and I con-[38]-sider that the destruction of the bond *was an accident*: and, as I should be sorry Mr. Bayly should be a sufferer *by the mistake*, I shall never, directly or indirectly, mention the affair to my son: therefore the annuity is as secure as ever." Another letter also was proved from Mrs. Bedingfield to Ransom, dated the 5th of January 1826, in which she acknowledged that she had received the promissory note which he had sent to her by Bayly's desire.

At the hearing of the cause Mr. G. Richards and Mr. Pitman, for the Defendants, said that the acts or the declarations of one obligor were not evidence against a co-obligor, and, therefore, the evidence above mentioned was not admissible as against James Bedingfield.

Mr. Knight Bruce and Mr. Koe, for the Plaintiff. The bond is proved to have existed, and the answer admits the fact of its destruction; then the declarations of one of the co-obligors as to the circumstances of its destruction become admissible against the other co-obligor. Gilb. Ev. edit. 1769, p. 57: *Whitcomb v. Whiting* (Doug. 652); *Perham v. Raynal* (2 Bing. 306); *Wyatt v. Hodson* (8 Bing. 309); *Burleigh v. Stott* (8 Barn. & Cres. 36); *Pritchard v. Draper* (1 Russ. & Myl. 191); *Nottidge Prichard* (8 Bligh, 493); *Jackson v. Fairbank* (2 H. Black. 340); *Saltern v. Melhuish* (Ambl. 247).

Mr. G. Richards, in reply. Declarations by one of several persons mutually interested are admissible when authorised by the nature [39] of the joint interest, as in the familiar instance of partners: but here the act of one obligor is tortious and unauthorised by the joint interest.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is not necessary to enter into the question how far the declaration of one obligor, as to an act to be tortious, would be evidence against a co-obligor.

Put this case: a bond is lost without saying anything about destruction; but it is out of the Plaintiff's possession and he cannot get it. Suppose one co-obligor says: "I admit it is in my possession:" would not the Court have jurisdiction to make a decree against that obligor? It would be singular if the Court should have the power to make a decree against the one and not against the other, when the liability, if it exists at all, is joint. I cannot see why, in such a case, a decree should not be made against both.

The answer represents that the bond is destroyed, but says that it was destroyed under other circumstances than those alleged by the bill. There may be a set of circumstances stated as to that by the bill, which, in the Defendant's view, it may be very material to traverse. But still the joint and several answer admits the destruction, though it represents that it took place under circumstances different from those stated by the bill. But, if the destruction is admitted to have happened in any manner, the Court has jurisdiction and the evidence ought to be admitted against both the obligors.

Another objection made for the Defendants was that as the only ground for the Plaintiff's suing in a Court of Equity was that the bond had been destroyed, he [40] ought to have annexed to his bill an affidavit of that fact, or, at all events, that the bond was not in his custody. In support of that objection the following authorities were cited: Mitf. on Plead. 4th edit., pp. 54 and 124; *Whitchurch v. Golding* (2 P. W. 541); *Walmsley v. Child* (1 Vez. 341); *East India Company v. Boddam* (9 Ves. 464); *Anon.* (3 Atk. 17); *Whitfield v. Fausset* (1 Vez. 387); *Mossop v. Eadon* (16 Ves. 430); *Macartney v. Graham* (ante, vol. ii. 285); *Hansard v. Robinson* (7 Barn. & Cres. 90); *Dormer v. Fortescue* (3 Atk. 132).

THE VICE-CHANCELLOR. The answer admits the destruction of the bond. All that it disputes is the circumstances under which it was destroyed. If the answer admits the destruction to have taken place, no matter how, the Court has jurisdiction; and, therefore, the objection for want of the affidavit must be overruled.

The objections having been overruled, the hearing of the cause was proceeded with; and, finally, His Honor pronounced a decree declaring that the Plaintiff, as Bayly's executor, was entitled, by virtue of the bond, to an annuity of £50, and ordered an account to be taken of the arrears of the annuity with interest at £4 per cent.; (1) and the amount to be found due for principal and interest (not, however, exceeding the penalty of the bond) to be paid by the Defendants to the Plaintiff.

(1) See *Jewdine v. Agate*, ante, vol. iii. p. 129; *Hyde v. Price*, ante, vol. viii. p. 578; and 3 & 4 Will. 4, c. 42. The minutes of the decree contained no direction for the computation of interest: probably because the arrears alone exceeded the penalty of the bond.

[41] GOODMAN v. COOMBES. March 8, 1841.

Practice. Revivor.

After decree, the Plaintiff died; and one of the Defendants filed a bill of revivor against his executors, but, for several months, neglected to obtain an order to revive. The Court gave the executors liberty to revive the suit, if the Plaintiff in the bill of revivor should not revive it within a week.

On the 29th of September 1839 and after decree, W. Slade, the Plaintiff in the original suit, died. On the 7th of March of 1840, Goodman, one of the Defendants in that suit, filed a bill of revivor against his executors and the other surviving parties to the original suit, but did not obtain an order of revivor. In consequence of which,

Mr. Bagshawe, for Slade's executors, obtained an order, on the 21st of January 1841, on the authority of an unreported case, *Gordon v. Bertram*, Reg. Lib. A. 1815, fo. 370 and 497, that Goodman should obtain an order to revive within a week after the service of the order to be made on the motion, or that the Defendants, Slade's executors, should be at liberty to draw up the order.

On the 8th of March, Goodman not having obtained the order,

THE VICE-CHANCELLOR [Sir L. Shadwell], on the application of Mr. Bagshawe, ordered the suit to be revived.

Reg. Lib. A. 1840, fo. 271 and 501.

[42] STAMMERS v. HALLILEY. March 5, 1841.

[S. C. 5 Jur. 817.]

Will. Construction. Legacy. Priority.

Testator gave legacies to trustees, in trust for his daughters for their separate use for their lives, and, after their deaths, for their children. By a codicil, after reciting that he had settled on his daughters fortunes which he was satisfied his property would allow of being increased, he gave to each of them £500, which he directed not to be settled, but to be paid to them. By a second codicil, he gave to his wife £3000 in lieu of £1000 which he had given her by his will. His property proved insufficient to pay the legacies in full. Held, that the legacies given by the first codicil were postponed to the legacies given to the daughters by the will, and also to the legacy given to the wife by the second codicil.

The bill in this cause was filed by Martha, the wife of the Defendant Joseph Stammers, by her next friend, on behalf of herself and all other the unsatisfied pecuniary legatees of John Halliley, her late father.

The testator, by his will, dated the 1st of June 1827, gave to his wife, Sarah Halliley, the sum of £1000 in lieu of dower, and the sum of £4000 to trustees, in trust for the Plaintiff's separate use for life, and after her decease, in trust for her children; and he gave sums of the same amount upon like trusts for the benefit of his four other daughters and their children. By a codicil, dated the 28th of January 1828, after reciting that, by his will, he had given to or settled upon his five daughters fortunes in money, *which he was satisfied his property would allow of being increased*, he gave to each of them the sum of £500, and directed it to be paid to them, with interest at £5 per cent., without being settled on them, by two equal instalments, one at the expiration of one year, and the other at the expiration of two years after his death. The testator made another codicil, dated the 29th of May 1828, by which, after reciting that he had, by his will, given to his wife a legacy of £1000, he revoked that legacy, and bequeathed to her a legacy of £3000 in lieu of it.

The testator died on the 16th of August 1828. His assets having proved insufficient to pay the legacies [43] given by his will and codicils, in full, one question in the

cause was whether the legacies given by the first codicil were to be postponed to those given by the will.

Mr. Jacob and Mr. Prendergast, for the Plaintiff, and

Mr. Knight Bruce and Mr. Elmsley, for Defendants in the same interest, said that as the testator, in the codicil in which he gave the additional legacies to his daughters, had expressed his satisfaction that his property would allow of the fortunes which he had provided for them by his will being increased, he had declared, in effect, that he did not intend those additional legacies to be paid, unless his property should be more than sufficient to pay the legacies given by the will, in full. They relied on *The Attorney-General v. Robins* (2 P. W. 23).

Mr. Girdlestone and Mr. Goulburn, for the Defendant, Joseph Stammers, contended that the legacies given by the will and those given by the codicils were to be paid *pari passu*. They cited *Beeston v. Booth* (4 Madd. 161), and *Blower v. Morret* (2 Vez. 420), and added that the passage in the first codicil which had been relied on by the Plaintiff's counsel expressed nothing more than what was in the mind of every testator and was the natural inference from the act of giving legacies; for every testator was satisfied that his property would be fully sufficient to pay all his legacies: that the language of the testator in *The Attorney-General v. Robins* differed materially from that used by the testator in the present [44] case; for there the testator said merely that he *apprehended* that there would be a surplus of his personal estate; so that he expressed a doubt upon the subject, and it was to be inferred that he had given the further legacies with reference to that doubt: but, in the present case, the testator said that he was *satisfied* that his property would be more than sufficient to pay the legacies given by his will: that, at all events, there was no ground whatever for contending that the legacy of £3000 given by the second codicil was to be paid in priority to the legacies given by the first codicil.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have read through the will and codicils, and I cannot say that I see any substantial distinction between this case and the case of *The Attorney-General v. Robins*.

It is observable that, in that case, the M.R. says that the legacies at the latter end of the will were given on the presumption that there would be a surplus; and afterwards he says that the codicil must be taken as part of the will. But, in the codicil, the testator provides for there being a deficiency; which does not shew that he had a very strong presumption or apprehension that there would be a surplus.

However, that case is so like the present that, unless it involves some clear violation of principle (which I do not think it does) I must be bound by it.

Here the second codicil does not increase the fund, nor does it shew that the testator had altered the view which he took of the amount of his property when he made his first codicil. Indeed the second codicil con-[45]-firms (1) the first as it stood at the time, that is, with the expression of satisfaction in it. Therefore, if there is any distinction between this case and *The Attorney-General v. Robins*, this case is the stronger one for holding that the legacies given by the first codicil are postponed to those given by the will, and also to the £3000 given by the second codicil.

[45] UPTON v. SOWTON. March 8, 1841.

Practice. Answer.

A Plaintiff having died before the Defendant had answered, his representative filed a bill of revivor and supplement, praying that the Defendant might answer it and also the original bill. The Defendant put in an answer, which was intitled as his answer to the original bill of the Plaintiff, "since deceased." The answer was ordered to be taken off the file.

Before the Defendant had answered the original bill the Plaintiff died. His

(1) The second codicil, as set forth in the brief, with which alone the reporter was furnished, contained no express confirmation of the first.

personal representative then filed a bill of revivor and supplement, praying that the Defendant might answer it and also the original bill. After the suit had been revived, the Defendant put in an answer, which he intituled as his answer to the original bill of the Plaintiff, "*since deceased*." Mr. Lowndes now moved that the answer might be taken off the file for irregularity. He said that no indictment for perjury could be sustained upon it. He also referred to *Vigers v. Lord Audley* (*ante*, vol. ix. p. 408).

Mr. Renshaw, *contrà*, said that the answer stated, in the body of it, that the suit had been revived. He cited *Sayle v. Graham* (*ante*, vol. v. p. 8).

[46] THE VICE-CHANCELLOR said that a Plaintiff had a right to have an answer rightly intituled; that the answer which had been filed purported to be an answer in a suit which had wholly abated, and, therefore, the title was wrong. But, as the second suit was described in the notice of motion to have been commenced by bill of revivor only and not by bill of revivor and supplement, His Honor made the order without costs.

[46] SIMEON v. DAVIS. March 9, 1841.

Practice. Injunction. Impertinence. Answer.

Exceptions to an answer for impertinence cannot be shewn as cause against dissolving a special injunction.

An injunction had been obtained *ex parte*. The answer having been filed, a motion was now made to dissolve it.

Mr. Keene, for the Plaintiff, shewed exceptions taken to the answer for impertinence as cause against dissolving the injunction. He cited *Raphael v. Birdwood* (1 Swanst. 228).

Mr. Jacob, for the Defendant, said that exceptions to an answer, whether taken for impertinence or for insufficiency, could not be shewn as cause against dissolving a *special* injunction: that, in the case cited, the injunction, though said to have been special, could have been nothing more than the common injunction which had been extended to stay trial.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Under the new orders of the Court, an answer cannot be referred, generally, for impertinence, but the matter [47] alleged to be impertinent must be specified by way of exception. Why then may not the answer in this case be taken as an answer disregarding those parts of it which have been excepted to as being impertinent?

I see no reason why this motion should not be proceeded with.

[47] CASTELLAIN v. BLUMENTHAL. March 9, 1841.

Practice. Affidavits. Injunction.

On shewing cause against dissolving an injunction, the Plaintiff cannot read affidavits to prove allegations in the bill of matters of fact, which the answer neither denies nor admits.

An order *nisi* to dissolve the common injunction having been made on the coming in of the answer,

Mr. Knight Bruce and Mr. L. Wigram, on shewing cause against the order being made absolute, tendered an affidavit to prove allegations in the bill as to which the Defendant said he did not know, nor could he set forth, whether they were true or not. They cited *Morgan v. Goode* (3 Mer. 10), *Hodgson v. Dean* (2 Sim. & Stu. 221), and an unreported case of *Orl v. White* (since reported in 3 Beav. 357), before the Master of the Rolls in the winter of 1840, in which the question as to the admissibility of affidavits to substantiate allegations in the bill, as to which the answer stated

that the Defendant was ignorant, was much discussed; and the Master of the Rolls, though he decided the motion independently of the affidavits, yet said that, as the point had been much discussed, he would express his opinion that the affidavits were admissible.

[48] Mr. Jacob and Mr. Bacon, *contra*, objected to the affidavits being read, and cited *Barrett v. Tickell* (Jac. 154).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the opinion of the Master of the Rolls was extra-judicial, as he decided the case independently of the affidavits: that a party who moved for an injunction, or shewed cause against the dissolution of it on an answer, was bound by the answer; that it had been repeatedly decided, and he considered it as settled, that affidavits to prove *facts* as to which a Defendant stated he was ignorant were not admissible, especially in a case like that before him, in which the Plaintiff was shewing cause on merits confessed in the answer. His Honor added that, in *Hodgson v. Dean*, Sir J. Leach seemed to think that it was a mere accidental omission to state the fact as to which the affidavit was received.

[49] TURNER v. TRELAWNY. March 10, 11, 12, 13, 15, 1841.

[S. C. 10 L. J. Ch. 249; 5 Jur. 698. Distinguished, *Farrar v. Farrars, Limited*, 1888, 40 Ch. D. 414.]

Bankrupt. Assignee. Purchase of Bankrupt's Property. Breach of Trust. Principal and Agent. Laches. Length of Time.

In January 1820 A. and B., who held more than a third of the shares in a Cornish mine, which was then a losing concern, and the shares were of very little, if any, value, became bankrupt. At a meeting of the other shareholders, held in February, at which G., though not then a shareholder, was present, it was resolved, in order to prevent the mines from being abandoned and the injury which the neighbourhood would sustain thereby, that a new company should be formed, consisting of old shareholders and of persons who might be inclined to purchase shares in the mine, and that, for the security of the latter, the mine should be sold under a decree of the Court of Stannaries, and the debts of the mine paid with the proceeds. Shortly afterwards G. was appointed assignee of the bankrupts; and then, in order to avoid the responsibility of continuing to hold their shares, he relinquished them under counsel's advice. Afterwards the shares were disposed of amongst old and new adventurers, and G., who had proposed to the trustees for the Defendant, then a minor, to take some of the shares, agreed to take eleven, *for himself and friends*; and about the same time the trustees authorized him to take four shares for the Defendant. The mine was afterwards sold, in the Court of Stannaries, to G., on behalf of the new company. The purchase-money was paid into Court, and then applied to pay the debts of the mine. Soon afterwards the Defendant came of age; and his agents paid G. for the four shares at the rate at which he had purchased the eleven, and the four shares were transferred into Defendant's name. The mine continued to be a losing concern to the new company until after they had prevailed on Defendant, who was the owner of the freehold, to accept a surrender of the lease under which it had been held, and to grant a new lease *at reduced dues, and including new mining ground*. Afterwards G. was removed from the assigneeship, and a renewed commission was issued, under which the Plaintiff was chosen assignee of the bankrupts.

Notwithstanding the term granted by the old lease had long expired, and the Defendant had no knowledge of the bankruptcy, and fifteen years had elapsed during which there had been a large expenditure on the mine, the Court declared the Defendant to be a trustee of his shares in the mine, including the new ground, and decreed him to account for and pay to the Plaintiffs the profits thereof.

This case arose out of the transactions stated in *Turner v. Hill*, *Turner v. Tyacke* and *Turner v. Bor-*[50]*-lase*, reported *ante*, vol. xi. pp. 1, 16 and 17. Those cases

came before the Court on the argument of demurrers, and, therefore, in the reports of them, the allegations in the bill were stated as facts. This case, however, was brought to a hearing, and therefore it will be necessary to state the facts as they appeared from the evidence in the cause.

In and before 1819, Messrs. J. & T. Gundry were the owners of more than one-third of the shares in certain mines in Cornwall, which were held for terms of years ending in 1831, which had been granted by George Woolcombe and George Leach, the trustees under the will of the Defendant's late father. At the end of 1819, and the beginning of 1820, the Messrs. Gundry were much embarrassed in their circumstances, and were greatly indebted to the mines; and, owing principally to their embarrassments and mismanagement, the mines were a losing concern; and there was reason to apprehend that the working of them must cease.

In the early part of January 1820 the late Mr. Grylls, who was a gentleman of considerable influence and property in the neighbourhood, exerted himself to keep the mines in work, as they afforded employment to a great number of labourers, and tended to promote the trade of the neighbouring town of Helston. Accordingly, on the 6th of January 1820, he wrote to Mr. Henry Woolcombe, the solicitor to the trustees, stating that the mines could not, at the then price of tin, be worked so as to do more than pay their expenses, that the trustees must feel the necessity (if they could not give immediate assistance) of promising that the matter should be taken into consideration as soon as the De-[51]-fendant, the tenant in fee under the will (but who was not then quite of age), should attain twenty-one, and that an abatement in the dues payable for the mines would induce the adventurers to continue the working of them with spirit.

On the 20th of January 1820 a commission issued against Thomas Gundry, and on the same day a commission issued against John Gundry, under which they were found bankrupts respectively. On the 24th of the same month a joint commission issued against them, under which also they were declared bankrupts.

On the 5th of February 1820 a meeting of the adventurers was held, at which Grylls, though he had then no interest in the mines, was present; and it was then resolved, as the only measure that could prevent the mines from stopping, that at least one-half of them should be offered for sale at the price of £500 per share; and, in case that one-half could be disposed of at that rate, it was proposed *for the security of the new adventurers*, that the mines, materials, and halvans should be sold by the decree of the Vice-Warden of the Stannaries, and entered upon as on the 1st of February then instant, *clear of all debts and demands contracted before that day*; that the amount of shares to be sold to new adventurers should be paid into the Vice-Warden's Court; that the sum which might be raised from John Gundry's shares should be appropriated to pay the amount due from the mines to the end of October then last; that the old adventurers who should continue their shares should give an undertaking to the Vice-Warden to pay their proportions of the deficiency which might remain due from John Gundry, after the produce of his shares should have been appropriated as above; that commu-[52]-nication should be made to Mr. Grylls respecting the purchase of the half of the mines agreed to be offered for sale, and that he should be requested to correspond with such persons as might be willing to become purchasers thereof, and that the adventurers present at the meeting would endeavour to dispose of some part thereof amongst their friends.

Mr. Grylls did not sign these resolutions; but, in consequence of them, he applied to several persons to take shares in the mines; but neither he nor any of the adventurers could then dispose of any of the shares.

On the 15th of February 1820 Grylls and Charles Read were chosen assignees of John Gundry's separate estate; and the creditors present on that occasion authorized the assignees to relinquish J. Gundry's shares in the mines to the other adventurers.

On the 16th of February 1820 another meeting of the adventurers was held, at which also Grylls was present; and it was then resolved that the principal creditors of the mines should then immediately petition the Vice-Warden of the Stannaries for a decree to procure the payment of the sums due to them; and that they should represent to the Vice-Warden at the same time that there was a great number of

other creditors, and request him to appoint a day for the proof of their claims before his secretary, with a view to have a decree for the sale of the mines, materials, and halvans, for the purpose of defraying the whole sum which might be due; that the Vice-Warden should be then petitioned for a decree to sell the mines, &c., in one lot; that the proceeds of the sale should be paid into the Vice-Warden's Court, and be considered in precisely the same situation with respect to the claims of the creditors as [53] the mines, &c., would have been if no sale had taken place.

On the 18th of February 1820 Grylls and Read were chosen assignees of Thomas Gundry's separate estate, and on the 23d of the same month they were chosen assignees of J. & T. Gundry's joint estate.

On the 18th of that month Grylls and Read relinquished to the continuing adventurers the shares of both John and Thomas Gundry in the mines, in order, as the answer alleged, to protect themselves from the future responsibility which they would have incurred to a great extent if they, as assignees of insolvent estates, had continued adventurers in the mines, and from which they had no prospect of being otherwise relieved, after the refusal of so many persons to take shares in the mines: for, as the Defendant believed, the produce of the mines did not then pay the expenses thereof, and the debt on them then exceeded the value thereof and of the property belonging thereto.

On the 23d of February 1820 another meeting was held (at which also Grylls was present) between the old adventurers and persons who had then proposed to become new adventurers in the mines, for the purpose of coming to an arrangement as to the terms upon which the new adventurers were to take up their shares; and it was then resolved that four persons should be appointed to value the materials, halvans,(1) &c., on the mines, two by the old and two by the proposed adventurers, and that the mines (1) should be sold at the valuation to be so made; and such of the parties as were old adventurers agreed to take such additional shares as were set [54] opposite their respective names, and such of them as intended to become adventurers to take such shares as should be set opposite their respective names: and it was further resolved that immediate measures should be taken to induce the Vice-Warden to grant a decree for the sale of the mines, in order to pay the debts due in January then last; and that, in case of such sale at the valuation above mentioned, or at any higher sum, the purchase-money should be paid into the Vice-Warden's Court, and be considered precisely in the same situation with respect to the responsibility of the then adventurers as the mines, materials, &c., would have been in if no such sale had taken place.

Grylls signed these resolutions as taking three shares; and on the 29th of February he wrote a letter to Henry Woolcombe, as the solicitor to the Defendant's trustees, enclosing the last-mentioned resolutions, and stating that some of the shares which had been relinquished had been taken; but he despaired of finding persons to take the remaining shares, and that the consequence would be that the working of the mines must stop, which would be very injurious to the Defendant's interest and to the neighbourhood.

On the 8th of March 1820 Grylls wrote another letter to H. Woolcombe, proposing that three shares should be taken for the Defendant. On the 11th of March H. Woolcombe wrote, in answer, that he would desire a person named Davey to visit the mines, and that, if he recommended the trustees to purchase the three shares, they would do so, provided that Grylls could advance the money and not require payment until September then next. H. Woolcombe wrote to Davey accordingly; and, on the 15th of March, Davey's son answered the [55] letter for his father (who was absent in Wales), saying that he had shewn H. Woolcombe's letter to Captain William Francis, who had lately inspected the mines for some gentlemen in the neighbourhood, and that Francis thought it was doubtful whether the mines could pay their way, but that it would be advantageous to the lord (meaning the Defendant) if it should be the means of continuing the working of the mines, as the dues would more than pay the probable loss on the three shares.

In the interval between the 23d of February and the 22d of March 1820, Grylls

(1) So in brief.

prevailed on several of the persons who, by the resolutions of the 23d of February, had agreed to take shares, to take further shares in the mines; and on the 22d of March another meeting was held, at which the persons present agreed to take such shares as were set opposite to their respective names on the conditions expressed in the resolutions of the 23d of February; and Grylls signed the resolutions of the 22d of March, as taking eleven shares, "for self and friends."

About this time, but when in particular did not appear, Henry Woolcombe authorized Grylls to take four shares for the Defendant.

On the 23d of March an amicable suit was instituted in the Vice-Warden's Court by certain creditors of the mines against several of the adventurers, and also against Grylls and Read as the assignees of the bankrupts, in pursuance of the arrangement which had been made at the meetings before mentioned.

On the 20th of April 1820 Grylls, by the advice of counsel and with the consent of the creditors of the [56] bankrupts present at a meeting, relinquished the shares of the bankrupts in the mines and in the materials, halvans and other property belonging thereto, the previous relinquishment of the 18th of February having extended to the mines only. Other adventurers also relinquished their shares in the mines, some at the same time, and some previously; and one of them, who held four shares, relinquished them in September 1821.

On the 25th of April 1820 the separate commissions against John and Thomas Gundry were superseded.

On the 9th of May the suit in the Vice-Warden's Court was heard; and a decree was made directing the mines, materials, &c., to be sold for the payment of the debts due to the creditors of the mines. On the 2d of June 1820 Grylls was authorized by the adventurers to attend at the sale and to purchase the mines, &c., on their behalf for £18,000. The sale under the decree was advertised for the 5th of June; but owing to some misunderstanding it did not take place until the following day. Grylls was the only bidder at it, and the mines were knocked down to him for £18,000. That sum was afterwards paid, in obedience to an order of the Court, into a bank, and applied in payment, as far as it would extend, of the debts due from the mines.

The Defendant attained 21 in June 1820, and in November following his agents paid to Grylls the price of the four shares which he had purchased for the Defendant; and those shares were then transferred in the cost-book of the mines from Gryll's name to the Defendant's. In 1829 Grylls and Read were removed from being assignees under an order made in the bank-[57]-ruptcy, and a new commission was issued, under which the Plaintiff and two other persons, since deceased, were chosen assignees of the bankrupts' estates. In 1834 Grylls died.

The bill, which was filed in September 1835, contained allegations tending to impute fraudulent and improper motives to Grylls in engaging in the transactions above mentioned; and it charged that the mines had been, from the commencement of those transactions and still were, very profitable; and that the eleven shares which Grylls had purchased were part of the shares of the bankrupts; that Grylls purchased those shares when he was assignee of the bankrupts, and that the Defendant purchased his four shares, part of the eleven, through the means of Grylls, and that Grylls purchased those four shares for the Defendant's benefit, having been authorized so to do as before mentioned.

The bill prayed that the Defendant might be declared to be a trustee of the four shares for the Plaintiff, and might be decreed to transfer them to the Plaintiff, and to account for and to pay him the profits thereof from June 1820.

The Defendant said in his answer that he had not, nor, as he believed, had the trustees of his late father's will, or either of them, nor, as he believed, had Henry Woolcombe, at or before the time when he took to his four shares, or at or before the time when the purchase-money was paid for the same, any notice or information of the circumstances alleged in the bill to have attended the sale of the mines, or of any circumstances whatsoever whereby such sale or the title of purchasers under the same could be impeached, and that he considered the transaction as being the formation of a [58] new company of adventurers, the old company being unable to carry on the mines. The answer further stated, and there was evidence tending to shew that the

mines continued to be a losing concern for a considerable time after the new adventurers became concerned therein; and that they sustained a loss thereby of upwards of £5000; that, from representations made to the Defendant, he was satisfied that, unless he consented to reduce the dues and to grant new setts at reduced dues, including additional mining-ground, the mines could not be carried on and would be abandoned; wherefore he agreed to grant and did, in December 1821, grant new leases or setts to the adventurers by which not only reduced dues were reserved to him, but additional mining-ground was granted; that, on the granting of the new leases or setts, the former ones which would have expired in March 1831 were delivered up, and that in consequence thereof and of discoveries which had been made of valuable tin and copper ore, *the mines comprised in the new setts* (in the working of which and in making the discoveries therein considerable expenses had been incurred by the new adventurers) had since July 1822 become productive and profitable; but the Defendant believed that the loss which he had sustained by reducing the dues reserved to him by the old setts greatly exceeded the profits of his shares down to the time when the old setts expired.

Mr. Jacob, Mr. G. Richards and Mr. Follett, for the Plaintiff. In February and March 1820 Mr. Grylls wrote to Mr. Henry Woolcombe, who was the solicitor to Mr. Leach and Mr. Woolcombe, the trustees of the Defendant's property, and represented that it would be ad-[59]-vantagous to the Defendant for the trustees to take shares in the mines on his account. Mr. H. Woolcombe was, at first, disinclined to involve his clients in any risk; but after some further correspondence with Mr. Grylls, he, on behalf of the trustees, instructed a person named Davey to examine the mines and to report to him as to the expediency of taking shares in them. Davey's son answered the letter; and in consequence of the advice contained in it, Mr. H. Woolcombe instructed Grylls to take four shares for the Defendant. Whilst this was going on, a meeting of the intended shareholders took place on the 22d of March 1820, and Grylls, who had previously taken only three shares, agreed to take 11 shares in the mines: and signed the resolutions entered into at that meeting as a purchaser of those shares for himself and friends. Then, in pursuance of the plan which had been previously formed for making a title to the mines through the medium of a sale in the Vice-Warden's Court, an amicable suit was instituted in that Court by a creditor of the Gundrys, the bankrupts; and Grylls having previously relinquished the shares of the bankrupts in the mines (without, however, having apprised the creditors of his intention so to do), the mines were sold under the Vice-Warden's decree. Grylls was the only person who bid at the sale, and he, in pursuance of a previous arrangement with some of his co-adventurers, purchased the mines for £18,000. Grylls advanced the money for the purchase of the Defendant's four shares, and was afterwards repaid it. Those shares for some time stood in Grylls's name; but after a short time they were transferred into the Defendant's name; and the Defendant has, from time to time, received his share of the profits. At the time when those transactions took place, Grylls was standing in the situation of assignee of the Gundrys, who had been the proprietors of nearly one-[60]-half of the shares in the mines; and everything that was done with respect to the Defendant was done through the agency of Grylls. He took the shares and managed the whole business for the Defendant; so that, whatever interest the Defendant acquired in the mines was acquired by a dealing carried on by the agency of the individual who was the assignee of the bankrupts' estates; and therefore the Defendant cannot be allowed to retain any benefit acquired thereby. In 1825 the creditors of the bankrupts began to complain; and a petition, *Ex parte Badcock* (Mont. & Macar. 231), was presented, in the bankruptcy, to the Lord Chancellor: and his Lordship ordered Grylls to relinquish, for the benefit of the bankrupts' estate, the shares in the mines which he continued to hold, and that he and Read, who was his co-assignee, should be removed and new assignees appointed. The case of *Ex parte Bennett* (10 Ves. 381), to which the Lord Chancellor refers in his judgment, is one which applies very closely to the present case. There, a purchase of a bankrupt's property was set aside, because one of the commissioners had bid for it and purchased it on behalf of a third person, although he merely repeated the words that had been put into his mouth by the agent for the purchaser, who had been suddenly called out of the auction-room.

That case applies directly to the present. Neither the Defendant nor his trustees had anything to do with this matter, except through the agency and trusteeship of Mr. Grylls.

It is immaterial whether the transaction was a purchase of the shares of the bankrupts; or whether it was a purchase and an acquisition of property in which the bankrupts were interested; if it was obtained by means of the bankrupt's property, by means of a surrender of [61] it through the agency of the assignee, and by his power and authority. For the same principle applies whether it is a simple purchase, or whether it is any other transaction by which profit is acquired by the assignee or his friends for whom he is acting. It is not necessary to shew that the property which the assignee has got is, specifically, a part of the bankrupt's property. For example, if an assignee has, in his character of assignee, a leasehold estate, or is in possession of property as tenant from year to year, and makes an arrangement with the landlord by which he obtains a new lease on surrendering the interest which he has as assignee; then, what he has got for himself is something different from what the bankrupt had; but still he has got it through his position as assignee, and by the surrender of that which was before in the bankrupt: and in such a case he will be declared a trustee of the whole of that which he has thus acquired, and not merely of the few years of the bankrupt's term which remained unexpired. One of the late cases in which this or a similar principle was acted upon was certainly a very strong case: *Greenlaw v. King* (3 Beav. 49). There the incumbent of a parish had power to raise money by annuity, with the consent of the Bishop of the Diocese, for the purpose of rebuilding the parsonage-house. He tried to borrow the money, but nobody would lend it to him except at nine per cent. The bishop, however, advanced him the money at a lower rate. The bishop and the incumbent both died; and the new incumbent filed a bill against the bishop's executors, to set aside the transaction; and it was set aside. So in *Cook v. Collingridge* (Jac. 607), and *Wedderburn v. Wedderburn* (2 Keen, 722; and 4 Myl. & Cr. 41), transactions by means [62] of which executors had acquired a benefit from the property of their testators were set aside, and the executors were decreed to account for the profits which they had derived from the transactions.

The judgments of the Lord Chancellor in *Ex parte Badcock* and *Ex parte Grylls* (2 Deac. & Chitty, 290) involve the whole of the principle which we are contending for: because Grylls was declared a trustee of those shares which he took for his friends, and which they declined to adopt, and also of those which they returned to him, inasmuch as they, taking the shares through his agency and trusteeship, could not have retained them.

Among the different points relied on by the Defendant in his answer, one is the length of time during which he has been allowed to enjoy the profits of his shares. The Court will have noticed that, during a period of nine years from the bankruptcy, the bankrupts' affairs were under the management of the gentleman who was principally concerned in the transactions to which this suit relates. The petition for the removal of Grylls and Read from the assigneeship was presented in 1825. They opposed that petition most vigorously, so that it was not until some time in the year 1829 that the Lord Chancellor's order for their removal and for the choosing of new assignees was made; and the choice of new assignees was then delayed in consequence of a renewed commission being to be taken out. Afterwards, the new assignees were involved in the proceedings on Mr. Grylls's petition, which did not terminate until 1832 or 1833: and in 1835 the present bill was filed; which is much within the time [63] allowed for suing in equity. The Defendant, too, in consequence of the litigation in the bankruptcy which had been going on for so many years, must long since have had notice that the transaction respecting the purchase of his shares was one which was subject to be impeached.

Lastly, if Mr. Trelawny is to account at all for the profits of his shares, the account must be taken not merely from six years before the filing of the bill, but from the time when his shares were purchased. For this is a case to which the rule founded on the Statute of Limitations does not apply. It is a case which a Court of Equity considers as a breach of trust, and, therefore, the account must commence in 1820. *Wilson v. Moore* (1 Myl. & Keen, 126 and 337).

Sir William Follett, Mr. Knight Bruce, Mr. Sharpe and Mr. Steere, for the Defendant. The ground on which the Plaintiff rests his claim to the relief sought is that Mr. Grylls, one of the persons who acted in forming the new company of shareholders, was the assignee of the Gundrys, who had held a considerable portion of the shares; but it is impossible to contend with success that the doctrines of a Court of Equity can allow a Plaintiff to unrip, after so great a lapse of time, a transaction which is proved to have been perfectly fair and honest, and to have proceeded from the best of motives. It is in evidence in the cause that Grylls accepted the office of assignee unwillingly, and in compliance only with the urgent solicitations of the creditors. There is no imputation against him or any other party to the transaction: they acted *bonâ fide* [64] and from the purest motives. If they had not taken upon themselves the management of the mines, the working of them must have ceased; which would not only have occasioned a great sacrifice of property, but would have thrown many persons out of employment, and have caused great injury to the neighbouring town of Helston. The relinquishment of the bankrupts' shares in the mines by the assignees was a right and proper act; it was done with the advice of counsel; and was the necessary consequence of the bankruptcy of the Gundrys, and of the circumstances under which the mines were placed at that time; for they were then a losing concern, and the Gundrys were greatly indebted to them. Other shareholders also relinquished their shares. By the relinquishment, the interest which the bankrupts had in the mines was put an end to. The evidence shews that that measure was not adopted with a view, as has been stated, to carry into effect the plan of forming the new company. None of the Plaintiff's witnesses state that it was adopted for that purpose, or that the shares of the bankrupts could have been sold, or, indeed, that any other course than that of relinquishment could have been taken with respect to them. There is no evidence, as there was in *Ex parte Bennett*, that the shares were sold for less than their value; on the contrary, it is proved that they were absolutely unsaleable; and the assignees relinquished them, in order to avoid any further loss. It is proved also that, for 18 months after the formation of the new company, the mines continued to be a losing speculation, and that in those 18 months a loss of above £5000 had been incurred. We find, too, that a gentleman who held four shares relinquished them at that time, although he was not indebted to the mines. It is evident, therefore, that the relinquishment by the assignees was [65] not a colourable act; but was one which it was their duty to do. Besides, the bankrupts owed a very large debt to the mines, to which their shares were subject; it was quite impossible, therefore, that their shares could have been turned to any advantage for their estate. Lord Lyndhurst, when the case was brought before him in *Ex parte Balcock*, said that whether the creditors were or were not consulted as to the expediency of relinquishing the shares was a matter of controversy; but that it was clear that the relinquishment was known to the creditors, and that they did not object to it. Now, it appears from the evidence in this cause that the assignees did consult the creditors present at a meeting held on the 20th of April 1820, and desire their opinion upon the steps to be taken with respect to the bankrupts' shares; and that the creditors decided that the shares should be relinquished. It is evident, therefore, that the shares were then considered to be worth nothing to the bankrupts' estate. Lord Lyndhurst further says that, considering that the mines could not be made immediately available or beneficial to the estate, the assignees were not bound, in point of law and of strict propriety, to incur personal responsibility by continuing the works, and that, looking at this transaction singly, they were justified in what they did. If then the relinquishment was a right and proper act, one which it was the duty of the assignees to do, and which was done by them with the consent of the creditors, on what ground can the Plaintiff be entitled to the relief which he asks; for, by the relinquishment, the interest of the bankrupts was entirely gone? Since that act was done, there has been a great lapse of time; nothing, however, has occurred or could have occurred to render the transaction invalid. It is true that the mines have become profitable in the [66] hands of the new company; but from what causes? In December 1821 the company surrendered the old setts and obtained new ones, having prevailed on the lord of the soil, that is the Defendant himself, to reduce his tolls one-half, and to grant to them additional ground. They have sunk new shafts, made new levels,

erected new engines and worked the mines in a more scientific manner than the Gundrys did; and they have expended nearly £8000 in so doing. Under these circumstances, will this Court set aside a transaction which took place 15 years before the bill was filed, and make the Defendant account for the profits which he has received?

We now come to a very important question in this case, and that is, supposing, for a moment, that this Court should consider the relinquishment as part of the transaction, or that there were circumstances relating to the relinquishment which rendered it possible to set aside the transaction as against the assignees or any person immediately connected with the bankrupts, can that be done as against a person standing in the situation of Mr. Trelawny? The mines were beginning to fail, and there was good ground for apprehending that they would cease to be worked. His trustees at first declined to take any shares in the mines; but, after the report which they received from Davey, whom they had sent to examine the mines, they consented to take four shares for the Defendant. The Defendant became an adventurer in the mines, precisely in the same way as any of the other adventurers, that is, he took a certain number of shares and paid a certain sum for them. That sum passed through Grylls's hands, as did the money which the other adventurers paid; because Grylls had become the purchaser of the whole of the mines, under the decree in the Vice-Warden's Court, in pursuance of [67] the arrangement made by the adventurers; and, consequently, the different adventurers paid him for their shares, and he paid what he received into a bank, and the money was afterwards paid out to the different creditors of the mines. [THE VICE-CHANCELLOR. Therefore you refer the purchase made on the Defendant's account to the fact that Grylls, under the decree, had become the purchaser of the whole.] That is, we submit, a correct view of the matter. It does not precisely appear at what time the Defendant's trustees consented to take shares for the Defendant. Grylls, it is true, took a certain number of shares for himself and his friends; but it does not appear that he took any of them, specifically and purposely, for the Defendant. Now, is this case within the principle of *Ex parte Bennett*? Is there not one important point which the Plaintiff has omitted to establish, namely, that the Defendant or his trustees, or their solicitor, had notice of the bankruptcy, and that Grylls was the assignee? The Defendant, in his answer, says that he had not, nor, as he believes, had his trustees or their solicitor, at or before the time when he took to the shares, or at or before the time when the purchase-money was paid for the same, any notice or information whatever of the circumstances in the bill alleged to have attended the sale of the mines, or of any circumstances whatever whereby such sale, or the title of purchasers under the same, could be impeached; and, in the correspondence between Grylls and the trustees, there was nothing whatever which had reference to the bankruptcy, or to the position in which Grylls stood with regard to the bankrupts. But it does not rest here, for Mr. Henry Woolcombe has distinctly sworn that he did not know that Grylls was assignee of the bankrupts' estate. Moreover, the Defendant has re-[68]-duced, by one-half, the tolls which he was entitled to under the setts of the mines which were in existence at and for some time after the bankruptcy. He has granted new setts, including additional ground; and he and his co-adventurers have expended large sums in rendering the mines profitable.

The parties interested in the bankrupt's estate were cognizant, in 1825, of all the facts on which this bill is founded; why then was the institution of this suit delayed until 1835? In 1825 they proceeded against Mr. Grylls; why did they not then proceed against the Defendant? Instead of doing so, they have laid by until the mines have been made profitable by means of a large expenditure of capital, and in consequence of the new setts that have been granted, including new mines, and on terms much less advantageous to Mr. Trelawny than the old ones. The case of *Norway v. Rowe* (19 Ves. 144; see 159) is an authority that the circumstance of the Plaintiff having laid by, until the expenditure has taken place, is alone sufficient to prevent this Court from giving the relief that is asked by this bill. *Muskett v. Hill* (1) was another case

(1) An unreported case, before the Lord Chancellor, in 1840.

relating to mines; and there the Court refused to interfere on the same principle as was laid down in *Norway v. Rowe*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case has occupied a long time, but, in my opinion, it is one of the simplest cases that ever was brought before the Court of Chancery, at least within my knowledge. A great deal of evidence has been read, but it seems to lie in a small compass.

[69] As I understand the case, Mr. Grylls, first of all for a laudable purpose, took active measures respecting the mines. I give full credit to the motive by which he is said to have been actuated, namely, a regard to the welfare of the neighbourhood, and of the labourers employed in the mines. But, a very little while after he had first taken an active interest in the prosperity of the mines, the Gundrys became bankrupt and he became their assignee; and then it was thought right, in the prosecution of the general purpose of supporting the mines, that various means should be adopted; and it appears that relinquishments were made of the shares of the Gundrys in the mines. If the matter had stopped there, there would have been nothing to complain of. But the matter did not stop there; and it is quite plain that it was not intended to stop there; for the parties, after making the relinquishments, went on to construct a new company, into the mass of which the shares which the Gundrys formerly had in the mines were to be thrown. Then, in April 1820, Grylls became the owner of 11 out of the 54 shares into which the mines were divided; and those 11 shares were taken by him for himself and his friends; by which, of course, I understand that if, in the first place, any friends would share with him, he was willing they should do so on terms about which there was no dispute; and, if not, he was to take the whole himself; and that appears to have been the way in which the matter was treated. Now it seems that there was, before the end of the month of March, a chaffering between Mr. Grylls and Mr. Henry Woolcombe as to certain of the shares which, it was proposed, should be taken for the benefit of Mr. Trelawny; but nothing very definite was done at the time; but the matter was, in effect, to be a subject for further consideration; and inquiry was to be made, [70] on the part of Mr. H. Woolcombe for the benefit of Mr. Trelawny, whether it would really answer to take any shares. The proposal which was made by the letter of the 8th of March was in these terms, "I know it is decidedly for his (the Defendant's) interest to do so;" that is, to take shares in the mines; "and if he will undertake to carry on three shares on his attaining 21, I will get the money advanced." Then on the 11th of March Mr. H. Woolcombe wrote to Mr. Grylls and said: "I write by this night's post to Captain Wm. Davey, requesting him to visit Wheal Vor (1) once more, and, if he recommends us to purchase the three shares you recommend, we will do so, provided you can advance the money at present, and not require payment till the 1st of September next." Then it seems there was an inquiry made by Captain Davey, the party named by Mr. H. Woolcombe; and Mr. H. Woolcombe himself, as I understand, went to visit the mines; and the result of it altogether was that it was arranged between Mr. H. Woolcombe and Mr. Grylls that Woolcombe should take for Mr. Trelawny four of the shares, which were four of the eleven 54th shares which, ultimately by the resolution of 22d March 1820, were marked down to Grylls for himself and friends. The rest is mere machinery. An application was made to the Vice-Warden's Court; the result of which was that the mines and the halvans, including the various materials, engines and so on, were sold for £18,000.

The real nature of the transaction was that the £18,000 was to be contributed by the persons who were to become partners in the new adventure at the [71] rate of £333, 6s. 8d. for every 54th. That is plain, because the £18,000 was to be divided by fifty-four; and I only notice that, for this reason, namely, because it appears, by the subsequent letter which was written towards the close of the year, that there actually were paid, on the Defendant's behalf, partly by a gentleman named Sylvester and partly by Henry Woolcombe, sums which together made £1333, 6s. 8d.; which was the proportionate value of four of the eleventh 54th shares, at the rate of £333, 6s. 8d. for every 54th.

What struck me as remarkable is this: that it is quite plain that the transaction

(1) The name of the mines.

was not a purchase from Mr. Grylls; but that it was a transaction by means of which when Mr. Trelawny or his agents did actually pay the £1333, 6s. 8d., they merely paid the proportionate part of the £18,000 for which that sale, whatever its character was, did take place in the month of June before. So that it is not a case in which you can consider Mr. Grylls as, first of all, in any way becoming the owner of certain shares, and then selling them, by a distinct transaction and by means of a distinct contract: but it is impossible to look at all the circumstances taken together, without seeing that the ultimate payment which was made in the month of November 1820 on the part of Mr. Trelawny was nothing more than, as he represents it in his answer, the adoption of the original transaction by Mr. Grylls.⁽¹⁾ I dwell on that [72] more, because, if that be the true view of the case (as it strikes me to be), there is an end of all question about notice.

I must say that, when Mr. Knight Bruce made the representation which he did about the notice, it struck me that he then said the only thing that really was of weight in the case for the Defendant. But if the circumstances when looked at resolve themselves into this, that, originally, there was a severance, from the mass of the new interest taken by the new adventurers, of four 54ths, subject to this sort of loose arrangement, namely, that if, when Mr. Trelawny came of age, he or his trustees would pay the due proportion of the sum which was treated as the purchase-money for the whole 11 shares, he should have four of them: then, from the very beginning Mr. Grylls was himself an agent: and, therefore, whatever knowledge he had of the transaction must, of necessity, affect those for whom he was acting as agent.

It appears to me that that is the true view of the case; and, if it is, it will follow, as a matter of course that, from the commencement, Mr. Trelawny must be considered as holding, with notice, a certain portion of the bankrupts' interest in the mines which was not acquired in a legitimate manner: and the consequence, therefore, is that he must be considered as a trustee of the property, and must account for all the profits he has received; but of course all just allowances must be made to him.

Mr. Knight Bruce. Does your Honor, in using the expression "the bankrupts' interest," extend that ex-[73]-pression to the whole of the four 54ths under the new arrangement, or only to so much of them as would be taken out of the bankrupt's estate?

THE VICE-CHANCELLOR. I think it must be considered that Grylls reserved to himself or took to himself some portion of that interest which the bankrupts had before, and for this reason: because the interest which the bankrupts had in the mines amounted to more than a third of the shares; and it is quite obvious that eleven shares are not one-third of fifty-four: consequently, the interest which Grylls had can only be accounted for as being a portion of the mass of the interest which the bankrupts had.

Mr. K. Bruce. Under the head of just allowances, the Master can allow only the amount of dues paid: does your Honor decide that the allowances are to be made to Mr. Trelawny, without regard to the diminution of dues?

THE VICE-CHANCELLOR. It seems to me that I have no more to do with that than I have to do with the fluctuating price of any article which the gentlemen who were carrying on the mines might have occasion to buy from time to time. My notion is that, originally, the eleven fifty-fourths were the property of the bankrupts; and then, for the purpose of carrying on the mines, the lord made new setts, which were accretions to the bankrupts' shares; and, in my opinion, the estate of the bankrupts is as much entitled to the benefit of those new setts as they are to the benefit of any new machinery which the adventurers may have thought fit to use in working the mines.

[74] Declare that the Defendant is a trustee of four of the eleven shares of the

(1) The answer did not state in express terms that the Defendant adopted Grylls's contract, as far as his four shares were concerned: it admitted, however, towards the end of it, that the Defendant did, in the manner and under the circumstances therein-before stated, become the purchaser of four of the eleven 54th shares, *by the means of Grylls.*

mines called the Wheal Vor Consolidated Mines (1) in the pleadings mentioned for the Plaintiff; and that the Plaintiff is entitled to the profits of such four shares from the month of June 1820: order the Defendant to transfer such four shares to the Plaintiff: refer it to the Master to take an account of the profits of the four shares from the month of June 1820; and, in taking such account, *the Master is to allow to the Defendant the sum of £1333, 6s. 8d. paid by him to H. M. Grylls in the pleadings mentioned*: and, for the better taking the said accounts, the parties are to produce before the Master, upon oath, all books, &c., and are to be examined on interrogatories as the Master shall direct, who, in taking the accounts, is to make, unto the parties, all just allowances: order the costs of the suit up to and including the hearing, to be taxed *and paid by the Defendant*.

[75] SPRY v. BROMFIELD. March 12, 1841.

Case sent to Law. Order.

Form of order where a case has been set to a Court of law on the argument of a demurrer, and, on the return of the certificate, the case is sent to another Court of law.

The question in this case arose upon the construction of a will, and was brought before the Court by demurrer. The Court did not decide the question but directed a case to be made for the opinion of the Barons of the Exchequer. On the return of the certificate of the learned Barons the question was again discussed, and the Court directed a case to be stated for the opinion of the Judges of the Queen's Bench. (See *ante*, vol. x. p. 224.) The following is the form of order which Mr. Colville, the registrar, drew up on the occasion:—

“The matter of the demurrer filed to the Plaintiff's bill coming on to be argued in this Court, on the 12th of February 1839, in the presence of counsel, &c., on debate of the matter, &c., this Court did order that a case should be made for the opinion of the Judges of Her Majesty's Court of Exchequer, and that the question should be, ‘what estate,’ &c.; and it was ordered that it should be referred to the Master of this Court in rotation to settle such case if the parties differed about the same; and it was ordered that the Judges of the said Court should be attended with such case: and it was ordered that the demurrer should stand over until after the Judges of the said Court should have given their certificate; and the parties were to be at liberty to apply, &c.; that, in pursuance of the said order, a case was made for the opinion of the said Judges of the said Court of Exchequer, who were attended thereon, and, [76] by their certificate, dated the 30th of January last, they certified as follows (that is to say):—‘We have heard,’ &c.: and the matter of the said demurrer coming on this present day to be again argued before this Court, on the said Judges' certificate, in the presence of counsel, &c., upon debate of the matter and hearing the said order and the said certificate read, and what was alleged by the counsel on both sides, this Court doth order that a case be made for the opinion of the Judges of Her Majesty's Court of Queen's Bench, and that the question be: ‘What estate,’ &c.; and it is ordered that it be referred to the Master, to whom the former case was referred, to settle such further case in case the parties differ about the same: and it is ordered that the said Judges of the said Court of Queen's Bench be attended with such case; and it is ordered that the said demurrer do stand over until the Judges of the said Court shall have made their certificate; and any of the parties are to be at liberty to apply,” &c.

(1) This was the name given to the mines after the new setts had been made,

[77] THE ATTORNEY-GENERAL, at the relation of HENRY JACKSON and THOMAS STRINGER, *Informant*; and THE MASTER, WARDENS AND COMMONALTY OF THE MYSTERY OF CORDWAINERS, LONDON, *Plaintiffs*, v. JOHN SOUTHGATE AND OTHERS, *Defendants*. March 12, 1841.

[S. C. 10 L. J. Ch. 241, and, on appeal, 12 L. J. Ch. 148.]

Will. Construction. Administration. Debts. Legacies.

Testator gave all his real, leasehold and personal property to trustees upon the trusts after-mentioned; and, to effect those trusts, he directed them to sell all his property in order to form a fund to pay his debts and legacies, and then to dispose of the residue as after directed. The testator next gave several legacies, and then gave the residue of his property remaining in the hands of his trustees to trustees for a charity. The Vice-Chancellor held that the leasehold and other personal property were alone liable to the payment of the debts and legacies. But the Lord Chancellor, on appeal, differed from His Honor, and held that the debts and legacies were payable out of the mixed fund, composed of the produce of the real as well as the leasehold and other personal estates, in proportion to the relative values of those three estates.

James Milner made his will, dated the 19th of March 1830, part whereof was in the following words:—

“I give, devise and bequeath to Mr. John Banks, Mr. John Southgate, junior, and Mr. William Rowe, my executors hereinafter particularly appointed, all my freehold and leasehold property whatsoever and wheresoever, and all my personal property of whatsoever sort or kind the same or any part thereof may be, to hold the same to them, the said John Banks, John Southgate, junior, and William Rowe, their executors, administrators and assigns, upon trust to and for the ends, intents and purposes of this my will as hereinafter directed; and to effect the said trusts hereinafter willed and directed my said trustees or the survivor of them, or [78] the executors and administrators of such survivor, do and shall, as soon after my decease as may be, make sale and dispose of all my said property either by public sale or private contract as may seem most meet and best, and call in and receive all such debts, and execute all such deeds and conveyances or other assurances in the law, and give such receipts as may, in all and every case, be necessary for the perfecting such sale or sales, and, on receipt of all the monies to arise and be produced by the sale of my whole property, shall deposit the same, in their joint names, in the Bank of England, to form a fund out of which to pay, in the first place, my just debts and expenses and all expenses attendant on this my will, and then to pay over, invest and distribute the residue thereof as hereinafter more particularly described and directed: and, first, relative to my niece, Julia Smith, formerly Julia Travis.” The testator then recited the trusts of a settlement of a sum of £5000, which he had executed on the marriage of his niece, and that a clause had been introduced into it directly contrary to his will, wishes and directions, whereby the £5000, in case of his niece’s death in the lifetime of her husband, was to become the absolute property of her husband, and declared that if his niece or her husband or the trustees of their settlement should, after his decease, make a demand upon his executors and trustees by virtue of the settlement, and should compel payment of the £5000, they and all and every person and persons claiming by or from them or on their behalf, should be for ever debarred from any benefit, claim or demand by, from or out of any part of his real or personal estate, in any manner howsoever, but in case his niece and her husband and the trustees of their settlement should, during his lifetime or after his decease, immediately upon the publication of his will, cancel and [79] destroy the settlement, then he gave, devised and bequeathed £5000 to the trustees of the settlement, to be issuing and payable out of his estate and effects, and the monies to be produced by the sale thereof by his executors as before mentioned, to hold to the trustees of the settlement, in trust for the separate use of his niece for

life, and, in case she should die in the lifetime of her husband leaving a child or children by him, then in trust for such child or children; but in case she should die in her husband's lifetime without leaving any child or children as aforesaid, then he willed and directed that his said trustees should hold the said monies, and pay the interest and dividends thereof to his niece's husband during the husband's life, and that, at his decease, the £5000 should revert to and become part and parcel of his, the testator's, real and personal estate and effects, and should be transferred and transferable as he had thereafter directed and appointed concerning the residue of his property. The testator then gave pecuniary legacies to several of his relations, friends and servants, and directed that none of those legacies should be payable until his executors and trustees should have sufficient money in hand to pay the whole; and he further directed that his trustees and executors should not be liable to pay or make good any more sum or sums of money than might be actually produced by sale of his property, nor be answerable for any more interest or dividends than should respectively actually come to their hands, nor be liable to make good any losses that might happen to the aforesaid trust monies, estate or effects, or the said residue, or in placing out the said trust monies according to the directions of his will: and he further directed that his executors should pay and [80] reimburse themselves, out of his estate and effects, all reasonable costs, charges and expenses for loss of time and trouble in executing his will, and all expenses attendant on the trusts thereof. He then expressed himself as follows:—"And whereas I hope and trust Providence, in His goodness towards me, has blessed me with more than will be necessary to pay the sums hereinbefore bequeathed and given, therefore, from and after every demand on my estate be satisfied, I give, devise and bequeath the residue of my property then remaining in the hands of my said trustees in the Bank of England as aforesaid, unto the Master, Wardens and Court of Assistants of the Cordwainers' Company in Distaff Lane in London for the time being, to hold to them the said master, wardens and court of assistants and their successors for ever, in trust that they, on the receipt of the said residue, invest the same in permanent Government securities, in trust to receive the dividends or interest to become due thereon from time to time, and, after allowing themselves a reasonable remuneration for their trouble, shall, half-yearly, distribute and divide the same amongst so many poor and distressed fathers of families, that each father may not receive more than £20 a year, nor less than £15 a year, during his life." The testator made two codicils, both of them dated the 25th of March 1830, and thereby gave some further pecuniary legacies, and directed that they should be paid by the executors to his will at such time and in such manner as therein directed, but did not alter his will in any other respect.

The testator died on the 28th of March 1830.

The bill was filed to establish the will and carry the trusts of it into execution.

[81] As the testator died seised of real estate and possessed of leasehold and other personal property, the devise and bequest to the Cordwainers' Company was good as to his pure personal estate, but void, under the Statute of Mortmain, as to all the rest of his property.

At the hearing of the cause for further directions,

Mr. Knight Bruce, Mr. Wakefield and Mr. K. Parker, for the company, and Mr. Anderdon and Mr. Piggott, for some of the testator's next of kin, who had been made Defendants, by supplemental bill, as being entitled to the leasehold property, or the produce of it, exempt from the bequest to the company, said that the testator had expressed an intention that his entire property should form one mass, without any distinction as to the liability of the separate parts of it: that the Court, finding such an intention, must give effect to it, and direct the testator's debts and legacies to be paid out of the different descriptions of property in proportion to their relative values or amounts; as was done in *Roberts v. Walker* (1 Russ. & Myl. 752). They referred also to *Williams v. Kershaw* (1 Keen, 274, note), and *Johnson v. Woods* (2 Beav. 409), and *Fourdrin v. Gowley* (3 Myl. & Keen, 383).

Mr. Jacob and Mr. F. J. Hall appeared for the testator's heir, and

Mr. Wigram, Mr. Stinton and Mr. Hallett, for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The only question is whether the testator in this [82] case has expressed an intention that the

general rule of this Court as to the payment of debts and legacies should be altered. I confess that I cannot see anything in this will to prevent the application of the rule in the usual way.

In *Roberts v. Walker* Sir John Leach, M.R., says: "When a testator creates, from real estate and personal estate, a mixed and general fund, and directs the whole of that fund to be applied for certain stated purposes, he does, in effect, direct that the real and personal estates which have been converted into that fund shall answer the stated purposes and every of them, *pro rata*, according to their respective values." That, in my opinion, is quite a gratuitous proposition; and I consider that Sir John Leach's decision in *Roberts v. Walker* is contrary to the ordinary rule of this Court as observed in the administration of assets.

Declare that the costs, charges and expenses already taxed and paid, and those directed to be taxed and paid as after mentioned, are charged upon the testator's real estate and his personal estate savouring of realty, and his pure personal estate, and are payable thereout in proportion to the relative values of those estates: declare that the testator's debts, funeral expenses and legacies ought to be paid out of the testator's personal estate savouring of realty and out of his pure personal estate, in proportion to the relative values of those estates: declare that the testator's heir at law is entitled to the produce of the sale of the testator's real estates, subject to the charges before declared and to the expenses of the sale thereof: declare that the residuary bequest is void to the extent of that proportion of the residuary estate which consisted of personal estate [83] savouring of realty: declare that the testator's next of kin living at his death are entitled to such last-mentioned personal estate; and declare that the Plaintiffs, as trustees of the charity, are entitled to the pure personal estate, subject to the several charges thereon.

The Plaintiffs appealed to the Lord Chancellor from the above decree. The Lord Chancellor differed in opinion from the Vice-Chancellor, and decided that the testator's debts, legacies, &c., ought to be paid out of the mixed fund.

His Lordship's decree, dated the 23d of December 1842, declared that the testator's debts, legacies and funeral expenses, together with the costs, charges and expenses already taxed and paid and thereby directed to be taxed and paid, were a charge upon the testator's real estate and his personal estate savouring of realty and his pure personal estate, and were payable thereout in proportion to the relative values of such estates respectively; that the testator's heir was entitled to the produce of the sale of the real estates subject to the funeral expenses, debts, legacies and other charges before declared and also to the expense of the sale of the real estates; that the residuary bequest was void to the extent of that portion of the residuary estate which consisted of personal estate savouring of realty, and that the testator's next of kin living at his death were entitled to the personal estate savouring of realty subject to the funeral expenses, debts and legacies and the other charges affecting the same, as before declared.

[84] THE ATTORNEY-GENERAL *v.* GLYN. March 5, 6, 20, 23, 1841.

[See *Governors of Magdalen Hospital v. Knotts*, 1878-79, 8 Ch. D. 725; 4 App. Cas. 331.]

Charity. Mortmain. Stat. 9 Geo. 2, c. 36. Lease.

A school was founded for the education of poor children within a certain district. The district was converted into a dock under a local Act of Parliament, so that the objects of the charity failed. The Court referred it to the Master to approve of a scheme for the application of the funds of the charity, *cy pres*.

A lease of land already in mortmain made to a charity does not require enrolment under 9 Geo. 4, c. 36.

In 1705 the Master, Brethren and Sisters of St. Katharine's Hospital, near the Tower of London, established a school for the education of poor children inhabiting

the precinct of St. Katharine, which was their property; and, in April 1812, they granted a lease of two houses in the precinct to trustees for the benefit of the school. The lease was granted for 40 years,⁽¹⁾ and at a rent of £2, 14s. per annum. The St. Katharine's Dock Company, under their Act of Parliament, purchased the precinct, including the site of the hospital, and converted it into a dock; the consequence of which was that there were no children to attend the school. The hospital, however, was rebuilt on a new site, provided for the purpose in the Regent's Park.

The questions in the cause were: First, whether the lease was not void under the Statute of Mortmain, 9 Geo. 2, c. 36, for want of enrolment.

Second, whether it was not void under the statutes 13 Eliz. c. 10, s. 3; 14 Eliz. c. 11, s. 19 and c. 14, relating to leases granted by ecclesiastical corporations, masters of hospitals, &c.

[85] Third, whether a reference ought not to be directed to one of the Masters of the Court to approve of a scheme for applying the sum for which the lease of the houses had been sold to charitable purposes *cy pres*.

Mr. Romilly and Mr. Goodeve, for the relators, said, first, that the houses were in mortmain at and long before the time when the lease of them was granted; and, therefore, the lease was not within the Statute of Mortmain. *Walker v. Richardson* (2 Mees. & Wels. 882), *De Costa v. De Paz* (Amb. 228; and 2 Swans. 487, note).

Secondly, that the 14 Eliz. c. 11 was the statute under which the lease had been granted, and that the terms of the lease were in conformity to the 19th section of that statute.

Thirdly, that, where a trust for a charity had once attached, this Court would not allow it to fail for want of objects, but would provide for the application of the fund *cy pres*.

Mr. Knight Bruce and Mr. Craig, for the Dock Company, contended: First, that the lease having been granted for the benefit of a charity, it was void for want of enrolment.

Secondly, that the yearly accustomed rent was not reserved by the lease, as required by the statutes of Eliz., or, at all events, there was nothing to shew that the rent reserved was the accustomed yearly rent.

Thirdly, that the lease having been granted, not for general but for a particular charity, which had failed, [86] the Court would not apply the funds to any other charity. *Cherry v. Mott* (1 Myl. & Cr. 123).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Here there was a charity established (which has existed more than a century) for the benefit of the poor children of the precinct. Now, the mere accidental fact that the Legislature has interfered and has destroyed, in effect, that precinct, does not appear to me to have destroyed the original charity. I apprehend that the Court finding an existing charity will see whether there cannot be an application of the funds. Because, all that has been done is this; the old site of the hospital has been taken away and a new site has been given. What the particular provisions of the Act of Parliament are respecting the site of the new hospital I do not know, but the hospital is not destroyed; it continues, and it appears to me that, as a part of the appendage to the hospital, that very charity itself does continue. It repeatedly happens that, where a charity has been instituted and has gone on for a century or more, and, for some reason or other, the charity cannot go on as it did, this Court will direct the Master to approve of a scheme; and, this being a case in which I must consider that the charity is existing and has not reverted, I must adopt the same course; more especially as, for anything that has been shewn to me to the contrary, there may be persons who are fit objects of the charity within the precincts of the site of the new hospital.

Next, with respect to the lease. Supposing it is good, what is it, in effect, but a donation by the hospital to the [87] charity? And supposing the lease is good, it is

(1) Under 14 Eliz. c. 11, ss. 17 and 19, leases for forty years of houses belonging to any ecclesiastical persons or bodies politic or corporate, situate in any city, borough, town corporate or market town, or the suburbs thereof, are good. See *Pivian v. Blomberg*, 3 Bing. N. C. 311; and *ante*, vol. vii. p. 548.

just the same as if money had been given. I see no difference ; but whether it is good or not in law is another matter.

All that the information and bill states respecting the lease is that demises were made from time to time by the chapter of the hospital on the payment of fines at the pleasure of the chapter for the time being. The answer makes no objection at all to the lease ; but an objection is made at the Bar in respect of the language used in the information and bill. Now the information and bill might have expressly averred that the lease was made at the accustomed yearly rent or more ; but it has not. Therefore, before I make any decree which will give to the informants and Plaintiffs the benefit of the lease, I must have it clearly made out that the lease is good under the statutes of Elizabeth, a matter which at present is left in uncertainty ; and for that purpose it will be necessary to direct an inquiry before the Master, which will have the effect of eliciting the fact whether the lease is a good lease within those statutes.

I have always understood that it is quite a settled point that a lease that is made by an eleemosynary corporation, though not ecclesiastical, is within the operation of the statutes ; and, therefore, the only question will be whether this is a lease which, by reason of its being a lease of tenements, within the suburbs of the city, for a period not exceeding 40 years, is a good lease or not in respect of the rent reserved.

With respect to the question whether the lease is void because it was not enrolled within six calendar months after the execution thereof, which is an objec-[88]-tion that arises on the statute of the 9th Geo. 2, my opinion is that I ought not to send any case to a Court of law on that point : because the precise point was determined in *Walker v. Richardson* : and I must say that it is my opinion that the question was rightly decided in that case. It is plain that what was meant by the statute was to repress the testamentary disposition of land to charitable purposes, and also to enforce the statutes of mortmain. But, if the land be already in mortmain, it is altogether out of the consideration of the Legislature.

The question then having been solemnly decided in a Court of law, and my opinion upon it being in accordance with that decision, I ought not to direct it to be again discussed.

[88] RICKETT v. GUILLEMARD. *March 27, 1841.*

[S. C. 5 Jur. 818.]

Will. Construction. Survivorship.

Testator gave £800 to the four children of H. R. to be divided into equal shares, and paid to them at 21, and the interest of their shares to be paid to their parents in the meantime : and in case of either of the legatees dying under 21, then his, her or their shares were to be equally divided amongst the survivors. Two of the children died under 21 in the testator's lifetime. Held, that the two survivors were entitled to the *original* share only of the child who died last.

A testator gave to Mary Rickett, H. Rickett, T. Rickett, and J. Rickett, the sons and daughters of Henry Rickett, £800 stock to be divided into equal shares and to be paid to them as they should respectively arrive at the age of 21 years ; and the dividends and interest of their respective shares to be paid to their parents in the meantime : and in case of either of the [89] before-mentioned legatees dying before attaining the age of 21 years, then he directed that his, her or their shares should be equally divided among the survivors. Two of the children died under 21 in the testator's lifetime. The question was whether the two surviving children, who were the Plaintiffs in the cause, were entitled to that portion of the share of the child who died first, which survived to the child who died last.

Mr. Simpkinton and Mr. Anderdon, for the Plaintiffs, cited *Walker v. Main* (1 Jac. & Walk. 1) ; *Willing v. Baine* (3 P. W. 113) ; *Humphreys v. Howes* (1 Russ. & Myl. 639) ; *Mackinnon v. Peach* (2 Keen, 555).

Mr. Jacob appeared for the Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The clause in the will which has been relied on by the counsel for the Plaintiffs is not sufficiently extensive to give over shares accruing by survivorship.

On the death of the child who died last, his *original share* went over to the two surviving children ; but his one-third of the share of the child who died first lapsed.

[90] OTTWAY v. WING.(1) WING v. OTTWAY. March 30, 1841.

[See *In re Turnbull* [1900], 1 Ch. 186.]

Practice. Feme Coverte. Process. Attachment.

An attachment ordered to be issued against a married woman for disobeying an order in a suit which she had instituted by her next friend.

The Plaintiff in the original cause was a married woman, who sued by her next friend ; and the bill was, in effect, for an injunction to restrain Wing from levying execution on her separate estate for a debt due by her before marriage. The cross-cause was to enforce Wing's equitable charge on the separate estate, and for an account and a sale.

The parties compromised the matter ; and an order was made, whereby it was declared that Wing had an equitable charge on Mrs. Ottway's separate estate, for the amount of his demand therein specified ; and it was ordered that the Plaintiff, Caroline Ottway should, within four days after service of a writ of execution of the order, pay to Wing the sum of £300, part of his said demand.

A writ of execution was served and the money not paid. The usual affidavit was made ; but the registrar objected to the issuing of an attachment without the express direction of the Court.

Mr. Coleridge mentioned the case to the Vice-Chancellor, and stated that Mrs. Ottway was here in the character of a *feme sole*, and that the order was made upon her as Plaintiff. He referred to *Bunyan v. Mor-*[91]-*timer* (Madd. & Geld. 278), where it was clear the order would have been made if the married woman, a Defendant, had been previously directed to answer separately. In this case Mrs. Ottway, by her own act, had placed herself under the liabilities of a *feme sole*. He also mentioned *Bell v. Hyde* (Prec. in Chanc. 328).

THE VICE-CHANCELLOR [Sir L. Shadwell], after conferring with the registrar, observed that Mrs. Ottway having, as Plaintiff, constituted herself a single woman for the purpose of the suit, she must take the consequences of disobeying the orders of the Court made upon her as Plaintiff ; and His Honor gave leave to issue the attachment against her as a *feme sole*.

[91] STOKES v. WILSON. March 31, 1841.

Practice. Injunction.

The Court refused to extend the common injunction to stay trial, where the Plaintiff in equity was served with notice of trial on the 28th of January, but did not file his bill till the 16th of March, and made the motion on the commission day of the Assizes at which the action was to be tried.

Motion to extend the common injunction to stay trial.

The action was commenced in August, and notice of trial was served on the 28th of January. On the 16th of March the bill was filed ; and Stokes, having obtained

(1) *Ex relatione* Mr. Coleridge.

the common injunction, moved, on this day (which was the commission day at Chester where the action was to be tried), to extend it to stay trial.

Mr. Knight Bruce, in support of the motion.

[92] Mr. Wigram and Mr. Koe opposed it on the ground that the Defendant had been guilty of *laches* in not filing his bill earlier than the 16th of March, although he had been served with notice of trial so long ago as the 28th of January. They added that the day on which the motion was made was the commission day at Chester, and that the action was expected to be tried on the day following. *Blacoe v. Wilkinson* (13 Ves. 454); *Field v. Beaumont* (3 Madd. 102; and 1 Swans. 204); *Thorpe v. Hughes* (3 Myl. & Cr. 742).

Mr. Knight Bruce, in reply, said that, if there had been any delay, his client was willing to give ample security for the costs which the Plaintiff in the action might have incurred in consequence of it.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that this was a case of greater negligence than *Thorpe v. Hughes*, and refused to grant the application even on the terms of Stokes giving security for costs.

Motion refused with costs.

[93] JACKSON v. MARJORIBANKS. April 2, 1841.

[S. C. 5 Jur. 885.]

Will. Construction. Remoteness.

Testator gave his real and personal estates to trustees, and directed them to invest his personal estate in the purchase of land, and to pay the rents, subject to certain annuities, to his son, for life; and, in case his son should die, leaving behind him no legitimate issue, then he directed the trustees to pay the rents to his, the testator's, widow for life; but in case his son should die leaving behind him legitimate issue, then, at the end of six months after the eldest male child *then living* of his son should have attained *twenty-five*, or, in default of male issue, the eldest female child then living of his son should have attained twenty-one, to convey all the estates to the eldest male child, or, in default of male issue, to the eldest female child, and *to his or her heirs of his or her body lawfully begotten, absolutely for ever*. The testator then (in case his son should die during the minority of such eldest male or female child) provided for their maintenance out of the rents until he or she should attain the respective ages before mentioned, and then declared that, in case his son should not die during such minority, his estates should continue on the trusts aforesaid until six months after his son's death, and then pass to his son's eldest male or female child in manner before expressed; and in case his son should die leaving no legitimate issue, then that the trustees should, after the death of the testator's wife, convey the estates to certain other persons. The testator's son married, and had a son born after the testator's death. The Court held the trust for the grandson not to be void for remoteness; and the grandson having survived his father and attained twenty-one (but being under twenty-five), and all the annuitants being dead, ordered the estates to be conveyed to him.

William Collins Jackson, by his will, dated the 15th of November 1808, gave, devised and bequeathed unto and to the use of trustees, their heirs, executors, administrators and assigns respectively, all his freehold messuages, lands, tenements and hereditaments whereof he was seised in fee, as well as all those his copyhold lands, messuages, tenements and hereditaments, which he had surrendered to the use of his will, situate in the parish of Langley Marsh, in the county of Buckingham, upon the trusts thereafter declared concerning the same; and he gave and bequeathed all his leasehold estates, as well for lives as [94] for years, together with all his personal estate, to the same trustees, their heirs, executors and administrators respectively, according to the nature of the several estates, upon the trusts therein-after declared concerning the same: (that is to say) upon trust, within 10 days after-

his decease, to pay £800 to his wife, Jane Jackson, and to surrender to her disposal certain goods and chattels therein specified; and upon further trust to sell and dispose of, within one year after his decease or as soon after as possible, all his landed estates (except the estate situate in the parish of Langley Marsh), and all his property in the funds, East India stock, and bonds and mortgages, together with all his personal estate, save as thereinbefore excepted, and to apply the produce in the purchase of freehold lands on which there should be no capital mansion, in one of the counties of Buckingham, Hertford, Berks, Surrey, Kent or Middlesex, upon trust, out of the rents, interests, rights and profits arising from the freehold lands so directed to be purchased, and also out of the rents, interests, rights, issues and profits arising and accruing from the estate in the parish of Langley Marsh, to pay, in the first instance, an annuity of £800 to his wife, Jane Jackson, during her life; and upon further trust to pay, in the second instance, one other annuity of £100 to his mother, Eliza Jackson, during her life; and upon further trust to pay, in the third instance, one other annuity of £500 to his son, William Collins Burke Jackson, during his life; and, if it should happen that the rents, issues, interests, rights, profits and advantages of all his estates should not be equal, with the aforesaid incumbrances thereon, to the full payment of the said annuity of £500 to his son, then he directed that the surplus of the said rents, issues, &c., after the payment of the annuities to his wife and mother, and [95] after all legal deductions, should be delivered over to his son, William C. B. Jackson, for his own use and benefit during his life: and upon further trust, in the event of either or both of the annuities of £800 and £100 falling in by the death of the annuitants, then he directed that the amount of the annuity so falling in should be transferred to his son, William C. B. Jackson, for his own use and benefit during his life, in addition to the annuity of £500: and upon further trust that, in case his son, William C. B. Jackson, should depart this life leaving behind him no legitimate issue, then that the trustees should pay the whole of the said rents, issues and profits to his wife, Jane Jackson, during her life, except the annuity of £100 to his mother, Eliza Jackson: and upon further trust that, in case his son, William C. B. Jackson, should depart this life leaving behind him legitimate issue, then that the trustees should, *at the end of six months after the eldest male child then living of the body lawfully begotten of his said son, William C. B. Jackson, should have attained the age of 25 years, or, in default of male issue, the eldest female child then living of the body lawfully begotten of his said son, W. C. B. Jackson, should have attained the full age of 21 years, convey, assign and transfer, in such manner as counsel should advise, all his said estates, together with all rents, interests, rights, profits and advantages accruing or that might have accrued therefrom, unto the said eldest male child, or, in default of male issue, unto the said eldest female child, and to his or her heirs of his or her body lawfully begotten absolutely for ever, subject to and chargeable nevertheless with the payment of the annuities of £800 and £100 as aforesaid: and upon further trust that, in case his said son W. C. B. Jackson should depart this life during the minority of the said eldest male child or the said eldest [96] female child, as the case might be, then his will was that, from and after the decease of his said son, the annual sum of £500 should be appropriated for the maintenance and education of such eldest male child or of such female child, as the case might be, until he or she should have attained their respective ages already expressed and declared; provided, nevertheless, that the appropriation of such annual sum should not interfere with the two annuities of £800 and £100: and upon this further trust that, in case his son should not depart this life during the minority of the said eldest male child or the said eldest female child, as the case might be, then that all his said estates should continue on the trusts aforesaid until six months after the decease of his said son, William C. B. Jackson, and, at the expiration of that period, pass to the said eldest male child or to the said eldest female child, as the case might be, in the way and manner already expressed and declared; and upon this further trust that, in case his said son William C. B. Jackson should depart this life leaving behind him no legitimate issue, then, at the expiration of six months after the decease of his wife, Jane Jackson, the trustees should convey, assign and transfer, by such advice as aforesaid (there being at the time no lineal descendant of his, the testator's, body lawfully begotten), all his said estates, together with all rents, issues, interest, rights, profits and advantages accruing*

or that might have accrued therefrom, unto certain other persons in manner therein mentioned : and the testator appointed the trustees his executors.

The testator died in 1814 leaving his son named in his will, his only child, his heir at law and customary heir, and his mother and wife him surviving. The testator's son married in December 1815, and had issue a [97] daughter and a son : the former was born on the 22d of October 1816, and the latter, who was the Plaintiff in the cause, was born on the 14th of December 1817. The testator's mother died a few years after the testator. His son died in March 1828. The Plaintiff attained 21 on the 13th of December 1838 : and on the 30th of the same month the testator's widow died.

On the 8th of March 1839 the bill was filed against the trustees of the will, praying that it might be declared that the Plaintiff *was absolutely entitled* to the real estates devised by the will, and also to the estates which the trustees had purchased, with the testator's personal estate, since his death, in pursuance of his will ; and that the trustees might convey and surrender the estates, *and the fee-simple* and inheritance thereof, to the Plaintiff *absolutely*.

The cause was heard on the 29th of May 1840, and a decree was then made according to the prayer of the bill.

The trustees afterwards presented a petition to have the cause reheard as to that part of the decree which declared that the Plaintiff was entitled to the real estates which had been purchased, with the testator's personal estate, since his decease, in pursuance of the trusts of his will, (1) and which directed the Petitioners to convey and surrender those estates to the Plaintiff and his heirs ; the Petitioners being advised that, by reason of *the remoteness and invalidity of the devise to the* [98] *Plaintiff*, the purchased estates resulted to the testator's next of kin.

The cause now came on to be reheard.

Mr. Jacob and Mr. Shadwell, for the Plaintiff, said that the devise was not void for remoteness, but was good on the authority of *Boraston's case* (3 Rep. 19) ; which had been followed in *Bromfield v. Crowder* (1 New R. 313) ; *Doe v. Nowell* (1 M. & S. 327) ; *Phipps v. Williams* (ante, vol. v. p. 44) ; *Snow v. Poulden* (1 Keen, 186) ; *Doe v. Ward* (9 Adol. & Ell. 582) ; *Edwards v. Hammond* (3 Levinz, 132 ; 2 Show. 398) ; *Manfield v. Dugard* (1 Eq. Abr. 195) ; *Doe v. Lea* (3 T. R. 41) ; *Doe v. Moore* (14 East, 601).

Mr. K. Bruce and Mr. W. M. James, for the Defendants, contended that the trust in the will of which the Plaintiff claimed the benefit was void for remoteness ; as it was not intended to be performed until after the eldest male child of W. C. B. Jackson, *who should be living at his decease*, should have attained 25, which age the Plaintiff had not even yet attained. *Cogan v. Stevens* (Lewin on Trustees, Appendix, 698) ; *Ackers v. Phipps* (9 Bli. 430 ; 3 Cl. & Fin. 665) : that, at all events, the question was so doubtful that it ought not to be decided without the testator's next of kin being brought before the Court.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I admit, as was said by Lord Brougham in *Phipps v. Williams*, that, when land and personalty are devised [99] together with a direction to invest the personalty in the purchase of land, the rule which governs the devise of the land must be applicable also to the personalty which is to be invested in the purchase of land. But as I think that, in this case, any claim that might be made by the next of kin could not be sustained, it would be unjust to the Plaintiff if I were to direct the cause to stand over with a view to the next of kin being brought before the Court, in order that they might have a decision pronounced against them. I admit, however, that the trustees were quite justified in submitting to the Court the question which they have raised by the petition of rehearing.

This case is precisely within the principle of *Boraston's case* : and though, on first reading that case, one is astonished at the decision, still, as, it has been followed in

(1) It was through inadvertence that the decree, as drawn up, directed the estates to be conveyed and surrendered to the Plaintiff in fee and not in tail. The Plaintiff being the testator's heir, the estates of which the testator *was seised at his death* would have descended to the Plaintiff if the devise had been void : consequently the petition was confined to the *purchased* estates.

Bromfield v. Crowder and in the other cases cited for the Plaintiff, my opinion is that I am not at liberty to escape from it. The decree, therefore, must be affirmed.

[100] THOMPSON v. SELBY.(1) April 22, 1841.

Practice. Motion.

After answer, the bill was amended and a plea was put in to the amended bill. Held, that the original bill having been answered, the pendency of the plea to the amended bill did not prevent the hearing of a motion for a receiver.

The original bill was amended after it had been answered ; and a plea was put in to the amended bill.

Mr. Lovat and Mr. Coleridge, for the Plaintiff, moved for a receiver.

Mr. Knight Bruce and Mr. Hare, for the Defendant, said that the pendency of the plea prevented the motion being heard : 2 Dan. Prac. 219.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As the original bill has been answered, I think that I am at liberty to hear the motion notwithstanding there is a plea pending to the amended bill.

[101] PETERS v. DIPPLE. April 23, 1841.

Will. Construction.

Testatrix gave an annuity of £50 to her son-in-law, for his life, provided he remained unmarried, but if he should marry, the annuity to cease ; and, after his death or second marriage, whichever should first happen, she gave £1000 to be equally divided between her brother and sisters ; and, if they should not all be then living, she gave the share of him, her or them so dying to be equally divided between them, her surviving brother and sisters. The testatrix's brother and sisters all died in her son-in-law's lifetime, and he died unmarried. Held that the brother and sisters took a vested interest in the £1000 as tenants in common.

Ann Parr, by her will, gave an annuity of £50 to her son-in-law, Robert Green, to be paid to him during his life, provided he should so long remain single and unmarried ; but, if he should thereafter marry, then she directed that the annuity should cease and be no longer paid from the time of such marriage : and from and after the decease of Robert Green or his marriage, whichever should first happen, she gave the sum of £1000 to be equally divided between her brother and sisters ; and, if they should not all be then living, she gave and bequeathed the share of him, her or them so dying to be equally divided between them, her surviving brother and sisters : and she gave the residue of her personal estate to her brother-in-law, Matthew Peters.

Matthew Peters and Robert Green survived the testatrix : and she left a brother and four sisters living at her death ; but they all died in Robert Green's lifetime. He died in August 1834 without having married after the date of the will.

The bill was filed by some of the residuary legatees under the will of Matthew Peters (who also was dead) against the representatives of the testatrix's brother and sisters and other parties, alleging that the testatrix's brother and sisters having died before the death or marriage of Robert Green, the legacy of £1000 lapsed and became part of the testatrix's residuary estate ; and praying that a sum of stock in which the £1000 had been invested might be transferred to the Plaintiffs as repre-[102]-senting the residuary legatees under Matthew Peters's will.

The cause was heard as a short cause.

Mr. Knight Bruce, Mr. James Parker and Mr. Craig, for the Plaintiffs, contended

(1) *Ex relatione.*

that the bequest on which the question raised by the bill arose was not a gift of the interest of a sum of money to one for life, with a bequest of the principal to others on his death; but that it was a gift of an annuity followed by a bequest of a sum in gross, which was contingent on the legatees being alive at the marriage or death of the annuitant. *Harrison v. Foreman* (5 Ves. 207); *Billingsley v. Wills* (3 Atk. 219); *Pope v. Whitcombe* (3 Russ. 124); *Smell v. Dee* (2 Salk. 415); *Norris v. Huthwaite* (1 Bro. C. C. 182, note).

Mr. Simons, Mr. Paynter and Mr. E. Montagn appeared for the Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that the gift in question was, in effect, a gift in remainder, and declared that the testatrix's brother and sisters took vested interests in the £1000 as tenants in common, equally.

[103] LLOYD v. WAIT.(1) April 23, 1841.

Practice. Production of Deed.

A., claiming to be heir to a mortgagor, filed a bill to redeem. The answer denied that he was heir. A motion by him for production of the mortgage deed was refused, because he had not established his title.

The bill was filed to redeem a mortgage by a person claiming to be heir *ex parte paternâ* to the mortgagor. The Defendants were the heir *ex parte paternâ* and the administrator of the mortgagor; and they had redeemed the mortgage and taken an assignment of it to themselves.

The answer denied that the Plaintiff sustained the character in which he sued.

Mr. Shebbeare, for the Plaintiff, moved that the Defendants might be ordered to produce the mortgage deed.

Mr. Roupell, for the Defendants, submitted that, as the title of the Plaintiff was denied, he must prove it before he could have a right to see the deed.

Mr. Shebbeare, in reply, cited *Hue v. Richards* (2 Beav. 305).

THE VICE-CHANCELLOR [Sir L. Shadwell]. As the title of the Plaintiff is denied, he must establish it before he can be entitled to see the deed: that is, he must first shew that he has an interest in the deed.

Motion refused with costs.

[104] *In re* LINGEN. May 1, 1841.

Practice. Stat. 6 Anne, c. 18. Cestui Que Vie.

Course of proceeding under 6 Anne, c. 18, to compel a lessee *pur autre vie*, to produce the *cestui que vie* to the reversioner.

On the 22d of December 1840 an order was obtained, under 6th Anne, c. 18, s. 1, (2) by a person [105] entitled to certain property, in reversion expectant on the

(1) *Ex relatione.*

(2) This Act is intituled: "An Act for the more effectual Discovery of the Death of Persons pretended to be Alive to the Prejudice of those who claim Estates after their Deaths." It enacts, "that any person or persons who hath or shall have any claim or demand in or to any remainder, reversion or expectancy, in or to any estate, after the death of any person within age, married woman or any other person whatsoever, upon affidavit made in the High Court of Chancery by the persons so claiming such estate of his or her title, and that he or she hath cause to believe that such minor, married woman or other person is dead, and that his or her death is concealed by such guardian, trustee, husband, or any other person, shall and may, once a year, if the person aggrieved shall think fit, move the Lord Chancellor, Keeper or Commissioners for the custody of the Great Seal of Great Britain for the time being, to order,

determination of a lease thereof *pur autre vie*, for the production of the *cestui que vie* by the lessee, to two persons named in the order at the church-door of the parish on the 8th of January 1841, between the hours of 10 and 12 in the forenoon.

The lessee was served with the order, but did not produce the *cestui que vie*; as appeared by affidavit and by the return made by the two persons to whom the *cestui que vie* was ordered to be produced. Whereupon another order was obtained, commanding the lessee to produce the *cestui que vie*, at the Bar of the Court at the sitting of the Court at 10 o'clock in the morning of the 1st of May 1841. The lessee having disobeyed this order as well as the former one,

Mr. Blunt, by whom the orders had been obtained, said that the registrar doubted whether the Act did not [106] require that some return to the last order should be made into the Petty Bag Office, before an order entitling the reversioner to enter on the demised premises could be drawn up.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I apprehend that all that is necessary is that the registrar should insert a minute in the book of proceedings of this Court that, on this day, at the sitting of the Court at 10 o'clock in the morning, no person represented to be the *cestui que vie* was produced or appeared.

[106] *Ex parte SEIDLER.* May 5, 1841.

[Questioned, *In re Home Assurance Association*, 1871, L. R. 12 Eq. 113.]

Practice. Costs. Petition.

If a petition is presented under an Act of Parliament by a person who is out of the jurisdiction, the respondent may require security to be given for costs, notwithstanding he has answered the affidavits in support of the petition.

This was a petition presented under an Act of Parliament, authorizing the Court to make an order on petition in a summary way.

The Petitioner being out of the jurisdiction of the Court, and the respondent having answered the affidavits in support of the petition, the question was whether he had thereby lost his right to require the Petitioner to give security for costs.

and they are hereby authorized and required to order, such guardian, trustee, husband or other person, concealing or suspected to conceal such person, at such time and place as the said Court shall direct, on personal or other due service of such order, to produce and shew to such person and persons (not exceeding two) as shall in such order be named by the party or parties prosecuting such order, such minor, married woman, or other persons aforesaid; and if such guardian, trustee, husband or such other person, as aforesaid, shall refuse or neglect to produce or shew such infant, married woman, or such other person, on whose life any such estate doth depend, according to the directions of the said order, that then the Court of Chancery is hereby authorized and required to order such guardian, trustee, husband or other person to produce such minor, married woman, or other person concealed, in the said Court of Chancery or otherwise before commissioners to be appointed by the said Court, at such time and place as the Court shall direct, two of which commissioners shall be nominated by the party or parties prosecuting in such order at his, her, or their costs and charges; and in case such guardian, trustee, husband or other person shall refuse or neglect to produce such infant, married woman or other person, so concealed in the Court of Chancery, or before such commissioners, whereof return shall be made by such commissioners, and that return filed in the Petty Bag Office, in either or any of the said cases, the said minor, married woman or such other person so concealed, shall be taken to be dead, and it shall be lawful for any person claiming any right, title, or interest, in remainder or reversion or otherwise, after the death of such infant, married woman, or such persons so concealed as aforesaid, to enter upon such lands, tenements and hereditaments, as if such infant, married woman or other person so concealed were actually dead."

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that he had not, but that he might, make the application on the petition coming on to be heard.

[107] WALDO v. WALDO. May 5, 1841.

[S. C. 10 L. J. Ch. 312. See *Phillips v. Barlow*, 1844, 14 Sim. 265; *Seagram v. Knight*, 1867, L. R. 2 Ch. 631; *Lowndes v. Norton*, 1877, 6 Ch. D. 143. Cf. *In re Barrington*, 1886, 33 Ch. D. 523.]

Timber. Tenant for Life and Remainder-man.

Estates were devised to A. in fee, in trust to sell them on B. for life, remainder to C. for life, *without impeachment of waste*, remainder to C.'s first and other sons in tail. Soon after the testator's death, A., with the consent of B. and C., cut and sold some timber on the estates which was going to decay, and invested the proceeds in consols. Afterwards a suit was instituted by C. against A. B. and C.'s infant eldest son, in which the stock was ordered to be transferred into the Court. The Court having ascertained the circumstances under which the timber had been cut, ordered the dividends of the stock to be paid to B. for life; and, afterwards, B. having died, the capital to be transferred to C.

The testatrix in the cause, by her will, dated the 8th of June 1827, devised her manor of Heaver, in Kent, and all other her estates in that county and elsewhere, to S. N. Meredith and his heirs, upon trust, as soon as conveniently might be after her decease, to convey the manor and other estates to the use of the Defendant Jane Waldo, now deceased, for her life (but she not to have any power of cutting down more timber than was merely necessary for repairs), with remainder to the use of trustees to preserve, &c., with remainder to the use of the Plaintiff, Edmund Wakefield Mead Waldo, for life, without impeachment of waste, with remainder to the use of trustees to preserve, &c., with remainder to the Plaintiff's first and other sons, successively in tail, with divers remainders over, with the ultimate reversion or remainder to the testatrix's right heirs.

The testatrix died in December 1829. Shortly after her death, Mr. Meredith, with the consent of Jane Waldo and the Plaintiff, caused some timber on the devised estates, which a surveyor employed by him had marked as being fit and proper to be cut owing to the same having arrived at maturity and being in an incipient state of decay, to be felled and sold, and the proceeds to be invested in the three per cent. consols.

[108] In September 1831 Meredith made a settlement of the estates pursuant to the directions of the will:

By the decree made on the hearing of the cause on the 5th of July 1834, the stock purchased with the timber-money was ordered to be transferred into Court, and the Master was directed to inquire as to the circumstances under which the timber had been cut. The Master reported that the timber was in a decaying state, and was cut under the circumstances above stated; that none of it had been planted for the purpose of, or was calculated to serve for, ornament or shelter to the mansion-house on the estates; and that the timber which remained uncut was amply sufficient for future repairs.

By the decree made on the hearing for further directions, dated the 30th of January 1835, the Defendant, Jane Waldo, was declared entitled to and was ordered to be paid the dividends of the stock, during her life; and, after her death, any person or persons entitled to or interested in the stock were to be at liberty to apply to the Court concerning it, as they should be advised.(1)

Jane Waldo died on the 28th December 1840, having received all the dividends of the stock which became due in her lifetime. The Plaintiff then presented a petition in the cause, praying that the capital of the stock, and a dividend which had accrued

(1) See *ante*, vol. vii. p. 261.

thereon, since Jane Waldo's death, might be transferred and paid to him. The petition now came on to be heard.

[109] Mr. Knight Bruce, Mr. Jacob and Mr. Osborne, in support of the petition. The Court has already decided that, owing to the superintending authority of the trustee, the cutting of the timber was not a wrongful act; and, that being the case, it must be considered, in this Court, as still standing; and the Court will take care that the rights of the Plaintiff, who has now become tenant for life in possession, without impeachment of waste, shall not be prejudiced by an act which it has sanctioned and adopted. If the timber were still standing, the Plaintiff would be entitled to cut and sell it for his own benefit; and, therefore, he is entitled to the sum of stock which now represents the timber. *Lewis Bowles's case* (11 Rep. 79 b.; see 7th Resolution, p. 82 b.); *Pyne v. Dor* (1 T. R. 55); *Wickham v. Wickham* (19 Ves. 419); *Cockerell v. Cholmeley* (1 Russ. & Myl. 418; S. C. 3 Bing. 207, nom. *Cholmeley v. Parton*).

Mr. Girdlestone and Mr. Tennant, for the Defendant Edmund Waldo Mead Waldo, the Plaintiff's eldest son, who was an infant. The act of cutting down the timber was a wrongful act, which instantly enured to the benefit of the party entitled, not to the next estate for life, but to the inheritance; he being the only party entitled to take advantage of the wrongful act.

In *Udal v. Udal* (Ayleyn, 81) it was resolved, "that, if there be tenant for life, the remainder for life, and tenant for life cut down timber trees, he that hath the inheritance [110] may seize them, although he cannot have an action of waste during the life of him in remainder; for the particular tenant hath not the absolute property in the trees, but only a special interest in them so long as they continue annexed to the land. And, therefore, a termor cannot grant away his term excepting the trees, but the exception is void, for that he cannot have a distinct interest in them, but only relative to the land." *Paget's case* is to the same effect. (5 Rep. 76.) In Butler's Notes to Co. Litt. 218 b. the law on the subject is thus laid down: "No person is entitled to an action of waste against a tenant for life, but he who has the immediate estate of inheritance in remainder or reversion expectant upon the estate for life. If, between the estate of the tenant for life who commits waste and the subsequent estate of inheritance there is interposed an estate of freehold to any person *in esse*, then, during the continuance of such interposed estate, the action of waste is suspended; and, if the first tenant for life dies during the continuance of such interposed estate, the action is gone for ever. Yet, if the waste be done by cutting down trees, &c., such remainder-man in fee may seize them, and, if they are taken away or made use of before he seizes them, he may bring an action of trover; for, in the eye of the law, a remainder-man for life has not the property of the thing wasted." In *Robinson v. Litton* (3 Atk. 209) it was laid down by Lord Hardwicke: "That, where there is tenant for life, subject to waste, remainder for life dispensable for waste, remainder in fee, the Court will not suffer an agreement between the two tenants for life to commit waste to take place against the remainder-man before the time comes when the [111] second tenant for life's power commences." *Garth v. Cotton* (3 Atk. 751) is to the like effect, and is precisely this case.

Mr. Briggs appeared for the trustees.

Mr. K. Bruce, in reply. In the cases which were first cited for the infant tenant in tail, it does not appear whether the tenants for life in remainder were impeachable or unimpeachable of waste; and, in the absence of words to the contrary, they must be taken to have been impeachable of waste. The cases cited from Atkyns shew that the Court will not allow the *collusive* cutting of timber between two tenants for life, the one impeachable and the other unimpeachable of waste, to the disherison of the reversioner or remainder-man. In both those cases, however, it is said that the remainder-man for life unimpeachable of waste must wait until his estate comes into possession.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not recollect that this precise point has ever before been brought before the Court.

I remember very well that, when the case of *Tooker v. Annesley* (*ante*, vol. v. p. 235) was brought before me, I felt compelled, by the mode in which Sir E. Sugden argued the case, to look into all the cases on the subject; and they amounted only to

this, that, where this Court does interfere when timber has been cut, it will go on to make an application of the produce of the timber, which constitutes a part of the inheritance, by investing it in the [112] three per cents., and will order the dividends to be paid to the party entitled in possession.

This case must be determined by analogy to what is the law on the subject. The whole law, as far as the tenant for life unimpeachable of waste is concerned, is expressed thus in the 7th resolution in *Lewis Bowles's case* :—

"The clause of *without impeachment of waste* gives a power to the lessee which will produce an interest in him if he executes his power during the privity of his estate." I take this to be a correct statement of the law on this subject.

Where there is an estate settled on one for life unimpeachable for waste, with remainder over, and there is a power of sale to be exercised with the concurrence of the tenant for life, that power is not allowed to be exercised in this manner, namely, by selling the whole estate, and excepting the value of the timber from the whole purchase-money and paying that to the tenant for life. That very case occurred nearly 40 years ago before Sir W. Grant, who held that a tenant for life who had an option of cutting timber could not sell or concur in a sale of the whole estate, and have excepted out of it the value of the timber.(1) That case is only an authority where there is a tenant for life unimpeachable of waste.

Where, by the act of the Court, or the act of a trustee out of Court which the Court has adopted, timber, which is part of the inheritance, has been converted into consols and the Court has dealt with the fund as repre-[113]-senting the inheritance, by giving, in commutation for the rights of the tenant for life impeachable of waste, the interest produced by the investment in consols, I think that, where the estate of the tenant for life has ceased, the Court has only to consider the estate of the person next in succession; and, if he is unimpeachable of waste and asks for the *corpus* of the fund, he asks only for that which he would have been entitled to if he had exercised that power which the law gives him a right to exercise when he comes into possession. In strict analogy to this, when the estate of the person in remainder comes into possession in the shape of an estate for life unimpeachable of waste, the person having that estate is entitled to take that portion of the inheritance which is represented by the proceeds of the timber cut.

[113] SELWAY v. CHAPPELL. May 5, 1841.

Practice. Witness.

After a witness had been examined for the Plaintiff, the Defendant discovered that he was interested in the result of the suit. The Defendant was allowed to issue a new commission for examining the witness and other persons to prove the fact.

The Defendant, after a witness had been examined for the Plaintiff under a commission, discovered that the witness was interested in the result of the suit.

THE VICE-CHANCELLOR, on an application made by Mr. Jacob and Mr. Follett, for the Defendant, and opposed by Mr. James Parker, for the Plaintiff, gave the Defendant liberty to take out a new commission, directed to the old Commissioners, and to exhibit interrogatories for examining or cross-examining the witness as to his interest, and for examining other witnesses to the same point, with liberty to the Plaintiff to cross-examine those witnesses; the costs of the application and of the new commission to be paid by the Defendant.

[114] *Vaughan v. Worrall* (2) was cited in support of the application.

(1) See also *Cockerell v. Cholmeley*, 1 Russ. & Myl. 418.

(2) 2 Madd. 322; and 2 Swans. 395. The incompetency of witnesses on account of interest is now removed by 6 & 7 Viet. c. 85; and by the same Act a Plaintiff in equity is enabled to examine a Defendant as a witness, whether he is a mere formal party or not.

[114] SIR WM. PILKINGTON, Bart., v. BOUGHEY. May 7, 1841.

[S. C. 5 Jur. 1149.]

Mortmain. Charity. Trust. Will. Construction.

Testator, after limiting his Staffordshire estates to his daughter and her sons in strict settlement, recited that he had lately purchased an estate called C. for the purpose of endowing a chapel, but that he had been prevented from carrying his intention into effect; he then devised the C. estate to trustees, in trust to apply the rents upon such trusts and for such purposes as the persons for the time being in possession of his Staffordshire estates should, in their discretion, appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. Held, that both the subject and the object of the trust were clearly pointed out, and that the latter being charitable acts, the trust was void under the Statute of Mortmain.

Thomas Swinnerton, the testator in the cause, by his will, dated the 4th of August 1829, devised his capital mansion-house and estates at Butterson, Staffordshire, to his daughter, Lady Pilkington, the wife of Sir William Pilkington, for life, with remainders to her first and other sons in tail, with remainders to his daughter the Defendant, Mrs. Tynte, and her sons in like manner; and after reciting that he had then lately purchased an estate called Coalmore, situate in the parish of Stoke-upon-Trent, in the county of Stafford, for the purpose of endowing a private chapel, which he intended to build upon some part of his estate, at Butterson, adjoining his house there, but that certain [115] difficulties had arisen which prevented him from carrying his intention into effect; he directed that, in case at the time of his decease such chapel should not be built and endowed (as was the case), then such estate should be and enure, and he thereby gave and devised the same unto and to the use of the Defendants Sir Thomas Boughey and Francis Twemlow, their heirs and assigns, upon trust that they and the survivor of them and the heirs and assigns of such survivor should, from time to time, receive the rents, issues and profits thereof, and apply the same to such uses, upon such trusts and for such ends, intents and purposes as Lady Pilkington, or Mrs. Tynte, or the person or persons for the time being entitled to the immediate freehold in possession of his Staffordshire estates should in her, his or their discretion direct or appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of.

Mr. James, for the Plaintiffs, Sir William and Lady Pilkington, submitted that the language used by the testator was such as to give to Lady Pilkington the beneficial interest in the Coalmore estate, unfettered with any trust for charity or any other purpose; that there was a careful anxiety pervading the clause, which shewed that the testator was aware that, if he imposed any trust for charity, he would be doing a void act; that no objects were pointed out for whose benefit the rents were to be applied, but it was left to Lady Pilkington's uncontrolled discretion to apply them as she might think fit. *Sale v. Moore* (ante, vol. i. p. 534); *Meredith v. [116] Heneage* (ante, vol. i. p. 542); *Gibbs v. Rumsey* (2 V. & B. 294). This last case shews that Lady Pilkington may, if she pleases, appoint the rents to herself.

Mr. Hodgson, Mr. Daniell and Mr. Twemlow appeared for the other parties; but THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The testator recites that he had lately purchased the Coalmore estate for the purpose of endowing a private chapel which he intended to build upon some part of his estate at Butterson in Staffordshire, but that certain difficulties had arisen which prevented him from carrying his intention into effect. He then directs that in case the chapel should not be built and endowed at his death, then the Coalmore estate should be and enure to the use of Sir Thomas Boughey and Francis Twemlow, their heirs and assigns, in trust to apply the rents of that estate to such uses and purposes as Lady Pilkington, or Mrs. Tynte, or the person or persons for the time being entitled to

the freehold in possession of his Staffordshire estates should in her, his or their discretion, direct or appoint; but he trusted that, out of respect to his memory, they would exercise such power in doing such charitable acts as they knew he would most approve of. The testator, therefore, on the face of his will, tells us that he had purchased the Coalmore estate with the intention of endowing a chapel, but that he had been prevented from carrying his intention into effect; and, then he directs the trustees to apply the rents of that estate for such purposes as [117] the persons for the time being in possession of his Staffordshire estates should, in their discretion, think fit; but he trusts that they will exercise the power in doing such charitable acts as they knew he would most approve of. In the first place, therefore, the subject is plainly pointed out, namely, the rents and profits of the estate; and, in the second place, the only thing that you can collect as to his intention with regard to the mode in which the power given to the parties in possession of his Staffordshire estates was to be exercised is that it should be exercised in doing such charitable acts as they knew he would most approve of. It is clear, therefore, that the testator intended the rents to be applied for charitable purposes. Consequently the object, namely, charity, it clearly pointed out, as well as the subject; and the trust is void under the Statute of Mortmain; and the estate will pass to the right heirs of the testator.

[118] SIDNY v. RANGER. May 6, 7, 26, June 10, 1841.

Vendor and Purchaser. Sale under Decree. Solicitor. Fraud.

A party to a suit, who was also a solicitor, and had the conduct of a sale decreed by the Court, purchased at the sale under a feigned name. The Court, after the purchase had been confirmed, ordered the estate to be again offered for sale at the price at which the party had purchased it, and, if there should be no higher bidder, the party to be held to his purchase.

By the decree made in two causes, an estate at Lamberhurst in Kent, called the Cold Harbour estate, was directed to be sold, and Sir W. R. Sidny, who was a Plaintiff in one of the causes and a solicitor, took upon himself the carriage of the decree and the conduct of the sale. The estate was sold by auction in August 1833 for £600; but that sum being considered much below its value, Sir W. R. Sidny caused the biddings to be opened: and the estate was resold in March 1834. At the resale Sir William Robert Sidny purchased the estate for himself, but in the name of John King: and, in March 1838, he obtained an order confirming the purchase, and paid the purchase-money for the estate and for the timber on it into Court in the same name.

The parties to the two suits having discovered that Sidny was the real purchaser at the resale, a petition was presented by the Defendant Ranger, stating, in addition to the circumstances above detailed, that Sidny had cut down and sold some of the timber on the estate, and that the sums which Sidny had paid for the estate and the timber on it were much less than their real values, and praying that the estate with the timber thereon might be resold before the Master; and, in case the same, at such resale, should not produce a sum equal to the purchase-money paid by Sidny, exclusive of the timber, that Sidny might be held to his purchase; and that the costs of such resale and of the present application, and incident thereto and consequent thereon, might be directed to be paid by him: and that, [119] in case he should not be held to his purchase, the aforesaid costs, together with the amount of the timber cut down and sold by Sidny, might be deducted out of his purchase-money and paid into the bank to the credit of the causes, and the residue thereof repaid to Sidny; and that the Master might be directed to appoint another solicitor to conduct the resale.

Sidny made an affidavit in opposition to the petition, contradicting the allegation that he had purchased the estate for less than its value, and stating that his reason for purchasing the estate in a feigned name was that some of the parties to the suits were hostile to him, and he did not wish them to know that he was the purchaser.

Mr. G. Richards and Mr. Stone appeared for the Petitioner, and Mr. Willcock, for

Mrs. Munns, another party, who supported the petition. They cited *Domville v. Berrington* (2 Youn. & Coll. 723); *Ex parte Lacey* (6 Ves. 625); and *Owen v. Foulkes* (*Ibid.* 630, note), as authorising the Court to make an order according to the prayer of the petition.

Mr. Wakefield appeared for Sir W. R. Sidny, and Mr. Knight Bruce and Mr. Jacob, for other parties, who did not object to the purchase. They referred to *Elworthy v. Billing* (*ante*, vol. x. p. 98), and said that the prayer of the petition was inconsistent with itself; as it sought both to repudiate and to adopt the purchase: that, if the [120] purchase was irregular, the Court must set it aside at once, and not contingently.

THE VICE-CHANCELLOR. There is quite enough in this case to bring Sir W. R. Sidny within the principle of those cases which decide that persons standing in the situation of trustees cannot buy for themselves. But, before I finally dispose of the case, I will direct search to be made for the case of *Owen v. Foulkes*, in order that I may ascertain whether it authorises me to make such an order as is prayed by this petition.

June 10. THE VICE-CHANCELLOR [Sir L. Shadwell]. I have seen the case of *Owen v. Foulkes*, and I think that it justifies me in making an order according to the prayer of the petition in this case. Sir W. R. Sidny ought to have obtained the leave of the Court before he bid for the estate.

The biddings must be reopened, and the estate must be again offered for sale. If there is a higher bidder, that person must be the purchaser; but, if not, Sir W. R. Sidny must be held to his bargain. In short, an order must be made similar, as far as is compatible with the circumstances of the case, to the order in *Owen v. Foulkes*. I shall not make any order as to costs until I know the result of the resale.

The following order was drawn up: Order that the Cold Harbour estate in the pleadings mentioned be put up to auction at the sum of £670 (the price at which [121] Sir W. R. Sidny, in the name of John King, was allowed by the order made in these causes, dated the 14th of November 1833, to open the former biddings for the said estate), and be again resold: and it is ordered that the person, if any, that shall be reported as better bidder for the same by the Master's further report, within ten days from the time of such bidding, other than the said Sir William Robert Sidny being so reported, make a deposit after the rate of ten per cent. on his bidding (the amount to be ascertained by the said Master) into the bank, with the privy of the Accountant-General of this Court, to be there placed to the credit of these causes, subject to the further order of this Court. And, upon the new bidder making such deposit by the time aforesaid, it is ordered that the said Sir William Robert Sidny be discharged from his said purchase: and it is ordered that so much of the Bank three per cent. annuities as shall or may be then standing in the name of the Accountant-General of this Court in trust in these causes, as will be sufficient to raise the sums of £1140, 19s.(1) and £163, 10s., the amounts of the purchase-monies paid into the bank to the credit of these causes by the said Sir William Robert Sidny, for the said estate and timber, and also the amount of the costs, charges and expenses paid by him for the opening of the said former biddings for the said estate, and by reason of his having become and being reported purchaser as aforesaid of the said estate, after deducting therefrom the amount received by him for timber sold by him off the said estate, such amounts to be respectively ascertained by the said Master who is to certify the amount thereof, be sold with the privy of the said Accountant-General; and one of the [122] cashiers of the bank is to have notice to attend and receive the money to arise by the said sale, who, upon receipt thereof, is to pay the same into the bank with the privy of the said Accountant-General, to be there placed to the credit of these causes: and it is ordered that the money to arise by such sale when so paid into the bank be paid to the said Sir William Robert Sidny: and, for the purposes aforesaid, the said Accountant-General is to draw on the bank according to the form prescribed by the Act of Parliament, and the General Rules and Orders of this Court in that case made and provided: but, in default of such new purchaser making such

(1) The above order was correctly extracted from Reg. Lib.

deposit by the time aforesaid, it is ordered such new bidding be void : or, in case there shall be no better bidder, it is ordered that the said Sir William Robert Sidney do complete his said purchase : and it is ordered that the said Frances Munns (1) do thereupon execute a conveyance of the said estate to the said Sir William Robert Sidney : such conveyance to be settled by the said Master in case the parties differ about the same. And this Court does reserve the costs of this application : and any of the parties are to be at liberty to apply to this Court as there shall be occasion.

Reg. Lib. B. 1840, fo. 745.

The estate was resold in October 1841, and was purchased by a gentleman named Parker for £1400, exclusive of timber : and, that sum being more than double the price which Sir W. R. Sidney had paid for the estate, he was ordered to pay the costs reserved by the above order.

[123] MOOR v. RAISBECK. May 27, 1841.

[Approved, *In re Clowes* [1893], 1 Ch. 217 ; *In re Moses* [1902], 1 Ch. 116 ; affirmed in House of Lords (sub nom. *Beddington v. Bauman*) [1903], A. C. 13.]

Will. Construction. Children. Stat. 7 Will. 4 and 1 Vict. c. 26. Revocation.

Testatrix bequeathed £1300 to trustees in trust, as to one-third, for such of *the children* of A. S., then deceased, as should be living at the testatrix's death ; and in trust as to the remaining two-thirds, for the children of S. T. and T. P. living at the same time. S. T. had grandchildren, but no child living, either at the date of the will or at the testatrix's death : but A. S. and T. P. had each of them children living at those times. Held, that the grandchildren of S. T. could not claim the benefit of the trust.

Testatrix devised all her freehold messuages, &c., in S. to trustees in trust to sell and stand possessed of the proceeds in trust for A., and gave the residue of her personal estate to the trustees in trust for A. After the date of her will she sold the houses and conveyed them to the purchaser, and he deposited the conveyance and title-deeds thereof with her, to secure part of the purchase-money. Held, that the security and the money due on it did not pass, under 7 Will. 4 and 1 Vict. c. 26, s. 26 (the late Will Act), to the trustees in trust for A., but to the trustees in trust for B.

The testatrix in the cause, by her will, dated the 24th of March 1838, directed that her executors and trustees should, at the expiration of six calendar months next after her decease, *out of the monies to be produced from her leasehold and personal estates thereafter to them given, retain the sum of £1300*, and should stand possessed thereof upon the trusts thereafter declared concerning the same ; and she devised all her freehold messuages, burgages or dwelling-houses and hereditaments at Stockton, in the county of Durham (which formed the whole of her real property), unto and to the use of the trustees, their heirs and assigns, in trust, as soon as conveniently might be after her decease, absolutely to sell, convey and dispose of the same premises ; and to stand possessed of the money to arise therefrom, and of the rents and profits thereof until such sale, and of the sum of £1300 thereinbefore directed to be retained by them, upon trust, as to one [124] equal third part thereof, for such of the children of Ann Stonehouse, widow, then deceased (the late aunt of the testatrix's late husband) as should be living at the time of the decease of the testatrix, equally to be divided between or among them, if more than one ; and, as to one other third part thereof, the testatrix directed that the same should be in trust for *such of the children of Susanna Taylor* (who was another aunt of her late husband) as should be living at the time of the testatrix's decease, equally to be divided between or amongst them, if more than one ; and, as to the remaining one-third part thereof, that the same should be in trust for Thomas

(1) The trustee for sale of the estate.

Peacock; but, if he should die in her lifetime (an event which happened) the same one-third part should be in trust for such of his children as should be living at the time of the testatrix's decease, equally to be divided between or amongst them, if more than one; and the testatrix bequeathed all her messuages, lands and hereditaments, situate in the township of Billingham or elsewhere and held under several leases for 21 years under the Dean and Chapter of Durham, to the trustees, in trust, as soon as conveniently might be after her decease, to sell the same and to pay, apply and dispose of the proceeds in manner and for the purposes thereafter expressed; and, after bequeathing certain legacies, she gave all her ready money and money upon securities, plate, china, linen and household furniture, and all other her estate and effects whatsoever and wheresoever, to the trustees, in trust to sell and dispose of, get in and convert the same into money, and to stand possessed of the money to arise therefrom, upon trust thereout to pay her funeral and testamentary expenses, and all the debts which she should owe at the time of her decease, and the sum of £1300 thereinbefore directed to be retained, and the several other legacies thereinbefore given; and she [125] declared that the residue of the same trust monies should be upon trust, as to two equal fourth parts thereof, to invest the same in the usual securities, and to pay the dividends, interest, &c., thereof to her nephew, the Plaintiff James Moor, during his life; and that, after his decease, the same two-fourth parts should be in trust for his child and children then living and thereafter to be born who should attain 21. Provided that if all the children of the Plaintiff James Moor then living and thereafter to be born should die before any of them should attain the age of 21 years, then the same two-fourth parts should be upon the same trusts as were thereafter expressed concerning the fourth part of the last-mentioned residue, which was thereafter declared to be in trust for her nephew, the Plaintiff Thomas Darnell, and his children. The testatrix then declared the same trusts, as to another fourth part of the residue, for Thomas Darnell and his children, as she had declared, as to the two fourth parts, for James Moor and his children. And she directed that, after the decease of Thomas Darnell, the income of the shares of such of his children as should be under 21 in the same fourth part should be applied for their maintenance. Provided that if all the children of Thomas Darnell then living and thereafter to be born should die under 21, then the same fourth part should be upon the trusts thereafter declared concerning the two-fourth parts for James Moor and his children. The testatrix then declared that the remaining fourth part of the residue should be in trust for her nephew, John Darnell, since deceased, during his life, and that, after his decease, one moiety thereof should be upon the same trusts as were thereinbefore declared concerning the two-fourth parts for James Moor and his children, and the other moiety thereof upon the same trusts as were thereinbefore declared concern-[126]-ing the fourth part for Thomas Darnell and his children. And she gave to her trustees, their heirs and assigns, all such real estates as, at the time of her death, should be vested in her by way of mortgage, in order to enable them with greater ease and convenience to recover, receive and get in the monies secured by such mortgages for the purposes of her will.

In November 1838 the testatrix agreed to sell to Thomas Plews the freehold houses and premises at Stockton mentioned in her will in consideration of £350, and of an annuity of £6, 10s. for her life. Afterwards she consented to take a promissory note for the £350; and accordingly Plews signed and gave to her a note, dated the 23d of November 1838, in the following words:—"Borrowed and received, of Mrs. Elizabeth Peacock, the sum of £350; which I promise to repay to her or her order on demand, with interest for the same after the rate of £5 for £100 for a year."

By indentures of lease and release, dated the 14th and 15th of February 1839, the testatrix conveyed the houses and premises at Stockton to a trustee in fee, in trust, out of the rents, to pay the annuity to the testatrix during her life, and, subject thereto, in trust for Plews, in fee. The £350 was mentioned in the release to have been *paid* by Plews to the testatrix.

Upon the execution of the conveyance, the testatrix required Plews to give her some further security for the £350; and thereupon Plews deposited with her the conveyance and title-deeds of the houses and premises, and signed a memorandum, dated the 22d of February 1839; and thereby, after reciting the contract for the

purchase of the houses and premises and the conveyance [127] made in pursuance thereof, and that, it being inconvenient for Plews to pay the £350 as expressed in the release, the testatrix had consented to take his promissory note for that sum, on having the deeds relating to the houses and premises deposited with her: it was witnessed that Plews agreed that the deeds should remain in the testatrix's custody for better securing the £350 and interest; and Plews also agreed, at the request of the testatrix, her executors, &c., to convey the houses and premises to the testatrix in fee, by way of mortgage, for more effectually securing the payment of the £350 with interest, to the testatrix, her executors, &c.

The testatrix died on the 27th of April 1840. The annuity was paid up to her death, but the £350 remained due on the securities above mentioned.

Susanna Taylor had no child living at the date of the will or at the testatrix's death; but she had six grandchildren then living. All the other persons whose children were provided for by the will had children living at the two periods above mentioned.

The bill was filed by James Moor and Thomas Darnell, who were the nephews and next of kin of the testatrix, alleging that inasmuch as there was no child of Susanna Taylor living at the date of the will or at the testatrix's death, the bequest of one-third part of the £1300 entirely failed, and the sum of £433, 6s. 8d, being such one-third part, *was undisposed of*, and the Plaintiffs were entitled to it as the testatrix's next of kin: that the devise of the houses and premises at Stockton, in trust to sell and to stand possessed of the produce in trust for the children of Ann Stonehouse and Susanna Taylor and [128] for Thomas Peacock and his children, was revoked by the sale to Plews, and that the £350, secured by his note and by the deposit of the deeds, formed part of the surplus trust monies bequeathed for the benefit of the Plaintiffs and John Darnell and the children of the Plaintiffs: that the Defendants, Susanna Taylor's grandchildren, pretended that they were entitled to the £433, 6s. 8d.; but the Plaintiffs charged that those Defendants, being grandchildren of Susanna Taylor, could not take under the description of her children, and consequently the £433, 6s. 8d. was undisposed of: that the Defendants, the children of the Plaintiffs, pretended that that sum was not undisposed of, *but was included in the surplus trust monies bequeathed in trust for the Plaintiffs and their children*: but the Plaintiffs charged that that surplus was expressly exclusive of the £1300 of which the £433, 6s. 8d. formed a part, and that there was no general residuary bequest sufficient to include the £433, 6s. 8d.: that the Defendants the children of Ann Stonehouse and of Thomas Peacock, and the six grandchildren of Susanna Taylor, pretended that the devise of the houses and premises at Stockton was not revoked by the sale thereof by the testatrix in her lifetime, and that the interest which the testatrix had in those houses and premises at her death, as the equitable mortgagee thereof, passed, by her will, to her trustees upon the same trusts as were thereby declared respecting those houses and premises, and that the £350 secured by the equitable mortgage did not form part of the testatrix's personal estate at her death, or that it did not pass under the bequest of her personal estate, but that the same was then subject to the trusts declared by the will, respecting the produce of the sale of the houses and premises in case the same had remained to be sold by the trustees after the death of the testatrix: but the [129] Plaintiffs charged that the £350 was a mere debt due to the testatrix at her death, and that the same formed part of her personal estate, and that the equitable mortgage was a mere security, and the £350 passed under the bequest, and was subject to the trust declared of all her money on securities; and that all the interest which the testatrix had in the houses and premises at her death passed to the trustees under the devise of estates vested in her by way of mortgage; and that such interest was vested in the trustees in trust to get in the monies secured thereby for the purposes of her will: that, if the Court should be of opinion that the £350 was subject to the same trusts as were declared respecting the produce of the sale of the houses and premises in case the same had remained to be sold by the trustees after the testatrix's death, then the bequest of one-third part of that sum had failed in consequence of there being no child of Susanna Taylor living at the testatrix's death; and that the Plaintiffs were entitled to it as the testatrix's next of kin, or, at all events, that such one-third, as well as the £433, 6s. 8d., were subject to the trusts declared by the will for the benefit of the Plaintiffs and their

children. The bill prayed for declarations and relief founded on the above-mentioned charges.

The Defendants, the grandchildren of Susanna Taylor, and the children of Ann Stonehouse and of Thomas Peacock, in their answers, said that the testatrix was, at her death, entitled to an equitable interest in the houses and premises at Stockton as equitable mortgagee; that, inasmuch as Plews never paid his purchase-money of £350 to the testatrix, but the same was due and owing to her at the time of her death, on the security of the promissory note and of the equitable mortgage of the [130] houses and premises, the devise thereof to her trustees upon trust to sell and divide the produce in manner in the will mentioned was not revoked by the sale to Plews in her lifetime; but that the interest to which the testatrix was entitled, at her death, in the houses and premises as such equitable mortgagee, and also the £350, the purchase-money remaining unpaid passed to the trustees of the will, upon the same trusts as were declared respecting the houses and premises and the produce of the sale thereof. And Susanna Taylor's grandchildren submitted that, inasmuch as Susanna Taylor was dead at the date of the will, and was therein mentioned as a person deceased, (1) and, as there was no child of Susanna Taylor living at the date of the will, her grandchildren living at the death of the testatrix were entitled to take the benefit of the bequest in trust for her children living at the death of the testatrix; and that under those circumstances they ought to be declared entitled, in equal shares, to one-third of the £350, and of the interest accrued thereon since the death of the testatrix.

The Defendants, the children of the Plaintiffs, in their answer, submitted that the one-third of the £1300, to which the children of Susanna Taylor (if there had been any) would have been entitled, was not undisposed of, but formed part of the testatrix's residuary personal estate, and was included in the surplus trust monies bequeathed for the benefit of the Plaintiffs and their children.

Mr. Faber, for the Plaintiffs. The first question is with respect to the one-third of the £1300, which the testatrix bequeathed in trust for [131] the children of Susanna Taylor. Mrs. Taylor had no children living either at the date of the will or at the testatrix's death; but she had six grandchildren then living; and it will be contended that they are entitled to that one-third. I submit, however, that they are not entitled to it; for the language of the will shews plainly that the testatrix, when she used the word "children," used it in its correct sense. There is nothing to shew that she meant grandchildren by it.

The next question is with respect to the £350, which still remains secured by Plews's note of hand and by the equitable mortgage made by him of the houses at Stockton. As the testatrix sold and conveyed those houses after the date of her will, there could be no doubt before the passing of the late Act for the Amendment of the Laws with Respect to Wills (7 W. 4th and 1 Vict. c. 26), that the will, so far as it related to those houses, would have been revoked. But it will be said that, as there is an equitable mortgage for securing £350, part of the purchase-money for the houses, that sum is subject to the same trusts as the money produced by the sale of the houses would have been subject to if the sale had taken place after the testatrix's death: and the 23d sect. of the Act will be relied upon in support of that argument. (2) [THE VICE-CHANCELLOR. The object of that section is to prevent conveyances in the nature of fines and recoveries from operating as a [132] revocation of the will, as to the estates comprised in those conveyances. It applies also to cases in which a testator makes a mortgage in fee after the date of his will, and, on paying off the mortgage, takes a reconveyance of the estate to uses to bar dower.]

Mr. Roundell Palmer, for the grandchildren of Susanna Taylor. There can be no

(1) She was not so mentioned in the will as set forth in the brief.

(2) That section enacts, that no conveyance or other act made or done, subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

doubt that, before the passing of the Act referred to, the sale and conveyance of the houses to Plews would have been an entire revocation of the will so far as it relates to those houses: but the 23d section has abrogated the old rule of law, that a change of interest in the property devised operates as a revocation. The doctrine of revocation implies that there is something which, but for the act which is said to be an act of revocation, the words of the will would pass; and by using the word in this case, it seems to be admitted that, but for some such act, there is such an interest as the devise in question would operate upon. The act relied on is the conveyance and change of interest. But the 23d section of the Act of Parliament enacts that no conveyance of property made subsequently to the execution of a will shall prevent the operation of the will with respect to such interest in the property as the testator shall have power to dispose of, by will, at his death: and, by the third section, testators are enabled to dispose of all property which they shall be entitled to, either at law or in equity, at the time of their deaths. Now, if the conveyance to Plews was not a revocation (as, under the 23d section, it certainly was not), what other act was done in this case which was a revocation? The Act of Parliament defines expressly what acts shall revoke a will. They are marriage, an express revocation by some writing duly executed as a [133] will, burning, tearing or otherwise destroying the will by the testator or by some person in his presence and by his direction with the intention of revoking the same (see sects. 18 and 20); but none of those acts was done in this case. Again, the 24th section declares that every will shall be construed, with reference to the real estate and the personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. Consequently the devise now under consideration must be construed as if the testatrix had given to her trustees all the interest in the houses at Stockton which she might have or be entitled to at the time of her death, unless there is some intention, apparent on the will, which is repugnant to that construction: which there is not. So far from it, that construction will best effectuate the testatrix's intention in favour of her deceased husband's relations, which is strongly marked in the will. There is nothing inconsistent with that intention in her having anticipated the act which she had directed to be done by her trustees, that is, the sale of the property. In *Wall v. Bright* (1 Jac. & Walk. 494) a general devise in trust to sell was held to carry an estate which the testator had sold and for which he had received part of the purchase-money, but had not executed any conveyance of the estate to the purchaser.

The only question in this case that can be argued for a moment is whether the words of the devise, taking them to be spoken at the testatrix's death, describe the interest which she then had in the houses sufficiently to pass it. Can there be any doubt if she had never had any other interest in the houses, and [134] had no other houses at Stockton, that the words of the devise would have passed it; or that they would have passed it if the will had been made subsequently to the conveyance to Plews? In *Clarke v. Abbot* (2 Eq. Ab. 606, pl. 41) a mortgagee in fee of an inn at Chelsea devised all his freehold messuages and garden grounds in Chelsea: and the question was whether the mortgaged interest would pass by that description. It was held by Lord Hardwicke that it certainly would pass; as it did not appear that the testator had any other land there, *ut res magis valeat quam pereat*. That, like this, was a case of an equitable not a legal interest. In order to give effect to the part of the will on which I am now commenting, that construction must have been adopted, in the present state of the law, even though the testatrix had not been interested at all in these houses at the date of her will, but had afterwards become interested in them, or if the interest which she had at the date of her will had ceased entirely, and at a later period she had acquired a new interest by means of this equitable mortgage. *A fortiori* must that construction be adopted where her interest has been continuous. It is laid down by Mr. Hayes in his observations on the new Will Act (see *Introduct. to Conveyancing*, 5th edit. vol. 1, p. 390): "That a devise or bequest of a specific subject of property will pass whatever interest in that subject may be disposable by the testator at his death; and the gift will, consequently, be operative notwithstanding an absolute sale of the subject, provided any interest in the same subject,

although a new and even a different interest, be disposable by the testator at his death: and a devise or bequest of a specific subject of property, or of a specific interest in property, will even pass [135] (without re-execution or republication) whatever subject or interest, disposable by the testator at his death, may then happen to answer the description; and the gift will, consequently, be operative, notwithstanding an absolute sale of that subject or interest, provided some subject or interest to which the language of the description is pertinent be disposable by the testator at his death." Sir E. Sugden lays down the very point which I am contending for. He says (1 Treat. on Vendors, 10th edit. p. 304; see *post*, 140, note): "In a case like that of *Arnald v. Arnald* (1 Bro. C. C. 401), where a testator devises his estate to trustees to sell and pay the money to certain legatees, and afterwards sells the estate himself, which we have seen under the old law was an ademption, the distinction would now seem to be this, that if the money has not been received by the testator, it will pass to the legatees; because, notwithstanding the act done by the testator, namely, the sale, the will is still to operate on the estate or interest in the estate which the testator has power to dispose of by will at his death; and he has power at that time to dispose by will of the purchase-money and has a lien on the estate for it, which he can also dispose of, and the case of the legatees is rather strengthened than weakened by the 24th section. But if the testator has received the money, the ademption appears to be beyond the reach of the statute: the testator has no longer any interest in the property given by his will, although his general personal estate is increased by the sale, and the case does not seem to be aided by the 24th section."

Next, I have to submit that, under the circumstances of this case, the grandchildren of Mrs. Taylor are [136] entitled to the benefit of the trust expressed in favour of the children of that lady.

I admit that, *prima facie*, the word "children" cannot be held to include any issue except legitimate children. But this construction may be displaced by shewing a different intention, either on the face of the will or by evidence, which places the Court in the position of the testator, and enables it to decide according to the sense in which the testator must have used the word. The principle is, in every case, to give effect to the intention; assigning to the words their strict legal signification wherever they will bear it; and, where they will not, construing them in that sense in which the testator must, of necessity, have used them himself. That principle was recognised in *Lett v. Randall* (*ante*, vol. x. p. 112). In all cases where an entire class is described, and there are any of that class who can take, they take exclusively. But where, in order to give any effect at all to the bequest, it is necessary to give a more extensive sense to the words of the will, the Court will deviate from their strict meaning, and put that more extensive construction upon them. *Radcliffe v. Buckley* (10 Ves. 195), *Slade v. Fooks* (*ante*, vol. ix. p. 386), *Lord Woodhouselee v. Dalrymple* (2 Mer. 419), *Gill v. Shelley* (2 Russ. & Myl. 336). In *Wild's case* (6 Rep. 16 b.) the word "children" was construed to mean "issue;" and, in a case in 8 Vin. Ab. 310, pl. 9, a grandson was held to be entitled under the description of "son." The cases of *Gale v. Bennett* (Amb. 681), *Royle v. Hamilton* (4 Ves. 437), *Reeves v. Brymer* (*Ibid.* 692), and *Crooke v. [137] Brookeing* (2 Vern. 106), recognise the principle upon which, as I submit, this case ought to be decided.

Mr. Cory appeared for the children of the Plaintiffs: and

Mr. Wilson, for the trustees and executors of the will.

Mr. Faber, in reply, said that the testatrix, in disposing of the houses at Stockton, spoke of them as being property which was in her own ownership; that, construing the will according to the directions of the Act of Parliament, that is, to speak and take effect as if it had been executed immediately before the testatrix's death, the expression, "money upon securities," which the testatrix had used in her will, would apply most aptly to the £350, and the words "all such real estates as, at the time of my decease, shall be vested in me by way of mortgage," would include the interest which the testatrix had in the houses at the time of her death. (1)

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not find anything in this will

(1) The question whether one-third of the £1300 was undisposed of seems not to have been argued.

which makes it necessary for me to construe the word "children" as meaning any other individuals than those who strictly bore the character of children. It is plain that, in several instances, the testatrix has used that word in its proper sense: and, therefore, I am not at liberty to put a different construction upon it in that part of the will where the children of Mrs. Taylor are spoken of.

[138] Next, with respect to the houses at Stockton. The testatrix has devised them to the trustees, in trust to sell the same as soon as conveniently might be after her decease: and has directed the trustees to stand possessed of the proceeds upon certain trusts for the benefit of the children of Mrs. Stonehouse and Mrs. Taylor, who should be living at her decease, and also for the benefit of Thomas Peacock, and of his children living at the same time. The testatrix sold the houses after the date of her will, and conveyed them to the purchaser. But the purchaser, being unable to pay £350, part of the purchase-money, the testatrix consented to accept a deposit of the title-deeds of the houses as a security for the money remaining unpaid. And it was said that, under the 23d sect. of the late Act for the Amendment of the Law with Respect to Wills, the interest which the testatrix had in the houses at the time of her death, by virtue of the equitable mortgage and the money secured by the mortgage, pass to the trustees in trust for the children of Mrs. Stonehouse and Mrs. Taylor, and for Thomas Peacock and his children. It is clear, however, that, according to any construction that can be put upon the Act of Parliament, the will has been revoked as to the devise in trust to sell. Then the Act says that no conveyance or other act made or done, subsequently to the execution of a will, of or relating to any real or personal estate therein comprised, *except an act by which such will shall be revoked as aforesaid*, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of at the time of his death. So that there is an express exception of the case where the testator shall have revoked the will; and, on the ground of that exception, my opinion is that the property in question is [139] taken out of the operation of the general enactment contained in the clause of the Act which has been relied on. That clause applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee, and afterwards take a reconveyance of them to themselves and a trustee to uses to bar dower; but the clause does not apply to cases like the present, where the thing meant to be given is gone.

The will in this case, though revoked by the sale, has operation on the property in another form: for, by the sale, the testatrix changed the nature of the property from realty to personalty; and the money produced by the sale passes as part of her general personal estate.

Declare that the £350 formed part of the testatrix's personal estate at her death, and that the trustees of her will ought to stand possessed of that sum and of the securities for the same, upon the trusts declared by the will, respecting the monies to arise from the sale and conversion into money of her leasehold and other personal estate and effects: declare that the trustees ought to stand possessed of one-third of the £1300 in trust for the Defendant, J. Routledge, as the personal representative of J. Stonehouse, deceased, the only child of Ann Stonehouse living at the testatrix's death; and of one other third in trust for the Defendants, Elizabeth Richardson and Ann Stansfield, the only children of Thomas Peacock living at the testatrix's death, in equal moieties: declare that the bequest of the other third to such of the children of Susanna Taylor as should be living at the testatrix's death wholly failed; and that [140] it forms part of the general residue of the testatrix's personal estate.(1)

(1) In *Farrar v. Lord Winterton* (Rolls, 1842) [5 Beav. 1] a testatrix devised a freehold estate in June 1838, and afterwards agreed to sell it; but died before the contract was completed. Lord Langdale held that the unpaid purchase-money belonged not to the devisee, but to the executors.

[140] HOBHOUSE v. COURTNEY. May 27, June 17, July 7, 1841.

Practice. Subpœna. Substitution of Service. Defendant.

If a Defendant who is out of the jurisdiction has given special authority to a person within the jurisdiction to act as his agent with respect to the property which is the subject of the suit, the Court will order service of the *subpœna* to appear and answer, on that person, to be good service on the Defendant.

The bill prayed that the Plaintiffs, Messrs. Hobhouse & Co., might be declared to be entitled to a charge or lien, in respect of a debt of £14,000 and upwards, upon certain wines which the Defendant, Emilia Sheil, of Xeres in Spain, widow, had consigned to the Defendants, Messrs. Courtney & Co.; and that the wines might be sold and the proceeds applied in satisfaction of the debt.

Subsequently to the creation of the lien sought to be enforced, Mrs. Sheil became bankrupt, and the Defendants, De Giles and De Perea, of Xeres, were appointed assignees of her estate and effects, by the Chamber of Commerce in that city; and they claimed the wines, freed from the lien. In consequence of which the Plaintiffs' solicitor, in December 1840, wrote a letter to them, explaining the nature of the charge claimed by the Plaintiffs, and the circumstances under which it had been created. No notice was taken of this letter until April 1841, when Mr. Annesley, a solicitor, called on the Plaintiffs' solicitor for the purpose of having some communication with him respecting the Plaintiffs' claim to the wines; and Mr. Annesley then stated that he was employed and instructed by a gen-[141]-tleman who had come over to this country with a power of attorney from the assignees; and that it was of the most extensive kind, giving power to him to prosecute and defend any suits in this country, in relation to the rights of the assignees in reference to Mrs. Sheil's property and effects in this country, and also to the claims of the Plaintiffs. The gentleman alluded to by Mr. Annesley was an inhabitant of Xeres, named MacMahon; and in April 1841 he called on Messrs. Courtney, and stated that he was authorised, by the assignees, to demand the stock of wines, property and effects belonging to the creditors of Mrs. Sheil, and, generally, to wind up her affairs; and he then offered to shew the power of attorney under which he acted to Messrs. Courtney.

On the 27th of May THE VICE-CHANCELLOR, on the application of Mr. Sharpe, for the Plaintiffs, ordered that service on MacMahon of the *subpœna* for the assignees to appear to and answer the bill in this cause should be deemed good served on the assignees.

On the 17th of June a motion was made, on behalf of the assignees, to discharge that order. After notice of that motion had been served, an affidavit was made by the solicitor for the Plaintiffs, stating he had been informed and believed that part of the wines sought to be made liable to the charge or lien in favour of the Plaintiffs had been consigned by Mrs. Sheil to Messrs. Moore, Hanson & Co. of Bristol, on account of the Plaintiffs; (1) and such wines were, as the deponent believed, still in their possession: that MacMahon, since the service of the *subpœna* on him, had sent the following letter to Moore, Hanson & Co.

"London, 3d June.—Gentlemen,—The authority that the power of attorney the as-[142]-signees of the failed house of Widow Sheil, of Xeres, have conferred on me for liquidating the property you hold of shipments of wines consigned to you being recognised to be sufficient for any proceedings I may consider necessary to undertake in the Courts of this country on behalf and in the names of said assignees of Mrs. Sheil, I take the liberty to request you will be pleased to furnish me the requisite accounts of all the property and monies in your hands, and the disposal thereof, amounting, as per annexed statement, to £645. Expecting your kind answer, I remain," &c.

Mr. Wigram and Mr. Anderdon, in support of the motion, said that the Court

(1) So in brief.

had no jurisdiction to make the order. They referred to *Rickcord v. Nedriff* (2 Mer. 458); *Smith v. The Hibernian Mine Company* (1 Scho. & Lef. 238); *Waterton v. Croft* (*ante*, vol. v. p. 502); *Roberts v. Worsley* (2 Cox, 389). In this last case the Defendant had appeared to and answered the original bill. The Plaintiff afterwards amended his bill; at which time the Defendant was out of the jurisdiction of the Court. A motion was then made for the Plaintiff, that service of the *subpoena* to appear to and answer the amended bill upon the Defendant's Clerk in Court in the original suit might be deemed good service upon the Defendant: the Master of the Rolls, however, decided that the Court had no power to order the substituted service. It is hardly possible to conceive a stronger case than that: for, there, the Defendant had answered the original bill. In *Bond v. The Duke of Newcastle* (3 Bro. C. C. 386) Lord Thurlow refused to order the *subpoena* to be served upon the Defendants' Clerk in Court, although the Defendants had filed a bill relative to the [143] same subject by the same Clerk in Court: *Wellins v. Lomans* (2 Dick. 579); *Anderson v. Lewis* (3 Bro. C. C. 429; and 2 Dick. 776). The cases which we have cited were decided by Lord Thurlow, Lord Redesdale, Lord Kenyon, Lord Eldon, and other eminent Judges in this Court; and there is nothing to oppose to them except *English v. Hendrick* (Madd. & Geld. 205), in which the order was obtained *ex parte*. If the Court had jurisdiction to make such an order as the one in question, the Legislature would not have done so useless an act as to pass the 2d & 3d Will. 4, c. 33, (1) and 4th & 5th Will. 4, c. 82. (2)

Mr. Knight Bruce and Mr. Sharpe, for the Plaintiffs. The Acts of Parliament which the counsel in support of the motion have referred to relate to the service of process out of the jurisdiction of the Court, and not, as the present case does, to the service of process within the jurisdiction.

The question whether substituted service of the process of the Court ought or ought not to be ordered is a question not of jurisdiction, as it has been said to be, but of discretion; and it was so treated by Lord Eldon and by Lord Redesdale, as is evident from the observations made by those learned Judges respectively, in *Smith v. The Hibernian Mine Company*, and *Rickcord v. Nedriff*. Moreover, in the former of those cases, the power of attorney which had been given by the [144] Defendant, who was out of the jurisdiction, to the person on whom it was proposed that the *subpoena* should be served, was a power authorizing the donee to act for the Defendant in the management of his affairs, or, in other words, a general power. And Lord Redesdale relies upon that circumstance in his judgment. He says: "The Court has indeed substituted service in several cases where the party may have notice of the proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent for a different purpose cannot be looked on in that light." In the present case the power is not general but specific: the assignees in Spain have appointed MacMahon their agent or attorney for the purpose of claiming and recovering the wines, that is, the very same property which the Plaintiffs, by their bill, claim to have a lien or charge upon, and which lien or charge they seek by their bill to enforce. In *Rickcord v. Nedriff* the power of attorney which had been given by the Defendant, who had absconded, to the party whom it was proposed to substitute for him, was a power to receive the arrears and not the growing payments of the annuity. [THE VICE-CHANCELLOR. The application, too, was founded on an admission made by a third party, namely, by Nedriff in his answer.] We have been furnished with extracts from the registrar's book of the following cases. *Hallett v. Sutton* (reported in 1 Dick. 26, nom. *Hales v. Sutton*); *Carter v. De Bruyn* (*Ibid.* 39, nom. *Carter v. De Brune*); *Hyde v. Forster* (*Ibid.* 102, nom. *Hyde v. Forster & Myers*; S. C. 2 Mer. 459, note); and *Gelednicki v. Charnock* (6 Ves. 171, nom. *Gildenichi v. Charnock*); and we submit that those [145] cases, together with *English v. Hendrick*, shew plainly that the question as to the substitution of service is a question not of jurisdiction but of discretion; and that the Court has jurisdiction to substitute the service in a proper case in such a way

(1) To effectuate the service of process issuing from the Courts of Chancery and Exchequer in England and Ireland respectively.

(2) To amend and extend the preceding Act.

as to satisfy the Court that it will reach the party. (1) The case of *Carrington v. [146] Cantillon* (Bunb. 107) shews that the Court of Exchequer has the same jurisdiction.

[147] July 7. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case an order was made, directing that service on Mr. MacMahon of the *subpoena* to appear to and [148] answer the Plaintiff's bill should be good service on certain persons who were

(1) The following are the cases extracted from Reg. Lib. which are referred to above:—

Inter Maria Hallett, Infans, et al, *Quer.* Edred Sutton, Ar. Gul. Cogan, Gul.

Brooks, et Alios, *Deftes.* Lord Chancellor. 12^o January 17¹⁶/₁₇

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, &c., by Mr. Serjeant Jekyll, Sir Robert Raymond, Mr. Vernon and Mr. Williams, being of the Plaintiff's counsell, in the presence of Mr. Ward of counsell for the Defendant Brooks, and of Mr. Pancefort of counsell with George Sayers; it was alleged that John Hallett, late father of the Plaintiff Mary Hallett, the infant, dying in Barbadoes, the Defendants, Edmund Sutton and William Cogan, who live in Barbadoes, have sent over a probat, under the Governor's seal of the island, of a will pretended to be made by the said Colonel John Hallett, whereof they are executors, and, as such, claim the residue of the said Colonel Hallett's personal estate, after payment of his debts and legacies; and have likewise, with the said will, sent over a letter of attorney to the Defendant Brooks to procure a probate of the same will from the Prerogative Court of the Archbishop of Canterbury; and the Defendant Brooks hath, accordingly, employed Mr. Sayers, a proctor, to take out a commission, directed to the Governor of Barbadoes, in order to prove the said will *per testes*, the witnesses living in that island, which said Mr. Sayers had summoned the Plaintiffs, who had entred a *careat* against proving the said will, to shew their reasons against the proving thereof; and, upon hearing both sides, the said Prerogative Court hath directed such commission, which hath accordingly been sued forth. That the said Defendants, Sutton and Cogan, have already possessed the said Colonel Hallett's estate in Barbadoes, and, if they be permitted to prove the said pretended will here, the Plaintiffs, who are the wife and daughter of the said Colonel Hallett, and who are advised to contest the validity of the said will, or at least the title to the personal estate not thereby disposed of, and who, for that purpose, have exhibited their bill in this Court, will not be able to compel them to account for the same, by reason process of contempt cannot be served in the said island: It was therefore prayed that service of process of *subpoena*, for the Defendants Sutton and Cogan to appear and answer the Plaintiffs' bill, on the said Defendant Brooks and on the said Mr. Sayers, may be deemed good service on the said Defendants, Sutton and Cogan: Whereupon, and upon hearing an affidavit of Samuel Clark, gentleman, read, and what was alleged on both sides, his Lordship doth order that service of process of *subpoena*, for the said Defendants Sutton and Cogan to appear and answer the Plaintiffs' bill, on the Defendant Brooks and on the said Mr. Sayers, the proctor who hath acted in the Prerogative Court in behalf of the said Defendants Sutton and Cogan, be deemed good service of such *subpoena* on the said Defendants Sutton and Cogan.—A. 1716, fol. 64, E. G.

Inter Hen. Carter, *Quer.* Daniel De Bruyn, Gerard Vanneck, et al, *Deftes.*
Lord Chancellor. Jovis, 12^o July 1722.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, &c., by Mr. Horsley, being of the Plaintiff's counsell, in the presence of Mr. Mead, being of counsell for the Defendant Vanneck, it was alleged that the Plaintiff exhibited his bill in this Court against the Defendants, to be relieved touching the matters therein contained; and the Defendant, De Bruyn, lives in Holland; so that the Plaintiff cannot serve him with a *subpoena*: and he employs the Defendant Vanneck, as his agent here in England, to act for him in the matters in the said bill contained: And, therefore, it was prayed that service of a *subpoena* to appear and answer the Plaintiff's bill, on the Defendant Vanneck, may be deemed a good

made Defendants to the bill, and [149] were resident abroad. That order was made on an affidavit that the Plaintiffs had a lien on wines which had been consigned to Messrs. Courtney in this country by Emilia Sheil of Xeres in Spain. After the consignment Mrs. Sheil became bankrupt, and certain persons residing at Xeres, named De Giles and De Perea, were appointed assignees of her estate by the Chamber of Commerce in that city. It was represented that MacMahon had received a power of attorney to act for the assignees in this country respecting the wines. In proof of

service of the Defendant De Bruyn : Whereupon, and upon hearing of the Defendant Vanneck's counsell and what was alledged on both sides, it is ordered that service of a *subpœna* on the Defendant Vanneck, for the Defendant De Bruyn, be deemed a good service of the said Defendant De Bruyn to compel him to appear to and answer the Plaintiff's bill.—A. 1721, fol. 295, P.

Between William Hyde, *Plaintiff*; William Foster and John Myers and Others, *Defendants*. Lord Chancellor. Monday the 5th day of August, in the 19th Year of the Reign of His Majesty King George the Second, 1745.

Upon opening of the matter this present day unto the Right Honourable the Lord High Chancellor, &c., by Mr. Green, being of counsel with the Plaintiff, it was alledged that, in Hilary term 1744, the Plaintiff exhibited his bill in this Court against the Defendants, to be relieved touching the several matters therein complained of; that the Defendant Foster was, before the time of filing the bill, and is now at Jamaica, where he resides; that the Defendant Myers has put in his answer to the said bill, and thereby set forth that he is factor or agent for the Defendant Foster here in England; and that, by virtue of some power or authority from the Defendant Foster (who is now at Jamaica) he has been for some time past, and is now in the possession and receipt of the rents and profits of certain chambers in Bernard's Inn, for the use of the said Defendant Foster, which are part of the premises in question in this cause; and, therefore, it was prayed that service of a *subpœna* to appear in this cause, on the Defendant Myers as agent or factor for the Defendant Foster, may be deemed good service of the Defendant Foster; whereupon and upon hearing of Mr. Brown and Mr. Sewell of counsel with the Defendant, the answer of the Defendant Myers read, and what was alledged by the counsel on both sides; his Lordship doth order that service of a *subpœna* to appear in this cause, on the said Defendant Myers as agent or factor for the Defendant Foster, be good service on the said Defendant Foster.—A. 1744, fol. 491.

Between Anthony Geledneki and Thomas Mallby, *Plaintiffs*; Robert Charnock, Wm. Lennox, W. Thompson, and The Honourable The United Company of Merchants trading to the East Indies, *Defendants*. Lord Chancellor. Thursday, 2d July 1801.

Upon motion this day made unto this Court by Mr. Stanley, of counsel for the Plaintiffs, it was alledged that it appears by the affidavit of John Warne, clerk to Messrs. Dann & Teasdale, solicitors for the Plaintiffs in this cause, that the Defendant, Robert Charnock, lives and resides in Finsbury Square in the City of London, and the Defendant, William Lennox, in Broad Street Buildings in the said City of London, and that the Plaintiffs having filed their bill against the said Defendant William Thompson, who then and still resides out of the jurisdiction of this Court, as the said deponent believes, the said Defendant, William Thompson, appeared thereto by Mr. Radcliffe, his Clerk in Court, and made two several applications by motion to this Court, the notices whereof were signed by Messrs. Crowder & Lavie as his solicitors: and, therefore, it was prayed that process of *subpœna* to be awarded against the said Defendants Robert Charnock, William Lennox and William Thompson, to compel them to appear to and answer the Plaintiffs' bill, may be made returnable immediately, and that service of such *subpœna* on Messrs. Crowder & Lavie, the solicitors, and Mr. Radcliffe, the Clerk in Court for the Defendant William Thompson, may be deemed good service on the said Defendant; which, upon hearing the said affidavit read, is ordered accordingly.—A. 1800, fol. 426, P. W.

this fact there was an affidavit alleging that the solicitor of the Defendants, or, rather, of Mr. MacMahon, represented that the power of attorney was of the most extensive kind, enabling MacMahon to prosecute and defend any suits in this country, in relation to the rights of the assignees with regard to Mrs. Sheil's property here, and in relation also to the claims of the Plaintiffs. That affidavit was, upon the application to discharge the order for substituting service, opposed by [150] a joint affidavit made by MacMahon and Mr. Annesley, his solicitor. I have read it, but I do not find that it denies the fact that the power of attorney had been given to MacMahon. A further affidavit was then made by Mr. Martineau, the Plaintiffs' solicitor, and his clerk, which has not been contradicted. It stated that, since the service of the order of the 27th of May and of the *subpœna* on Mr. MacMahon, he, MacMahon, had written to Messrs. Moore & Hanson, of Bristol, a letter to this effect :—"Gentlemen" [see *ante*, p. 141]. The representation in this letter is a further confirmation of the first statement, that MacMahon has not only a power from the assignees to act for them generally, but also to act specially with regard to the wines in this country. The question, then, is whether the order for substituting service of the *subpœna* is wrong?

The first case I shall advert to is that which has been cited from Dickens's Reports, p. 26 ; and though, as Lord Redesdale said in *Smith v. The Hibernian Mine Company*, Dickens was rather a loose reporter and his notes are not of very high authority, yet it happens that the facts, as stated in his report of the case, tally with the statement of them in the registrar's book, although the case is reported under a somewhat different name. It is reported under the name of *Hales v. Sutton* ; but the real name appears from the registrar's book to be *Hallett v. Sutton*.

[His Honor here stated that case, and also *Carter v. De Bruyn*, and *Hyde v. Foster*, as extracted from Reg. Lib.]

Now it appears from these cases that three different Chancellors, namely, Lord Cowper, Lord Macclesfield, [151] and Lord Hardwicke, thought it right, in a case where it appeared that the person who was appointed agent had special authority to act for an absent Defendant in the matter which was the subject in dispute, that service of the *subpœna* on that agent should be good service on the principal abroad.

The case of *Geledneki v. Charnock* is reported in 6 Ves. page 171, but it is not quite correctly stated in the report.

[His Honor read the extract of that case from Reg. Lib.]

The Defendant, therefore, had appeared, and had made two applications through his solicitors, Messrs. Crowder & Lavie ; so that they were acting as the agents for the absent Defendant in the subject-matter of the cause ; and Lord Eldon ordered substituted service of the *subpœna* upon them.

Then came the case of *English v. Hendrick*.

[His Honor stated the facts of the case and the judgment.]

Here we have five instances during the period from 1717 to 1821, in which four Lord Chancellors and one Vice-Chancellor have taken one uniform view of the practice.

In addition to these cases, there is a case in the Exchequer, *Carrington v. Cantillon*, which is reported in Bunbury, page 107.

It was said that all these authorities have been superseded, and that a different practice has been [152] established in modern times ; and the case of *Roberts v. Worsley* was cited in support of that statement. There a Defendant had appeared to and answered the original bill. The Plaintiff then amended his bill ; at which time the Defendant was out of the jurisdiction of the Court. A motion was thereupon made that service of the *subpœna* to appear to and answer the amended bill, upon the Defendant's Clerk in Court in the original suit, might be deemed good service upon the Defendant. Lord Kenyon, M.R., said he was clearly of opinion that such an order could not be made. And then some general language is put into his Lordship's mouth, which he might, perhaps, have used with reference to the facts of the case : but the language as it stands in the report is, I must say, directly contrary to the decided cases. It is this : "The Court will never appoint an attorney to act for a man without his leave, except in the case of an injunction bill ; where it would be gross injustice that one man should be prosecuting an unrighteous demand at law, and yet

put himself out of the reach of the *subpoena* of this Court, in a cause instituted for the purpose of restraining such proceedings. But the present application was quite different : an amended bill might be altogether a new suit ; in which it would be very improper to force an attorney upon the party without his consent. And His Honor said he remembered several applications of a similar nature, but they had never been attended with success." That case, I apprehend, was rightly decided ; because the person who was the Clerk in Court for the absent party had no authority to act for him in any capacity whatever, except as his Clerk in Court ; and he had that authority with respect to the original suit only. He could not, therefore, stand in the situation of a person specially [153] authorised to act as the agent of the absent party in the matter of the amended bill.

In *Bond v. The Duke of Newcastle*, which is much the same sort of case, a bill had been filed by parties claiming under a marriage settlement for a receiver of the amount of certain sums which had been allowed by the Commissioners of American Claims. Bond was the holder of the certificates which had been issued by the Commissioners on allowing those sums to be due ; and he claimed to hold the certificates and to receive the monies payable on them as a purchaser for valuable consideration without notice of the settlement. Bond filed his bill against the Plaintiffs in the first suit, and then made an application that service on their Clerk in Court might be deemed good service : which the Lord Chancellor thought could not be allowed. And it certainly could not : for the Clerk in Court was agent only for the purposes of the suit in which Mrs. St. George and her trustees, who were the parties entitled under the settlement, were Plaintiffs, and not in the suit in which they were made Defendants. That, too, was not even a cross-suit ; for Bond was not a party to the other suit.

The next case is *Wellins v. Lomans*, in 2 Dick. 579. The case, as it stands in the book, is this : "A Defendant, a mortgagor, living or being about to go abroad, by an indorsement on the mortgage deed agreed, in case he should not redeem by a limited time therein mentioned, that two persons therein named should accept a *subpoena* for him to appear and answer any bill that should be filed against him touching the mortgage : the Plaintiff having filed his bill to foreclose, applied that the persons named in the indorsement [154] might be served with the *subpoena*, and that such service might be deemed good service on the Defendant. After standing over for consideration, his Lordship denied the motion." Then there is a note subjoined, which states that the two cases of *Hyle v. Foster* and *Carter v. De Bruyn*, which I have already observed upon, were mentioned. The note then adds : "But in those cases it was admitted or proved that the persons served acted as attorneys or agents for the Defendants. . . . Besides, in this case, it doth not appear that it was with the privity of the persons named in the indorsement that their names were used ; neither did it appear that they would accept a *subpoena* to appear for the Defendant ; for who would indemnify them ?" The case, therefore, seems to proceed on this, namely, that there was no sufficient evidence of the fact that the persons named in the indorsement were specially appointed attorneys ; and, therefore, it was quite right to deny that the service of *subpoena* on them should be good service.

Then in 1803 came the case of *Smith v. The Hibernian Mine Company*, which is reported in 1 Scho. & Lef. 238. There a Defendant who was residing out of the jurisdiction had given a power of attorney to a person to act for him in the management of his affairs ; not in the management of the subject-matter of the suit : and the Court refused to allow substitution of service of *subpoena* on the person to whom the power was given. The reporter makes Lord Redesdale say : "I think the Legislature has decided this question : it has, in several instances, substituted service ; an interference which would be wholly unnecessary if this Court had power to do it. The Court has, indeed, substituted service in several cases where the party may have notice of the [155] proceedings, and where, in case he goes out of the way, there is a person whom he has named in Court as his agent, and whom the Court can look on as such. But a person named agent for a different purpose cannot be looked on in that light." Then his Lordship speaks of the case of an injunction bill ; which everyone admits. Next, he seems to refer to the case of *Wellins v. Lomans*, and adds : "That case was discussed with a considerable degree of attention ;

and I should imagine that those cases published by Mr. Dickens were cited ; but Lord Hardwicke must himself have altered his opinion since the time when those cases were decided. Mr. Dickens was a very attentive and diligent register ; but his notes, being rather loose, were not considered as of very high authority : he was constantly applied to, to know if he had anything on such and such subjects in his notes ; but, if he had, the register's books were always referred to." Lord Redesdale does not say on what occasion, or why he thought Lord Hardwicke had altered his opinion ; but merely says he must have altered it. As far as we know, Lord Hardwicke had not altered his opinion, but remained of the same opinion at the time when he decided the case of *Hyde v. Foster*.⁽¹⁾ Lord Redesdale then alludes to a case where a bill was filed to sell an estate for payment of debts, and the heir at law, who was entitled to the surplus after payment of debts, was out of the jurisdiction : and his Lordship says : "The Court ordered the estate to be sold for payment of debts : the heir might file a bill to set aside the proceedings if they were erroneous : and [156] there the heir at law had a mother and sister living in England, and in the habit of correspondung with him ; yet there was no conception of substituting service." There could, of course, be no such substitution, unless the persons so in correspondence with the heir had a legal power to act for him in the particular subject to which the suit related. I think that the case of *Smith v. The Hibernian Mine Company* has no resemblance to the present ; for there the foundation of the application was that the agent had a power to act for the absent party in the management of his affairs, that is, generally.

The next case was in the year 1817, *Rickcord v. Nedriff*, in 2 Mer. 458. There one Defendant was out of the jurisdiction, and the other Defendant admitted, by his answer, that he had received a power of attorney from the absent Defendant to receive the arrears of an annuity which it was the object of the bill to set aside. The Plaintiff, in that case, moved on the admission in the answer ; and of course Lord Eldon refused the application : for there was no foundation for it ; the admission in the answer of one Defendant not being evidence against a Co-defendant. Lord Eldon said that the proper course for obtaining the relief sought by the bill would be by motion against the Defendant Nedriff, upon affidavit of the facts alleged as constituting the ground of the application. I can understand why the application was made in the manner it was ; for, in *Hyde v. Foster*, the Court appears to have looked at the answer of a Co-defendant. That, however, was a mistake. But, from what Lord Eldon said, I think it is clear that he thought the motion before him would have been proper if the facts had been supported by affidavit.

[157] Then it was said that the case of *Waterton v. Croft* was an authority that the order sought to be discharged is wrong. There an original bill was filed, and then a cross-bill ; and an order was made, on a motion by the Plaintiff in the cross-suit, that the service of the *subpoena* to appear to and answer the bill in that suit on the Clerk in Court of the Plaintiff in the original suit might be deemed good service ; and I recollect expressing an opinion that that was not the proper course ; but that the proper course was to move to stay the proceedings in the original suit until the Plaintiff had answered the bill in the cross-suit. The only question in that case was how far service on the Clerk in Court ought to be considered good service. The distinction is plain between the case of a person being merely Clerk in Court for a party, and the case of a person having an express authority to act for an absent party in the particular matter of the suit. And if I find the cases decided, uniformly, by four different Judges, on that principle, and none attacking it, it appears to me that the matter is concluded ; for my opinion is that there is clear evidence in this case that MacMahon has special authority to act for the assignees of Mrs. Sheil. Therefore, the order for substituting service was right, and the application to discharge it is wrong, and must be refused with costs.

(1) The cases cited from Dickens's Reports, in the argument of *Smith v. The Hibernian Mine Company*, were *Carter v. De Bruyn*, *Hallett v. Sutton*, and *Hyde v. Foster*. The first was decided by Lord Cowper, the second by Lord Macclesfield, and the last only by Lord Hardwicke.

[158] TAYLOR v. MARTINDALE. May 28, 1841.

[S. C. 10 L. J. Ch. 339; 5 Jur. 648. Followed, *Parsons v. Parsons*, 1869, L. R. 8 Eq. 262; *Joynt v. Richards*, 1882, 11 L. R. Ir. 278.]

Annuity. Heir and Executor. Will. Construction.

A testator gave his real and personal estate to his wife, subject, amongst other bequests, to an annuity of £50 to A. B. *for ever*. Held, that on A. B.'s death intestate, the annuity passed not to his heir, but to his personal representative.

James Howe made his will in the following words:—

"I will, devise and bequeath, after all debts are paid, all the worldly property I die possessed of, whatsoever and wheresoever; one freehold estate, named Heath Cottage, at Tonbridge Wells, Kent; one freehold house, Hendon, Middlesex; and all freeholds, copyholds, leaseholds, monies in the funds, monies lent, stock-in-trade, and all other property of any or every kind, as I before observed, that I die possessed of, whatsoever and wheresoever, to my beloved wife, Sophia Howe, subject only to the hereafter written and following bequests: to my wife Sophia Howe's dearly beloved sister, £50 a year for her life, and, at her death, to be equally divided between her son, George Cheeseman, my dearly beloved wife, Sophia Howe, her own nephew, and Augustus Howe, my own nephew, son of my beloved brother, £25 a year to each for ever (1); and to my own dearly beloved brother, £50 a year for ever. I hope I am explicit. I will, devise and bequeath to my dearly beloved wife, Sophia Howe, all my freeholds, copyholds, leaseholds, monies in the funds, lent, stock-in-trade, book debts and all other of whatever description I die possessed of, whatsoever and wheresoever, subject only to the above written bequests." And he appointed his wife his sole executrix.

[159] William Howe, the testator's brother, survived the testator and died intestate. The question was whether the annuity of £50 a year given to him for ever passed on his death to his heir or to his personal representative.

Mr. Knight Bruce and Mr. Simpson appeared for the Plaintiffs, who were not interested in the subject of the question.

Mr. G. Richards, for the heir of W. Howe, said that the annuity was charged on real as well as personal estate, and was given to William Howe *in perpetuum*, that is, to him and his heirs; and consequently it was an annuity in fee, and on the death of William Howe it descended to his heir. Co. Litt. 144 b. *Turner v. Turner* (Amb. 776, and 1 Bro. C. C. 316); *Earl of Stafford v. Buckley* (2 Ves. sen. 171); 1 Williams on Executors, p. 522.

Mr. Loftus Wigram, for the personal representative of William Howe. There is no case in which the question has arisen, what is the effect of a gift of an annuity to a man for ever. The case of *Turner v. Turner* has no bearing on that question. The question in that case was whether the annuity was real or personal estate. It is quite clear that the annuity in this case is personal property. [THE VICE-CHANCELLOR. The only question is whether it is descendible to the heir or not. Does not the law recognise an annuity as one species of hereditament?] This annuity is not given to W. Howe and his heirs, but to him for ever; and it is nothing more than a gift to him of such a fund as would produce £50 a year for ever. [160] In *The Earl of Stafford v. Buckley* the annuity was given to the daughter for life and to her lawful heirs for ever.

Mr. Bichner, Mr. Warburton and Mr. Tripp appeared for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This point is singular, and does not appear to have been decided by any of the cases.

There is no doubt that an annuity, though personal in its nature, may be granted to a man and his heirs. The description which Lord Coke gives of an annuity with

(1) The testator seems to have described G. Cheeseman by his relationship to his wife's sister and also to his wife.

its legal incidents is: "An annuity is a yearly payment of a certain sum of money granted to another in fee, for life or years, charging the person of the grantor only. But not only the grantee, but his heir and his and their grantee also, shall have a writ of annuity." Lord Loughborough too, in his judgment in *Turner v. Turner*, says that an annuity, when granted with words of inheritance, is descendible; but, as to its security, is personal only. In this case, however, the testator has not used words of inheritance; and it is not imperative on me to construe the words "for ever," when used with reference to an annuity, to signify "heirs." In my opinion, the question is, which construction is most beneficial to the annuitant; and it seems to me to be most beneficial to him that the gift should be construed as a gift to him and his executors; as he might die without heirs; but might appoint executors. It is by no means a matter of necessity that a gift of an annuity to A. for ever must be construed as a gift to him and his heirs for ever.⁽¹⁾

[161] I think, therefore, I must hold that the gift in this case is a gift of the annuity to William Howe and his heirs, executors, administrators and assigns for ever.

[161] MOORE v. VINTEN. May 31, 1841.

[S. C. 10 L. J. Ch. 345.]

Trustee. Stat. 11 Geo. 4 and 1 Will. 4, c. 60. Practice.

A woman who was sole trustee for sale of real property married a man who absconded and had not been heard of up to the hearing of the cause. The Court decreed a sale, and that the husband should be declared a trustee within the 11 Geo. 4 and 1 Will. 4, c. 60, s. 19; but declined to appoint a person to convey in his room under the 8th section, on the ground that he was not the trustee "last known to have been seised;" there being a joint seisin in him and his wife.

Proof of search for a trustee under the 24th section of the stat. 11 Geo. 4 and 1 Will. 4, c. 60, may be given, at the hearing of the cause, by affidavit.

Knight Bridge by his will, after bequeathing a trifling legacy and directing payment of his debts out of his real estates in case his personalty should be deficient, and after appointing Esther Gregson, who was his wife's daughter, John Lee and Richard Blizard, executrix and executors of his will, gave, devised and bequeathed all the residue of his real and personal estate unto and to the use of the said Esther Gregson, John Lee and Richard Blizard, their heirs, executors, administrators and assigns, according to the nature of the property, upon trust to sell the same in such manner and at such time as they, or the survivors or survivor [162] of them should think fit; and, after paying the expenses of the sale, upon trust to invest the produce in the funds, and pay the dividends to the testator's wife, Esther Bridge, for her life; and, after her decease, upon trust to stand possessed of the said funds and securities and the dividends thereof, in trust for the testator's three children, Knight Bridge, Mary Moore and Elizabeth Beeson, and for his wife's two children, Elizabeth Mills and the said Esther Gregson, in equal shares; and, in case any of the said legatees should die without issue in the lifetime of the tenant for life, his or her share to go to the others.

Knight Bridge, the testator's son, died without issue in the testator's lifetime.

The testator died in January 1836. His widow remained in possession of the real estate during her life, and died in August 1837.

(1) Sir William Blackstone, in his Commentaries, vol. 2, p. 40, says: "An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands; whereas an annuity is a yearly sum, chargeable only upon the person of the grantor. Therefore, if a man by deed grant to another the sum of £20 per annum, without expressing out of what lands it shall issue, no land at all shall be charged with it; but it is a mere personal annuity."

In February 1836 Esther Gregson alone proved the testator's will. The other executors did not renounce probate, but they never interfered in the testator's affairs, and executed a deed of disclaimer of the trusts of the real estate.

In July 1836 Esther Gregson married Thomas Vinten, who, in December 1837, absconded, and had never been since heard of.

It appeared that part of the testator's real estate, which consisted of several houses and gardens, had been sold since Mrs. Vinten's marriage, and the money received by her husband; and he had absconded with it.

[163] The object of the bill was to have the remainder of the property sold and the produce secured for the parties entitled to it.

The cause now came on for hearing; and, in support of the case made by the bill as to the absconding, continued absence and impossibility of finding the husband, the wife's answer and also an affidavit of search was read; and the only question was, what order could be made with reference to the execution of the trust for sale?

Mr. Wakefield and Mr. Collyer, for the Plaintiff. The husband being a trustee within the 19th section of the 11 Geo. 4 and 1 Will. 4, c. 60, it is competent for the Court, under the 24th section, to receive proof by affidavit that the husband cannot be found: *De Crespigny v. Ketson* (in Chan. Aug. 1839). [THE VICE-CHANCELLOR. There is no doubt about that; I settled the practice in that case.] Then, the husband being a trustee within the meaning of the Act, and it being unknown whether he be living or dead, the Court will appoint a person to convey in his room under the 8th section; and will do so by the same decree which declares him to be a trustee. (See *Walton v. Merry*, ante, vol. vi. p. 328.) That a person who is merely a trustee by operation of law and who cannot be found may be declared a trustee under the Act for the sole purpose of appointing a person to convey in his room under the 8th section is apparent from *Beales v. Ridge* (4 Y. & C. 248, cited).

Mr. G. Richards and Mr. Selwyn appeared for Mrs. Vinten, and offered no opposition.

[164] THE VICE-CHANCELLOR [Sir L. Shadwell]. I doubt whether you can bring the husband within the 8th section of the Act. In order to do this, you must shew that he is the trustee "last known to have been seised:" but here there is a *joint* seisin in the husband and wife. You had better simply take a decree for sale, and let the husband be declared a trustee within the meaning of the Act. Perhaps you will hear of him again before a conveyance is required; and then all further difficulty will be at an end.

[165] HEMINGWAY v. FERNANDES. June 3, 1841.

Practice. New Orders. Plaintiff. Amended Bill.

Although a Plaintiff has amended his bill under an order not expressing that he does not require a further answer, he may (if no answer is filed within the time allowed by the 10th Order of 1833, and he thinks proper to waive the further answer) file a replication under the 14th Order, although that order applies in terms to those cases only in which the order to amend expresses that no further answer is required.

By the 10th General Order of 1833, a Defendant is allowed five weeks in a town cause and seven weeks in a country cause to plead, answer or demur, not demurring alone to an amended bill to which the Plaintiff requires an answer: and, under the 14th General Order, if a Plaintiff obtains an order to amend without requiring a further answer,⁽¹⁾ and amends accordingly, he is at liberty, after the expiration of eight days, to file a replication or set down the cause for hearing on bill and answer, unless the Defendant has previously served an order for time to answer, or taken out and served a warrant for time to answer the amended bill.

(1) If the Plaintiff does not require a further answer, the order to amend ought to contain a statement to that effect; otherwise it is irregular. *Boddington v. Woolley*, ante, vol. ix. p. 380.

[166] In this case the Plaintiff amended his bill under an order which did not express that the Defendant was not required to answer the amendments; and afterwards served the Defendant with a *subpœna* to answer the amended bill. The Defendant, however, did not file his answer within the time prescribed by the 10th Order: whereupon the Plaintiff filed a replication.

Mr. Knight Bruce and Mr. Loftus Wigram, for the Defendant, now moved that the replication might be taken off the file for irregularity, and that the Defendant might be at liberty to file his answer to the amended bill. They said that the Plaintiff was not at liberty to proceed in the manner pointed out by the 14th Order; as that order applied to a case where the Plaintiff did not require a further answer; and not to a case like the present, where the order to amend did not express that the Plaintiff did not require a further answer; and that the Plaintiff, instead of filing a replication, ought to have proceeded to compel the Defendant to answer the amendments by process of contempt.

Mr. Bethell and Mr. Shadwell, for the Plaintiff.

THE VICE-CHANCELLOR [Sir L. Shadwell]. As the Defendant neither put in his answer within the seven weeks, nor obtained an order for further time to answer at the expiration of that period, I think that the Plaintiff was at liberty to take the course which he has adopted: but, as this appears to be a new case, I shall allow the Defendant a fortnight to put in his answer: he must, however, pay the costs of the application.

Reg. Lib. A. 1840, fo. 895.

[167] TOMLIN v. HATFEILD. June 4, 1841.

Will. Construction. Distribution.

Testator directed his residuary real and personal estate to be divided, by his trustees, in such shares and at such times as they should think proper, amongst his nephews, A., B. and C., and his other nephews and nieces, sons and daughters of his late sisters, T. and H., who should be living at his decease, and the children of any other such nephews and nieces who, having died in his lifetime, had left issue. There were several children, and children of deceased children, both of T. and of H. living at the testator's death. The trustees not being able to agree as to the division of the property, the Court ordered it to be divided amongst the children, and the children of the deceased children of T. and H., *per capita*.

Edward Taddy, the testator in the cause, by his will, dated the 24th of April 1835, disposed of his residuary real and personal estate in the following words:—

“And as for all other my messuages, lands, tenements and hereditaments, and parts and shares of messuages, lands, tenements and hereditaments, and real estate whatsoever and wheresoever, and whereof no entire or absolute disposition is hereinbefore contained; and also as for all my monies, securities for money, effects, goods, chattels and personal estate whatsoever (after and subject to the payment out of such my personal estate of all my just debts, and funeral and testamentary charges and expenses, and the several legacies hereinbefore by me given and bequeathed), I give, devise and bequeath the same and every part thereof, unto and to the use of my nephews, John Tomlin, James Tomlin, Edward Hatfeild, and Charles Hatfeild, my executors herein-after named, their heirs, executors, administrators, and assigns, upon trust they, or the survivors or survivor of them, or the heirs, executors, administrators or assigns respectively of such survivor, shall and do, when and as they or he shall, in their or his discretion think fit, absolutely sell and dispose of all my said real estates hereby devised to them, and shall and do, forthwith upon my decease, collect, get in and convert into money [168] all such parts of my residuary personal estate, hereby bequeathed to them, as shall not, at my decease, consist of money; and my will is that, until my said real estate shall be sold and disposed of as aforesaid, the rents and profits thereof shall be considered as part of my residuary personal estate, and go

as I have hereinafter bequeathed such residue : and, as for all the monies to be received, as well from the sale of my real estates hereinbefore directed to be sold and disposed of as aforesaid, as from the rents and profits in the meantime to be received in respect thereof ; and also, as for all the monies to be received from my residuary personal estate, my will is that my said trustees and executors, and the survivors and survivor of them, and the executors or administrators of such survivor, shall pay and divide the same to and amongst themselves the said John Tomlin, James Tomlin, Edward Hatfeild, Charles Hatfeild, and my other nephews and nieces, sons and daughters of my late sister, Susanna Tomlin deceased, and of my sister Ann Hatfeild, who shall be living at my decease, and the children of any other of such nephews and nieces, who, having died in my lifetime, have left issue, in such parts, shares and proportions, manner and form, in all respects, and at such time or times, as they, my said trustees and executors, or the survivors or survivor of them, or the executors or administrators of such survivor, shall judge proper and direct : my will and meaning being that the division and distribution of all the said monies shall rest wholly with them, my said trustees and executors, and be in their entire discretion, and that their disposal and appropriation thereof shall not be called in question or disputed by any person or persons whomsoever : and, further, I do hereby declare and expressly direct that, in case any of my said nephews or nieces, or any child or children [169] of any deceased nephew or niece, shall be dissatisfied with the proposed division and distribution of the last-mentioned trust monies by my said trustees, and shall attempt, by any means, to interfere with or control them therein, such nephew or niece or child or children of any deceased nephew or niece shall be wholly and absolutely debarred and for ever excluded from any benefit of or from or participation in the trust monies or funds last above mentioned and so ordered to be divided or distributed by them, the said John Tomlin, James Tomlin, Edward Hatfeild and Charles Hatfeild, as hereinbefore mentioned."

It appeared, from the report made in pursuance of the decree at the hearing, that there were eight children, and two grandchildren the issue of two deceased children, of the testator's sister Susanna Tomlin living at the testator's decease : and that there were seven children and seven grandchildren the issue of a deceased child of the testator's sister Ann Hatfeild living at the same time.

The bill was filed by John and James Tomlin and Charles Hatfeild against Edward Hatfeild and other persons interested under the will, alleging (amongst other things) that the Plaintiffs were desirous to carry into effect the trusts reposed in them by the will, jointly with Edward Hatfeild, by selling the estates devised to them, and distributing the proceeds thereof and the residue of the testator's personal estate and effects amongst themselves and Edward Hatfeild and the other nephews and nieces of the testator, sons and daughters of his sisters Susanna Tomlin and Ann Hatfeild, and the children of such other nephews and nieces, children of Susanna Tomlin and Ann Hatfeild, who died in the [170] testator's lifetime leaving issue, according to the will : but Edward Hatfeild refused to concur with the Plaintiffs in effecting such sale and distribution. The bill prayed that the will might be established and the trusts of it performed under the decree of the Court ; and that the rights and interests of all parties in the testator's residuary real and personal estates might be declared and ascertained ; and that the real estates devised to the Plaintiffs and Edward Hatfeild might be sold ; and that the proceeds thereof and of the testator's residuary personal estate might be distributed amongst the Plaintiffs and Edward Hatfeild and the other parties entitled thereto under the will, according to the intention of the will.

The cause now came on to be heard for further directions.

The question was whether the proceeds of the sale of the testator's residuary real estates and his residuary personal estate were to be divided, *per stirpes* or *per capita*, amongst the children and the children of deceased children of Susanna Tomlin and Ann Hatfeild mentioned in the Master's report.

Mr. Knight Bruce, Mr. Wigram, Mr. Loftus Wigram and Mr. Rogers, for the Plaintiffs and for the Defendants in the same interest, contended that the division ought to be made *per stirpes*, as being the most equitable and the most conformable to the testator's presumed intention.

Mr. Girdlestone, for the Defendants, the seven grandchildren of Ann Hatfeild, said

that, as the trustees could not agree as to the mode of division, the Court [171] must divide the property amongst the claimants equally, that is, *per capita*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The will directs the trust property to be divided amongst certain individuals, some of whom are named and some of whom are not named but described: and I see nothing which shews that they are to take otherwise than as they are named and described. Therefore, all those persons who come within the description of children of deceased nephews and nieces of the testator must take, individually, a share.

"The trustees and executors of the will not being able to agree as to the mode of dividing the residuary real and personal estates of the testator amongst the persons amongst whom the same were, by the will of the said testator, directed to be divided, declare that the several persons in the Master's report mentioned in that behalf, that is (the children and the children of the deceased children of Susanna Tomlin and Ann Hatfield), are entitled to the residuary real and personal estates of the said testator in equal shares and proportions."

[172] VIGOR v. HARWOOD. June 4, 1841.

Will. Construction. Intermediate Rents.

Testator devised his real estates to trustees, in trust to sell as soon as conveniently might be after his decease, and as to the proceeds, together with the intermediate rents, after payment of the testator's funeral and testamentary expenses, debts and legacies, to pay one moiety to his nephew, and to invest the other moiety in the funds, in trust for his nephew, for life, and, after his death, for his children. The real estates were not sold until some years after the testator's death. Held, that rents accrued in the meantime ought not to be invested for the benefit of the nephew and his children, but that the nephew was entitled to them.

Edward Lane, by his will, dated the 23d of October 1813, appointed the Defendants, Harwood and Apletree, executors thereof and trustees of his real and personal estate for the purposes after mentioned. He then gave various pecuniary legacies, and subjected all his real and personal estate, except the life interest in his dwelling-house thereafter given to his sister, Mary Lane (since deceased), with the payment thereof. He next gave to his sister, Mary Lane, the use and enjoyment, during her life, of all his household goods and furniture and implements of household, books, plate, linen and china; and willed that, after her death, the same should fall into the residue of his personal estate for the purposes after mentioned: and he devised to his said sister his dwelling-house at Basingstoke during her life. The will then proceeded as follows:—"And, lastly, as to, for and concerning all and singular my personal estate, of whatsoever nature, kind or description, subject to the said bequest of the use of the said household goods and furniture and implements of household, books, plate, linen and china to my sister for her life; and as to, for and concerning all and every my freehold, leasehold and copyhold manors, messuages, lands, tithes, hereditaments and premises situate, lying and being in the counties of Southampton and Buckingham and in the City of Oxford or elsewhere (which copyholds I have duly surrendered to the use of my will), subject, nevertheless, to the devise of my said dwelling-house, [173] with the appurtenances to my said sister for her life, I give, devise and bequeath the same and every part thereof unto the said John Harwood and William Apletree, and to the survivor of them, his heirs, executors and administrators, according to the respective qualities of my said real and personal estate, upon trust, nevertheless, as soon as conveniently may be after my decease, either publicly or privately, and for the most money that can be had or gotten for the same, to sell and dispose of all and singular my said manors, messuages, lands, tenements, tithes, hereditaments and premises, either together or in parcels, as they, my said trustees or the survivor of them, or the heirs, executors or administrators of such survivor shall think proper and most for the benefit of the person and persons to be interested in the produce

thereof by and under the trusts of this my will ; and in trust as to the net produce of all such sale and sales, *together with the intermediate rents* and the surplusage, if any, of my general personal estate, after payment and discharge of my funeral and testamentary expenses and all other my just and lawful debts, and subject to the legacies herein and in the schedule hereto mentioned and contained, to pay one moiety or half part thereof unto my nephew, William Vigor, to and for his own sole use and benefit, as a vested and transmissible interest ; and upon further trust, to place out and invest the other moiety or half part thereof, in the names of my said trustees or of any new or other trustees to be appointed under the powers of this my will, on Government or real security, during the term of the natural life of my said nephew, and to apply and pay the interest, dividends and produce thereof half-yearly or otherwise as the same shall become due and payable, unto my said nephew for his own sole use and benefit ; and, upon and after the decease of my said nephew, to [174] call in the said trust monies so directed to be invested at interest as aforesaid, and apply, pay and divide the same to and amongst all and every the children of my said nephew lawfully to be begotten, if more than one, equally, share and share alike, and if there shall be only one such child, then the whole to such child ; and, in default of and for want of such children or child of my said nephew, William Vigor, or, being such, all of them should die in his lifetime without leaving lawful issue then living, in trust to continue the same at interest during the life of the widow of the said William Vigor, in case he should leave a widow him surviving, for and during the term of her natural life ; and, from and after her decease, or in case then there shall be no such children or child of the said William Vigor him surviving, or, being such, all of them shall be then dead without leaving lawful issue, in trust to pay, apply and divide the said principal trust monies unto and amongst such person and persons as shall then be the next of kin of me, the said Edward Lane, nevertheless to the utter exclusion of my wife, Catherine Lane, now and for many years past living apart from me, and any children she has or may have. Provided always that, if any or either of the children of my said nephew, William Vigor, shall happen to die in his lifetime leaving lawful issue, the share and shares of such children or child so dying shall go to and amongst such issue equally, to take *per stirpes* and not *per capita* ; and, in default of such issue, to and amongst the survivors of the said children of my said nephew, William Vigor, if more than one, but if there shall be only one such surviving child, then the whole to such survivor." And the testator directed that the survivor of his said trustees should, as soon as conveniently might be after the decease of his co-trustee, proceed to the nomination and appointment of some [175] new trustee, and so on from time to time while the trusts of his will should remain unaccomplished ; and empowered his trustees, from time to time, to lease, manage and conduct the business of his said estates in the best possible way according to their judgment and discretion until they should be sold as aforesaid.

The testator died in February 1826. The trustees and executors entered into the possession or receipt of the rents of the testator's real and leasehold estates ; and possessed themselves of his personal estate, which was insufficient to pay his funeral and testamentary expenses, debts and legacies ; and they afterwards sold the whole of the real estates except the estates in Buckinghamshire, of which they were still in possession ; and, out of the monies produced by those sales and arisen from the testator's personal estate, they paid the testator's funeral and testamentary expenses and debts ; and they invested the residue in Government or real securities.

The bill was filed by William Vigor, the testator's nephew (and who had become his heir and sole next of kin), against the trustees and executors of the will and the Plaintiff's two children, one of whom was an infant ; and, after stating as above, it alleged that the trustees were about to sell the estates in Buckinghamshire and to wind up the testator's affairs : but that doubts had arisen touching the application of the income of the testator's real and personal estate from the time of his death : that it was contended by or on the part of the Defendants, the children of the Plaintiff, that a moiety of the income of the real and personal estates from the time of the testator's death until the sale and investment and payment of his real and personal estates according [176] to the trusts of his will (subject to any proper application of the income, if necessary, towards the payment of his funeral and

testamentary expenses, debts and legacies), ought to be invested, pursuant to the trusts of the will, in Government or real security, for the benefit of the Plaintiff and his children. But the bill charged and prayed the Court to declare that, according to the true construction of the will, the Plaintiff (subject, if necessary, to the testator's funeral and testamentary expenses, debts and legacies) was entitled, for his absolute use and benefit, to the whole of the rents and profits of the freehold, copyhold and leasehold estates, from the testator's death until the sale of those estates; and that, subject as aforesaid, the Plaintiff was also entitled to the income, from the death of the testator, arising on all such parts of the testator's personal estate as, at the time of his death, produced income, and also to the income arising from other parts of the personal estate as had been realised and invested by the trustees from the respective times of such investments, and that the amount of such rents and profits and income might be ascertained and paid to the Plaintiff.

Mr. Knight Bruce and Mr. Hislop Clarke, for the Plaintiff, contended that no part of the income arisen from the real and personal estates from the testator's death ought to be invested on securities for the benefit of the Plaintiff and his children; but that the whole of it ought to be paid to the Plaintiff. They relied on *Noel v. Lord Henley* (7 Price, 241), and *Sitwell v. Bernard* (6 Ves. 520).

Mr. G. Richards and Mr. Freeling, for the Plaintiff's children, said that the will contained an express direc-[177]-tion that the real and personal estates should be sold as soon as conveniently might be after the testator's death; and that, after payment of his debts, &c., one moiety of the net produce and also of the intermediate rents should be invested by the trustees in the usual securities for the benefit of the Plaintiff for his life, and after his death for the benefit of his children: so that the income of the testator's property was incorporated with and subjected to the same trusts as the capital; and the Court could not hold that the Plaintiff was entitled to the intermediate rents without violating the plain language of the will.

Mr. Allfrey, for the executors and trustees of the will.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Taking the words of the will, which Mr. Richards has relied on, by themselves, it might be contended that they would amount to a direction to accumulate the intermediate rents: but the cases which have been cited by the Plaintiff's counsel warrant me in saying that a much more clear trust for accumulation would be required, in order to take away the enjoyment of the estates from the tenant for life.

"Declare that, according to the true construction of the will, the Plaintiff is entitled for his life, subject to the payment of the testator's funeral and testamentary expenses, debts and legacies, to the income of the real and personal estates, from the testator's death, until the sale and conversion thereof directed by the will."

[178] LINDSELL v. THACKER. June 7, 1841.

[S. C. 10 L. J. Ch. 348; 5 Jur. 603. See *Lewis v. Mathews*, 1866, L. R. 2 Eq. 180.]

Will. Construction. Devise. Trust Estate.

Testator gave all his property whatsoever and wheresoever the same might be at his decease to his wife, for her sole use for ever. Held, that an estate vested in the testator as a trustee did not pass by the devise.

John Thacker and Catharine, his wife, being seised of a copyhold estate for their lives and the life of the survivor of them, with remainder to the heirs of the survivor, and Thacker having agreed to sell the estate to John Lindsell, he and his wife surrendered it to Lindsell and Margaret, his wife, for their lives and the life of the survivor of them, with remainder to Margaret and her heirs: and Thacker executed a bond to Lindsell, conditioned for the further surrendering and assuring of the estate, by him and his wife and all persons claiming under them, to Lindsell and wife. Afterwards Lindsell died leaving his wife (who was the Plaintiff in the cause)

surviving. Then Mrs. Thacker died; and after her death her husband married again. In 1823 the husband died, having in January of that year made his will in the following words:—"I hereby give and bequeath all my property whatsoever and wheresoever the same may be at the time of my decease unto my loving wife, *for her sole use* for ever: and I also further appoint my affectionate and loving wife, Ann Thacker, whole and sole executrix of this my last will: and I further declare and appoint H. Markland and E. P. Sharpe executors in trust of this my last will."

The surrender by Thacker and his first wife not having, as it was alleged, affected the remainder which was then contingent but afterwards vested in Thacker on the death of his first wife, the bill prayed that the Defendant, his widow, might procure herself to be admitted to the estate and then surrender it to the Plaintiff, Mrs. Lindsell, in fee.

[179] The question which was discussed on the argument of a demurrer was whether the legal interest in the estate which was vested in Thacker at the date of his will and at his death passed, under the general devise in his will, to the Defendant.

Mr. James Russell and Mr. Romilly, in support of the demurrer. Whatever is given by Mr. Thacker's will is given to his wife for her separate use. *Adamson v. Armitage* (19 Ves. 416); *Ex parte Ray* (1 Madd. 199). Those cases establish that a gift to the *sole* use of a woman is equivalent to a gift to her *separate* use: and that being so, a mere dry legal estate would not pass by the general words in the will; for a dry, legal estate could not be taken by the testator's widow for her separate use. Besides, the language of the will throughout is much more applicable to personal than to real estate. In *Ex parte Brettell* (6 Ves. 577), a testator devised all the rest, residue and remainder of his estate and effects whatsoever and wheresoever and of what nature or kind soever to his natural son, George Hall, his heirs, executors, administrators and assigns for ever, to and for his and their own proper use and benefit; and Lord Eldon said that, although the testator probably meant nothing by the words, "to and for his and their own proper use and benefit," yet a meaning must be attributed to every word; and that there was not enough in the will to make the natural son a trustee. It is observable that, in that case, there were no words which qualified the interest given to the natural son; but in this case, whatever passed to the wife was to be enjoyed by her, for her separate use; and [180] that was a qualification which could not be annexed to an estate of which she was to be a mere trustee. Consequently the legal interest in the copyhold estate did not pass by the will. In *Lord Braybrooke v. Inskip* (8 Ves. 417: see 435), Lord Eldon said, in effect, that trust estates would not pass under general words, if it could be collected (as it can be here), from expressions in the will or the purposes or objects of the testator that he did not mean they should pass. In *Ex parte Shaw* (*ante*, vol. viii. p. 159) a testator gave all the property he might die possessed of or might thereafter acquire to his wife, her heirs, executors, administrators and assigns, to and for her own absolute use and benefit, and to be disposed of by her by deed, will or otherwise as she might think fit; and it was held that an estate, of which the testator was a trustee, passed by the devise. There the words superadded to the gift were not at all inconsistent with a legal estate passing; but here the qualified interest given to the wife is quite inconsistent with a legal estate passing by the devise. *Ex parte Marshall* (*ante*, vol. ix. p. 555).

Besides, in this case, the question relates not to a freehold but to a copyhold estate; and it is by no means clear that the general words will pass a copyhold estate which has not been surrendered to the use of the will. In *White v. Fitty* (2 Russ. 484; see 493), the Lord C.J. says: "It is stated, as a fact, that these copyholds were surrendered to the use of the testator's will. If they had not been surrendered, it would have been difficult probably, whatever might have been the intent of the testator, to have said that the words of the residuary clause were sufficient to pass them." [THE VICE-CHANCELLOR. The [181] will in this case was made after the necessity of surrendering copyholds to the use of a will had been dispensed with.] It may be fairly concluded that the testator in this case thought that he had disposed of all his interest in the estate, by the surrender which he had made to Mr. and Mrs. Lindsell; but, if he was aware that any interest remained in him, then by not

surrendering the estate to the use of his will he shewed that he did not intend that it should pass by his will.

Mr. Knight Bruce and Mr. Willecock, in support of the bill. The presumption is that a legal estate passes by general words in a will; and it lies on those who say that it does not pass to shew that there is something in the will which clearly shews that the testator must have intended that it should not pass. In *Lord Braybrooke v. Inskip* (8 Ves. 435) Lord Eldon says, "I know no case which states, as the rule, that trust estates shall not pass under general words, unless an intention that they should pass appears; and I incline to think they will pass, unless I can collect, from expressions in the will, or purposes or objects of the testator, that he did not mean they should pass. In this case there is no circumstance, except one that I shall observe upon, denoting any special intention. It is the case of a dry trust; all the debts and legacies being long paid, as I now understand. There was, therefore, a pure legal estate in this testator; nothing remaining to be done but to reconvey. There is no one circumstance in this will to cut down the general effect upon any notion of intention; unless it can be said that, where he meant to create a trust, viz., as to the personal [182] estate, he joins another person with his wife; giving the real estate to her alone. But that is too thin an evidence of intention to afford much inference. The result is this: a will containing words large enough, and no expression in it authorizing a narrower construction than the general legal construction, nor any such disposition of the estate as is unlikely for a testator to make of any property not in the strictest sense his (as complicated limitations) nor any purpose at all inconsistent with as probable an intention to vest it in his wife, as devisee, as to let it descend. I know of no case in which a mere devise in these general terms, without more, where the question of intention cannot be embarrassed by any reasoning upon the purpose or objects, or the person of the devisee, has been held not to pass the trust estate." In order to cut down the effect of a general devise, it is not sufficient to shew that the testator intended a benefit by it; for every devise imports a benefit: and in *Ex parte Shaw* express words to that effect were added to the devise; and yet your Honor held that a dry legal estate passed by the devise. *Ex parte Whitacre, In re Vallis* (1 Sanders on Uses and Trusts, 285, note). Here the testator meant to put his wife in his own situation with respect to all his property, and to give her the means of performing the obligation which he had created by executing the bond to Mr. Lindsell.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am of opinion that the demurrer ought to be allowed. For I take the rule to be as laid down in *Lord Braybrooke v. Inskip*, namely, that a trust estate will pass by general words in a will, unless it can be collected, either from the expressions in the will or from the purposes or objects of the testator, that he did [183] not mean that the legal estate should pass: as, for instance, where the devise is of all the testator's real estates to a trustee, in trust to sell and receive the proceeds, or where the estates are given to one for life with remainders over. There the object of the devise in the one case and the mode of limitation in the other are inconsistent with the intention to pass a dry legal estate.

If the testator in this case had simply given all his property to his wife and her heirs for ever, or if he had given it to her in any other general words amounting only to the same thing, the legal estate would have passed, according to what Lord Eldon says in his judgment in *Lord Braybrooke v. Inskip*, where he speaks of his decision in *Ex parte Brettell*. His Lordship says, "I certainly did not mean to be understood to put anything (as I am now understood at the Bar to have done) upon the expression that it was given to the use and behoof of the party. I perfectly agree that giving to a man, his heirs and assigns, is perfectly the same. But I meant that I thought I could collect that the testator intended to give to that individual a property which he could enjoy as beneficially as that property that was his own. I desire, therefore, not to be understood to put that opinion upon any such words, except so far as I could collect the intention from the will, calling in aid the particular situation of the devisee. My meaning was only that it may be a circumstance upon the intention that the testator did not mean a mere dry trust estate, and not in a beneficial sense altogether his, should pass as his under general words; when, if it did, it was incapable of such a large species of enjoyment as, upon the whole will, he intended to give in every part of the property." But in this case the tes-[184]-tator has given all his property what-

soever and wheresoever to his wife, in a particular manner, that is to say, for her sole use. The words "sole use" necessarily imply separate use, and indicate that the testator meant that the property which he had devised to his wife should be enjoyed by her beneficially. Then, if I find that the intention of the testator was that the subject of the devise should be beneficially enjoyed by the devisee, I am bound, by the decision in *Lord Braybrooke v. Inskip*, to say that in this case there is a sufficient demonstration of intention that a mere dry legal estate should not pass by the devise.

Demurrer allowed.

[184] PAINE v. WAGNER. June 8, 9, 1841.

[See *Dias v. De Livera*, 1879, 5 App. Cas. 136; *In re Jupp*, 1888, 39 Ch. D. 151; *In re Dixon*, 1889, 42 Ch. D. 308.]

Will. Construction.

A will contained the following clause:—"I recommend that the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike, Mrs. M., Mr. and Mrs. W. and children, likewise H. H." Held, that Mrs. W. was entitled to an equal share of the proceeds of the house and premises, as tenant in common with her husband and her children living at the testator's death, and with Mrs. M. and H. H.

Alexander Mitchell made his will, dated the 28th of November 1819, in the following words:—"Memorandum, in case of death, I leave to my dear wife £150 per annum for her life, to have a power of receiving it herself from the interest of money in the 5 per cents.; at her death the principal to be equally divided amongst Anthony and Sarah Wagner's children, giving to Hannah Harby an equal share with the children. I likewise leave to my dear wife a mortgage of £300 at Stathorne; the same £300 to be at her own disposal. I leave to Hannah Harby £700, to be paid to her in full, likewise the legacy left by my late brother. I leave to my sister, Margaret Gregory, the interest of [185] £200 in the £5 per cents.; at her death the £200 to be equally divided amongst her children. I leave my brother George ten guineas. I leave to Robert's widow ten guineas. I leave to Anthony Mitchell Wagner the lease of Mr. Monk's house. I recommend that the house and premises may be disposed of as soon as possible; and, after paying all just debts, may be equally divided, share and share alike, Mrs. Mitchell, Mr. and Mrs. Wagner and children, likewise Hannah Harby. I leave to W. A. Gould ten guineas. I appoint Mrs. Mitchell and Anthony Wagner, in trust for the whole concern."

The testator died on the 6th of June 1821. His estate consisted, in part, of two leasehold houses, one situate in Queen Street, Pimlico, in Middlesex, which was let to Mr. Monk, and the other situate in Ranelagh Walk, at the corner of Queen Street, in which the testator resided at his death, and which was alleged to be the property mentioned in his will as "the house and premises."

The bill was filed by the testator's widow (who married after the testator's death) against Anthony Wagner and his children living at the testator's death, and certain other persons, praying that the trusts of the will might be performed, and that the clear residue of the testator's estate and effects might be ascertained, and the rights, shares and interests of all parties interested therein ascertained, and paid, applied or secured for their benefit.

Two of the Defendants demurred to the bill because the personal representative, Sarah, the wife of Anthony Wagner (who died several years after the testator), was not a [186] party to the suit. The demurrer was in the following form:—"These Defendants, by protestation, &c., do demur to the said bill, and to all the relief and all the discovery thereby prayed; and, for cause of demurrer, shew that the said Plaintiff hath not made the personal representative of Sarah Wagner in the said bill named, the late wife of Anthony Wagner, one of the Defendants to the said bill, a

party to the said bill, nor prayed process against such personal representative; and that such personal representative is a necessary party to the said bill. Wherefore," &c.

Mr. Knight Bruce and Mr. Charles Hall, in support of the demurrer. The will directs the house and premises, or their produce, to be equally divided, share and share alike, between the Plaintiff, Mr. and Mrs. Wagner and their children, and Hannah Harby. If a legacy is given to a man and his wife, equally to be divided between them, each of them takes a moiety of the sum bequeathed. Mrs. Wagner was as distinct an object of the bequest in question as the Plaintiff. Consequently, she became entitled to share in the subject of the bequest equally with the other objects. Therefore her personal representative is a necessary party to the suit.

Mr. Girdlestone and Mr. Cameron, in support of the bill. First, the demurrer is wrong in point of form; for it alleges merely that Mrs. Wagner's personal representative is a necessary party to the bill; but that is not sufficient. The demurrer ought to have alleged that *it appeared by the bill* that her personal representative was a necessary party.

[187] Secondly, there is no fair construction of the will under which Mrs. Wagner can be held to take such an interest in the property in question as will make her personal representative a necessary party to the suit. The only construction which could make her personal representative a necessary party is that she and her husband and children were tenants in common; but we submit that that construction is entirely excluded; for the words "share and share alike" were not intended to be read distributively; but Mr. and Mrs. Wagner and their children were meant to take as joint-tenants as amongst themselves. In the bequest of the capital of the stock out of which the annuity of £150 was to be paid, the testator speaks of the children as a class; and, in the bequest in question, he speaks of them and their parents as a class; that is, he names three classes as the objects of the bequest; his widow is one, Mr. and Mrs. Wagner and their children are another, and Hannah Harby is the third. *Bricker v. Whalley* (1 Vern. 233); *Buffar v. Bradford* (2 Atk. 220); *The Attorney-General v. Bacchus* (9 Price, 30).

There is also another construction which the words of the bequest will bear, and which makes it unnecessary for Mrs. Wagner's personal representative to be brought before the Court; namely, that Mr. and Mrs. Wagner took for their lives with remainder to their children. *Newman v. Nightingale* (1 Cox, 341), *Crawford v. Trotter* (4 Madd. 361), are authorities for that construction.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In my opinion this is a good demurrer.

[188] I do not feel any difficulty upon the point of form; for I think the demurrer is sufficiently good in that respect.

Next, as to the substance of the case. In the first instance, the testator has given the fund which was to produce the annuity to be equally divided between Anthony and Sarah Wagner's children, giving to Hannah Harby an equal share with the children. There the children are stated to be substantive takers. Then, when he comes to speak about the money which was to arise from what he calls the house and premises, after paying his debts, he says: "I recommend the house and premises may be disposed of as soon as possible, and, after paying all just debts, may be equally divided, share and share alike," leaving out the word "between" "Mrs. Mitchell, Mr. and Mrs. Wagner and children, likewise Hannah Harby." It is a very ill-arranged set of words I admit; but it appears to me that the natural construction of them is that all the parties who are either named or described are to take, as between themselves, as tenants in common.

The demurrer therefore must be allowed.

I have certainly understood the law, ever since *Wild's case* (6 Rep. 16 b.), to be this, namely, that, if there is a gift simply to parents and children, and there be children living at the time, the children take with their parents; if there be no children, then the parents take for their lives, with remainder to their children.

[189] JONES v. ROBERTS. June 9, 1841.

Practice. Motion.

A person, though not a party to a suit, may apply in it by motion (stating his title in the notice of motion), unless a long statement of facts is required to shew his title; and then he must apply by petition.

On the hearing of a motion in this cause, it was objected that the person on whose behalf the motion was made, not being a party to the suit, could not move in it, but ought to have presented a petition.

THE VICE-CHANCELLOR [Sir L. Shadwell], however, ruled that, as the title of the applicant was stated in the notice of motion, and no long statement of facts was required to shew the title, the application might be made by motion.

[189] DUNCUFT v. ALBRECHT. June 9, 1841.

[See *Colonial Bank v. Whinney*, 1885-86, 30 Ch. D. 283; 11 App. Cas. 426.]

Railway Shares. Agreement. Specific Performance. Statute of Frauds.

The Court will decree a specific performance of an agreement for the sale of a certain number of shares in a railway company.

A parol agreement for the sale of such shares is binding; for they are neither an interest in or concerning lands, within the 4th section of the Statute of Frauds; nor goods, wares or merchandizes, within the 17th section.

By the London and Southampton Railway Act, passed in the 4th & 5th of Wm. 4th, the subscribers to the undertaking and their successors, executors, administrators and assigns were incorporated, and were empowered to purchase and hold lands for the purposes of the undertaking, and to sell and demise or otherwise dispose of the same in the manner thereby directed, and also to raise, for the purposes of the Act, £1,000,000, which was to be divided into 20,000 shares of £50 each, and each share was to be numbered from one to twenty thousand, and distinguished by its number, and the [190] shares were to be vested in the parties raising and paying the same (1) and their respective successors, *executors, administrators and assigns*, to their proper use and benefit, proportionably to the sums they should severally contribute; and all subscribers for shares were to be proprietors of a proportionate share of the capital stock of the company, and were to receive a proportionate part of the profits of the undertaking; and the company were to cause the names, additions and places of abode of the subscribers, with the number of shares which they were respectively entitled to, and the amount of the subscriptions paid thereon, and also the number by which every such share should be distinguished, to be entered in a book to be kept by the secretary of the company; and the shareholders were authorized to sell or otherwise dispose of, and to transfer their shares, subject to the rules and conditions therein provided and to such restrictions and regulations as the directors might think necessary to impose; and the form of transfer was set forth in the Act; and, on every sale of a share, the deed of transfer, when executed by the seller and purchaser, was to be produced to the secretary, who was to enter, in a book, a note of the transfer, and to indorse the same on the deed of transfer, and, until such note should have been so entered, the purchaser was not to be deemed a proprietor of the company, nor to have any of the rights or privileges of a proprietor.

By an Act passed in the 1st Vict. to amend the preceding Act, the company were to cause a certificate, signed by two of the directors and the secretary, to be delivered to every proprietor, specifying the share or [191] shares to which he should be entitled,

(1) So in brief.

and the certificate was to be admitted, in all Courts, as *prima facie* evidence of the title of such proprietors, their successors, *executors, administrators or assigns*, to the share or shares therein specified; and the form of the certificate was set forth in the Act; and, in case of a transfer of any share to a new proprietor, an indorsement of the transfer on the certificate was to be considered as a new certificate; and the before-mentioned provision in the preceding Act respecting the production of the deed of transfer to the secretary, and the entry and indorsement to be made by him was repealed, and, in lieu thereof, it was enacted that, on every sale of a share, the conveyance, having been executed by the seller and purchaser, should be produced to and kept by the secretary, and, on the production thereof and of the certificate of the share or shares sold, the secretary was to enter in a book a memorial of the transfer and sale, and indorse the entry of the memorial on the deed of transfer, and, on request, he was to make an indorsement of the transfer on the existing certificate of each share sold, and the indorsement, signed by the secretary, was to be considered the same as a new certificate, and, after the memorial should have been made and entered, the seller was to be released from all liability in respect of the share transferred, and, then and not before, the purchaser was to be deemed a proprietor, and to have the rights and privileges of a proprietor: and the company were empowered to raise an additional capital of £400,000, to be divided into 16,000 shares of £25 each, and the shares were to be numbered from 20,001 to 36,000, and every share was to be distinguished by its number, and was to be vested in the persons who should subscribe for the same and their respective successors, *executors, administrators and assigns*, to their proper use [192] and benefit, proportionably to the sums by them subscribed; and all subscribers to the new shares were to be proprietors of stock in the company, to the same extent and as beneficially as proprietors of the same number of original shares, and were to be entitled to the rights and privileges, and be under and subject to the powers, provisions, indemnities, remedies and penalties contained in the two Acts, in like manner as if the new shares had been original shares, except where altered or varied by the present Act.

By an Act of the 2d and 3d Vict., the title of the company was changed to that of "The London and South-Western Railway Company."

The bill, after stating as above, alleged that, on the 17th of February 1840, the Defendant was possessed of fifty shares and upwards in the company and of the certificates for them; and that it was then agreed, between him and the Plaintiff, that, in consideration of £53 then paid to him by the Plaintiff, he should, at the Plaintiff's request, to be made at any time on or before the 31st of December 1840, transfer to the Plaintiff 50 shares at the price of £46 per share: that the agreement was a verbal one, but that on the same day, the Plaintiff, at the Defendant's request, reduced or put it into writing as follows:—"Manchester, February 17th, 1840.—To Mr. John Duncuft.—Sir,—In consideration of the sum of £53 this day paid to me by you, I undertake to transfer to you, or to your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December 1840, fifty shares in the London and South-Western Railway, upon receiving the amount of £46 per share, with all calls paid; and I further engage to deliver, with the said fifty shares, any new shares, or [193] any part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your paying me for such new creation of shares, only such payment as I may have to make, without any interest on such payment. The transfer of the said shares to be at the expense of yourself or your nominee, and to be given in exchange for this engagement, and, in default of such request by you or your nominee within the time so limited, the aforesaid sum of £53, so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares shall be absolutely at an end." The bill further alleged that, in the afternoon of the 17th of February 1840, the Plaintiff presented the above memorandum of agreement or letter to the Defendant for his signature: that the Defendant read it, and said it would require some alteration; and then wrote on the back of it the substance of the alterations; which the Plaintiff assented to; and it was then agreed between the parties that the memorandum should be recopied and the alterations introduced in it, and, when recopied, should be signed by the

Defendant on the following morning, and that, at the same time, the Plaintiff should pay him the deposit of £53: that the memorandum was accordingly recopied, with the alterations, and was as follows:—"Sirs,—In consideration of the sum of £53 this day paid to me by you, I undertake to transfer to you or your nominee by indorsement hereon, at any time, upon request in writing, on or before the 31st day of December 1840, fifty shares, with all calls paid, in the London and South-Western Railway, upon receiving the amount of £46 per share: and I further engage to deliver, with the said fifty shares, any new shares or any [194] part of a share that may be created before the expiration of this contract, and to which, as the holder of the said fifty shares, I may be entitled, on your declaring to take such new shares certain, whether the other shares are taken or not, on your paying me, for such new creation of shares, such payment as I may have to make, with interest at the rate of £5 per cent. per annum; the transfer of the said shares to be at the expense of yourself or your nominee, and to be given in exchange for this engagement: and, in default of such request by you or your nominee within the time so limited, the aforesaid sum of £53 so paid to me for the option hereby given to you of taking the shares I have so contracted to deliver, shall be forfeited to me, and my engagement as to the delivery of the said shares shall be absolutely at an end: should you not take the shares before the first day of July, I am to receive any dividend that may be declared for the then past six months." The bill then alleged that, on the 18th of February 1840, the Plaintiff presented the altered agreement to the Defendant for his signature, and, at the same time, tendered to him the £53; but he refused to receive the same, or to sign the altered agreement: that no more shares in the railway had been created since the date of the agreement; and that the Plaintiff made several applications to the Defendant between the 18th of February and the 31st of December 1840, to transfer and assign the fifty shares to him, and offered to pay the purchase-money for the same, and that, in particular, on the 5th of November 1840, the Plaintiff tendered to the Defendant the sum of £2353, being the purchase-money for fifty shares, and, at the same time, requested the Defendant to transfer and deliver the shares and the certificates thereof to him; but the Defendant refused to accept such tender or to assign the shares to the Plaintiff; that, on the 6th of February 1841, the Plaintiff wrote and sent to the Defendant a letter requesting the Defendant to transfer and deliver to him the fifty shares in the railway sold to him on the 17th of February 1840; and adding that, unless the shares were so transferred and delivered, a bill would be filed against the Defendant, for a specific performance of the contract; and that the Plaintiff and his solicitor had frequently given notice to the Defendant to perform the contract on his part, and that, on the 29th of December 1840, the Plaintiff's solicitor applied to the Defendant to accept the purchase-money for the shares, and to transfer and assign them to the Plaintiff; and the Defendant then expressly refused to perform the contract. The bill prayed that the Defendant might be decreed specifically to perform the said agreement for the sale to the Plaintiff of the fifty shares in the railway company, and such, if any, new shares as had been or might be created since the 17th of February 1840, and to transfer all such shares to the Plaintiff, and to deliver up the certificates thereof to him, and to account to him for any dividends which might accrue on such shares previous to such transfer; the Plaintiff being willing thereupon to pay to the Defendant the purchase-money, after deducting thereout such sums, if any, as might be received by the Defendant for dividends before the transfer of the shares, and the expenses of the transfer; and that the Defendant might be decreed to make compensation to the Plaintiff for the difference in value of any of the shares at the time when the same should be transferred to the Plaintiff, and the time within which the agreement ought to have been performed, the amount of such difference to be ascertained by the highest price which could have been obtained in the market, for the shares during such time as aforesaid, and that the [196] Plaintiff might be entitled to retain the same out of the purchase-money.

The Defendant demurred to the bill for want of equity.

Mr. G. Richards and Mr. Mylne, in support of the demurrer. It is plain, from the allegations in the bill, that the parties contemplated that there should be an agreement in writing, signed by the Defendant, before he should be bound. As then

a further act was contemplated, and that act was not done, there was no concluded agreement between the parties. *Stokes v. Moore* (1 Cox, 219). Besides, by one of the terms of the agreement, it was provided that the shares should be transferred upon a request made by the Plaintiff, in writing, on or before the 31st of December 1840: but the bill does not allege that any request was made, in writing, on or before that day.

Secondly. The Court will not enforce the agreement in this case; for shares in a railway company fall within the description of goods, wares and merchandizes; and, by the 17th section of the Statute of Frauds (29 Car. 2, c. 3) it is enacted that no contract for the sale of any goods, wares and merchandizes, for the price of £10 or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same, or give something in earnest to bind the bargain or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such [197] contract, or their agents thereunto lawfully authorized. In this case none of those requisites has been complied with. Shares in a public company have been held to be goods, within the purview of the 72d section of the Bankrupt Act (6 Geo. 4, c. 16). *Cooper v. Elston* (7 T. R. 14); *Smith v. Surman* (9 Barn. & Cress. 561; see the judgment of Littledale, J., p. 571); *Mussell v. Cooke* (Prec. Ch. 533). All that the case of *Bradley v. Holdsworth* (3 Mees. & Wels. 422) decides, is that railway shares are not an interest in or concerning lands, tenements or hereditaments, and, therefore, not within the 4th section of the statute.

Thirdly. The property which is the subject of the agreement in this case is of such a nature that the Court will not decree a specific performance of the agreement. *Nutbrown v. Thornton* (10 Ves. 159). There is a material difference between this case and *Doloret v. Rothschild* (1 Sim. & Stu. 590). In that case, the subject of the contract was identified; but here there is nothing to identify the shares agreed to be sold. The agreement does not apply to the Defendant's shares in the railway company, or to any other shares in particular; it stipulates, merely, that the Defendant shall transfer fifty shares in the company to the Plaintiff.

Mr. Knight Bruce and Mr. Piggott appeared in support of the bill, but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: I do not feel any difficulty about this case; because I think that the verbal agreement, as it is stated, is quite sufficient.

[198] I agree with Mr. Richards that there was apparently an intention formed of varying the agreement. It was proposed, as I understand, that there should be a variation; and there was an acceptance, on the part of the Plaintiff, of the proposed variation; but then that could not bind him until the proposed variation had been accepted by the party who first proposed it. And it is plain that that was the progress of the transaction: for, first of all, certain alterations were made by indorsement upon a piece of paper, and then they were to be drawn out, so as to form an agreement which was to be signed, leaving, of course, to the party to whom it was proposed, the option of signing or not. Then the parties did not, as appears on the face of the bill, ultimately agree to the proposed variations. What was the result? Why, that the original verbal agreement stood in the manner in which it was stated originally.

In my opinion, this is a case to which the 17th section of the Statute of Frauds does not apply; because it is impressed upon my mind that, in the decisions which have been made with respect to the 17th section, it has been held to apply only to goods, wares and merchandizes which are capable of being in part delivered. If there is an agreement to sell a quantity of tallow or of hemp, you may deliver a part; but the delivery of a part is not a transaction applicable, as I apprehend, to such a subject as railway shares. They have been decided not to be land. They have been decided to be, in effect, personal estate; but not personal estate of the quality of goods, wares and merchandizes within the meaning of the 17th section.

Then the only question is whether there has been any decision, from whence you can extract a conclusion that [199] the Court will not decree a specific performance of an agreement for the sale of such shares? Now, I agree that it has been long since decided that you cannot have a bill for the specific performance of an agreement to

transfer a certain quantity of stock. But, in my opinion, there is not any sort of analogy between a quantity of 3 per cents. or any other stock of that description (which is always to be had by any person who chooses to apply for it in the market), and a certain number of railway shares of a particular description; which railway shares are limited in number, and which, as has been observed, are not always to be had in the market. And, as no decision has been produced to the contrary, my opinion is that they are a subject with respect to which an agreement may be made which this Court will enforce.

Then there is nothing, as I understand, either in the Statute of Frauds or in the law of this Court which prevents the execution of such an agreement as is here stated; and, though it may be true that the Plaintiff has asked more than this Court would give or might give under certain circumstances, my opinion is that he has stated quite enough to shew that is entitled to some relief: and, therefore, the demurrer must be overruled.(1)

[200] DAY v. DAVERON. June 9, 1841.

[S. C. 10 L. J. Ch. 349.]

Will. Construction. Fee-simple.

Testator gave a freehold house to his wife *for her sole use and benefit*, and another freehold house to her *for her life*; and he also gave to her all his household goods, plate, &c.; but, if she married again, the whole of the above property was *to become the property* of his daughter; and, in case his wife should remain unmarried, then he gave the second-mentioned house to his daughter, for her life, and to her children after his wife's death: "I also appoint my wife, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." Held, that the fee-simple in the first-mentioned house passed to the wife.

Philip Caley made his will, dated the 24th of January 1821, in the following words:—"I give, devise and bequeath unto my wife, Sarah Caley, all that freehold dwelling, situate in the East India Dock Road, in the county of Middlesex, now in the occupation of Simon Kingsell, with all the garden ground and other appurtenances thereunto belonging, and also all that cottage and stable situate at the back part of the last-mentioned dwelling-house, being also freehold, *for her sole use and benefit* after my decease: I also give and devise, unto my said wife, Sarah Caley, for the term of her natural life, all the rents and benefits arising from a dwelling-house in the said East India Dock Road, let on lease to James Walker, Esq., of Finsbury Square, in the county of Middlesex: I also give and devise, unto my said wife, Sarah Caley, all my household goods, plate, linen, books and wearing apparel: nevertheless, if my said wife, Sarah Caley, shall marry after my decease, then this will and testament shall be void and of no effect; but the whole of the above property *shall become the property of my daughter*, Ann Caley, during her natural life, and, after that, to be divided between her children, if there should be any living; but in case my said wife, Sarah, remains unmarried, I then give and bequeath unto my daughter, Ann Caley, the rents and benefit of the house now let on lease to James Walker, Esq., after the decease of my wife, for her, Ann Caley's, natural life, and to her children, if she should have any living, [201] and if not any living, then, in that case, I give and bequeath the aforesaid dwelling-house unto the children of William Day of Marchwood, county

(1) See *Hibblewhite v. M. Morine*, 6 Mees. & Welsb. 200; *Adderley v. Dixon*, 1 Sim. & Stu. 607; *Ex parte The Lancaster Canal Company*, Montagu's B. C. 116; and *Humble v. Mitchell*, 2 Railway Cases, 70.

On the 23d of July 1841 the Lord Chancellor affirmed the decision in the case above reported.

of Southampton, and the children of Jeremiah Capan, of the town of Dover, county of Kent, to be equally divided amongst them; I also appoint my wife, Sarah Caley, provided she remains unmarried, *sole executrix and residuary legatee to all other property I may possess at my decease*; and it is my wish and desire that she will pay to Catherine Corkhill the yearly sum of £10. Now, concerning *my funded property*, I hereby empower my said wife to sell out sufficient to pay all my debts, funeral expenses, &c., and, after that, I give and bequeath unto my said wife the one-half of what remains for her own use and benefit; the other half I give unto my daughter, Ann Caley, to be laid out in a Government annuity."

The testator died shortly after making his will, leaving his wife and daughter surviving. The daughter died shortly after the testator without having been married. In September 1839 the testator's widow died without having married again.

The Plaintiffs were the devisees, under her will, of the freehold premises mentioned in the testator's will, to be in the occupation of Simon Kingsell, and of the cottage and stable at the back thereof: and they having agreed to sell that property to the Defendant, he objected to complete his purchase, on the ground that only a life interest in the property passed under the testator's will to his widow.

The question as to the extent of the widow's interest [202] was brought before the Court upon the argument of a demurrer to a bill for a specific performance of the agreement.

Mr. Wigram and Mr. Kenyon Parker, in support of the demurrer. If we stop at the end of the first devise in the will, it is clear that nothing more than a life interest in the subject of that devise was given to Mrs. Caley. The only argument in favour of her taking the fee is grounded on the clause towards the conclusion of the will, where the testator appoints his wife residuary legatee to all other property he might possess at his decease. But it is observable that throughout the will the testator has used the word "property," not to describe his interest, but the property itself. *Pogson v. Thomas* (6 Bing. N. C. 337); *Kellett v. Kellett* (3 Dow, P. C. 248). [THE VICE-CHANCELLOR. In *Pogson v. Thomas* the testatrix gave all the residue of her estate and effects, wheresoever and whatsoever, to certain persons, their *executors, administrators and assigns*: therefore, it might be questionable whether anything more than personalty was meant to pass by that gift. In *Kellett v. Kellett* the testator did not make his executors residuary legatees *to his property*: the word "property" is not used.] Here the testator appointed his wife sole executrix and residuary legatee. Those words apply to personalty only; and they are immediately followed by the words "all other property I may possess at my decease." It is clear, therefore, that the testator meant to exclude the property mentioned in the previous part of his will, and to confine the residuary clause to his personal property.

[203] At all events, the question is not so free from doubt as that the purchaser can be compelled to take the title.

Mr. Knight Bruce and Mr. Pitman appeared in support of the bill; but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The question which has been discussed in this case seems to be reasonably plain.

With respect to the question in *Kellett v. Kellett*, I wonder that any doubt should have been entertained upon it. There the testator, after giving several sums of money to be raised and levied from his properties by his executors, bequeathed his interest in the lands of Barleyhill, in the county of Meath, to Richard Kellett, the eldest son of his uncle; and then devised the remainder of his properties to his executors, to make good the sums which he had before mentioned, and also those which he mentioned in the subsequent part of his will: and, after appointing the Rev. W. Kellett, Mr. George Holdcroft and Mr. F. H. Holdcroft the executors of his will and guardians of the fortunes of his children, he expressed himself thus: "And I also ordain, appoint and devise the said Rev. W. Kellett, Mr. G. Holdcroft and Mr. F. H. Holdcroft executors to this my last will and testament, also my residuary legatees, share and share alike." The heir claimed to be entitled by way only of resulting trust to the real estates which might remain after satisfying the legacies; and the only difficulty in the case arose upon the wording of the clause which the executors insisted was a residuary devise of the estates to them. But as the [204] testator in that clause had only appointed them his residuary legatees, without saying of what property they

were to be residuary legatees, it was considered that those words applied to his personal property only.

Pogson v. Thomas was a case sent by the Master of the Rolls for the opinion of the Judges of the Court of Common Pleas; and I do not know whether the certificate in that case was confirmed by his Lordship or not. It is clear, however, that the certificate was right upon the first point, that is, that the lands in the parishes of Little Bealings and Playford did not pass by the devise of the lands situate in the parish of Kesgrave: and I imagine that the opinion of the learned Judges upon the other point must have proceeded upon this, namely, that as the testatrix gave all the residue of her estate and effects to certain persons, *their executors, administrators and assigns*, those words necessarily pointed to personal estate only.

This case, however, is reasonably plain. The testator first gives the property which is the subject of the present suit to his wife for her sole use and benefit after his decease. Next he gives a dwelling-house which was let on lease to a gentleman named Walker to her for her life. Then, after providing for the event of his wife marrying again, he gives the dwelling-house, in case she remains unmarried, to his daughter after the death of his wife: but he makes no disposition in that event of the property comprised in the first gift to his wife. Then he says: "I also appoint my wife, Sarah Caley, provided she remains unmarried, sole executrix and residuary legatee to all other property I may possess at my decease." Now the words, "residuary legatee to all other property" mean the same thing as "residuary legatee [205] of all other property;" and those words carry the fee-simple in everything in which that interest was not before disposed of. It is clear, too, that that clause does not relate to personal property; for the testator, almost immediately afterwards, speaks of his funded property in a distinct sentence.

As to the objection that the testator, when he used the word "property," meant the thing given and not his interest in it; it is to be observed that, in the previous part of his will, he says: "The whole of the above property shall become the property of my daughter Ann Caley;" so that he clearly uses that word to denote the interest which his daughter was to take in the thing given.

I cannot, therefore, but think that the will passed the fee-simple in the property in question to the testator's widow.(1)

Demurrer overruled.

[206] IBBETSON v. IBBETSON. June 10, 11, 1841.

[For previous proceedings, see 10 Sim. 495; 5 My. & Cr. 26; 41 E. R. 281.

For subsequent proceedings, see 13 Sim. 544.]

Exoneration. Devisee and Executor.

A., by his marriage settlement, after reciting that he was seised in fee of certain estates, subject to mortgage debts, the amount of which was mentioned and which he had contracted, settled the estates, subject expressly to the debts, on himself for life, remainder to secure a jointure for his intended wife, remainder to the first and other sons of the marriage in tail male, remainder to himself in fee, and covenanted for the title, excepting the debts: and he reserved to himself power to raise £10,000 by mortgage of the estates, the mortgage to be made redeemable by the person for the time being entitled to the freehold or inheritance. A. exercised the power, reserving the equity of redemption to himself, his heirs, executors, &c., or the person for the time being entitled as aforesaid, and covenanted for payment of the mortgage money. He then died without issue, having by his will charged

(1) See *Saumarez v. Saumarez*, 4 Myl. & Cr. 331; *Doe v. Coleman*, 6 Price, 179; and *Noel v. Hoy*, 5 Madd. 38. Under the recent Will Act, 7 Will. 4 and 1 Vict. c. 26, s. 28, devises of real estate without words of limitation, in wills made after the 1st of January 1838, pass the whole of the testator's interest disposable by will, unless a contrary intention appear.

his real and personal estate with his debts and bequeathed the residue of his personal estate after payment of his debts to B., and having devised his remainder in fee expectant on the failure of his issue male to his brother and his brother's sons in strict settlement. Held, that they were not entitled to have his personal estate applied to exonerate the devised estates from any of the mortgage debts.

By the settlement on the marriage of Sir Henry Carr Ibbetson, Bart. (who was therein described as the eldest son and heir of Sir James Ibbetson, Bart., deceased), with Alicia Mary Scott, after reciting amongst other things that Sir Henry Carr Ibbetson was seised in fee in possession of the manor and capital mansion of Denton and other hereditaments in the county of York, *subject to a rent-charge of £800, the jointure of his mother, Dame Jenny Ibbetson, and to seven several mortgage debts of £2500, £1200, £3000, £1400, £2000, £1000, and £1000, amounting in the whole to £12,100*, Sir Henry Carr Ibbetson conveyed the manor, &c., *subject to the jointure and mortgage debts*, to trustees for the term of 99 years, and, subject to that term, to the use of Sir Henry Carr Ibbetson for life, with remainder to trustees to preserve, &c., with remainder to the use that Alicia Mary Scott might receive a rent-charge of £300 a year during her life, in case she [207] should survive Sir Henry Carr Ibbetson, and, after the decease of Sir Henry Carr Ibbetson, subject to and chargeable as before mentioned, to the use of trustees for the term of £100 years, and subject to that term, *and charged and chargeable as aforesaid*, to the use of the first and other sons of the marriage in tail male, and, for want of such issue, to the use of Sir Henry Carr Ibbetson in fee. The trusts of the term of 99 years were for securing £200 a year pin-money for Alicia Mary Scott during the coverture, and the trusts of the term of 100 years were for securing to her the rent-charge of £300 a year. And the settlement provided that if a power, which Sir Henry Carr Ibbetson had exercised by a deed of even date, of charging certain estates of which he was tenant for life, with portions for younger children, should be informally executed or otherwise fail of effect, the portions should be a charge upon the estates comprised in the settlement, *subject, nevertheless, to the claims and incumbrances subsisting thereon*: and Sir Henry Carr Ibbetson was empowered to charge the settled estates with any sum or sums, not exceeding £10,000, for any purpose or purposes whatsoever, with lawful interest for the same, and to mortgage the estates for a term of years for the purpose of raising that sum, so that the mortgaged estate should be made redeemable on payment of the sum or sums so to be charged, and the interest thereof by the person or persons for the time being entitled to the freehold or inheritance of the mortgaged estate. And Sir Henry Carr Ibbetson covenanted that, notwithstanding any act done by him or any of his ancestors to the contrary, *except as thereinbefore was excepted*, he had good right to convey the estates to the uses of the settlement, and that the estates should remain to those uses, and be peaceably enjoyed accordingly without any let, suit, &c., [208] by him or his heirs, or any person or persons claiming under him or any of his ancestors, *except as thereinbefore was excepted*, and that free from all incumbrances, &c., created by himself or his heirs, or any other person or persons claiming under him or any of his ancestors, *except such leases as were then in being*, and the rent-charge of £800 payable to his mother, and the mortgage debts of £2500, £1200, £3000, £1400, £2000, £1000, and £1000; and that he and his heirs and every other person claiming under him or under any of his ancestors, except persons claiming under any of the leases or incumbrances before excepted, would do all necessary acts for further conveying and assuring the estates to the uses of the settlement.

All the mortgages mentioned in the settlement were made by Sir Henry Carr Ibbetson, except the mortgage for £2500, which was made by his father, Sir James Ibbetson. Sir Henry Carr Ibbetson, from time to time after the date of the settlement, borrowed sums of money amounting together to £10,000; and, by deeds dated the 10th of March, the 17th of May, and the 18th of August 1806, the 20th of August 1809, the 22d of January 1810, and the 1st of June 1811, he mortgaged different parts of the settled estates for terms of years to the lenders for securing the sums advanced by them respectively. Each of those deeds recited the settlement, and purported to be made in exercise of the power thereby reserved to Sir Henry Carr Ibbetson to raise not exceeding £10,000 by mortgage of the estates: and in

each of the deeds the equity of redemption was reserved to Sir Henry Carr Ibbetson, his heirs, executors, administrators and assigns, or the person or persons for the time being entitled to the freehold or inheritance of the hereditaments therein comprised; and [209] Sir Henry Carr Ibbetson covenanted for the title and for payment of the principal and interest thereby secured.

Sir Henry Carr Ibbetson, by his will, dated the 11th of October 1814, charged his real and personal estates with the payment of his funeral and testamentary expenses and debts, and the legacies he might give by any codicil; and he gave to his wife, Alicia Mary, a rent-charge of £400 a year for her life, in augmentation of the jointure provided for her on her marriage with the testator, *to be issuing out of his reversion or remainder in fee-simple, expectant on failure of issue male of his body*, of and in his manors of Denton and Askwith in the county of York, and all his messuages, farms, &c., in Denton and Askwith and in Otley and Weston in the same county; (1) and he devised *his reversion or remainder in fee-simple* in the last-mentioned manors, farms, &c., and also all other his real estates to trustees for the term of 1000 years, and, subject to that term, to his brother, Charles Ibbetson, for life, with remainder to trustees to preserve, &c., with remainders to Charles Ibbetson's first and other sons successively in tail male, with remainders to the testator's brother, John Thomas Ibbetson, and his first and other sons, in like manner, with remainders to the testator's first and other daughters, whether born in his lifetime or in due time after his decease, successively, in tail male, with remainder to his sister, Isabella Ibbetson, for life, with remainders to her first and other sons, successively, in tail male, with remainders to his sister, Harriet Ibbetson, and her sons in like manner, with remainder to his own right heirs. The trusts of the term of 1000 years were for securing the rent-charge of £400 a year, and also (in case there should be no son or sons of the testator living at his [210] decease or born afterwards, or, being such, they should all die under 21 without leaving issue male) for raising certain sums for the portions of any daughters of the testator who might happen to be living at his decease or born afterwards: And he gave to trustees all his plate, pictures, books and household furniture in and about his mansion-house at Denton Park, upon trust, to permit the same to be used and enjoyed by the person and persons who, for the time being, should be entitled in possession to his mansion-house under or by virtue of his marriage settlement, or of the limitations contained in his will, until a tenant in tail should be in possession of his mansion-house, and then the plate, pictures, books and household furniture were to go and belong to such tenant in tail; and he gave all the residue of his personal estate and effects, after payment of his just debts, funeral and testamentary expenses, and such legacies as were thereinbefore mentioned, to the person who, at his decease, should be beneficially entitled in possession to his mansion-house; and he appointed his brother, Charles Ibbetson, executor of his will.

The testator made a codicil, dated the 26th of November 1824, and thereby gave out of his personal estate annuities and legacies to some of his servants, and in all other respects he confirmed his will.

The testator died in June 1825 without issue, leaving his wife, Dame Alicia Mary Ibbetson, and his brother Charles (who became Sir Charles Ibbetson) surviving. Sir Charles died in 1839 leaving two sons and a daughter surviving. The Plaintiff, James Ibbetson, was the younger of those two sons, and the Defendant Sir Charles Henry Ibbetson was the elder. Dame [211] Alicia Mary Ibbetson was still alive, and was a Defendant in the suit.

The cause was heard in 1840. (See *ante*, vol. x. p. 495.) It now came on to be heard for further directions.

The question was whether (as the Plaintiff was now interested in contending) the estates comprised in Sir Henry Carr Ibbetson's marriage settlement were solely or primarily liable to pay the mortgage debts mentioned in the settlement and created by Sir Henry Carr Ibbetson under the power reserved to him thereby; or whether (as it was the interest of Sir Charles Henry Ibbetson to contend) the personal estate of Sir Henry Carr Ibbetson was primarily liable to pay those debts.

Mr. Knight Bruce and Mr. Richard Atkinson, for the Plaintiff. As the mortgage

(1) The settled estates.

debt of £2500 was created by Sir James Ibbetson and not by Sir Henry Carr Ibbetson, it is perfectly plain that that debt at least is not payable out of Sir Henry Carr Ibbetson's personal estate. With respect to the other mortgage debts mentioned in the settlement, the estates were settled subject to them; and, in the covenants for title (which are more full and extensive than is usual in marriage settlements), and, particularly, in the covenant against incumbrances, those debts are excepted. The case, therefore, is just the same as if Sir Henry Carr Ibbetson had sold the estates subject to the mortgages. It appears from Sir Henry Carr Ibbetson's will that, when he made it, he had regard to his marriage settlement, and also that he contemplated the possibility of his having issue male. If there had been such issue they could not have con-[212]-tended that they were entitled to have the settled estates exonerated from the mortgage debts out of Sir Henry Carr Ibbetson's personal estate: can then the contingency which has happened, of there being no such issue, make any difference in that respect? Dame Alicia Mary Ibbetson is still alive; and her jointure remains a charge upon the estates. Has she any right to say that the mortgages ought to be paid off? She takes her jointure, as the sons of the marriage, if there had been any, would have taken their estates in tail male, subject, expressly, to the mortgage debts mentioned in the settlement, and subject also to the mortgages which might be created under the power reserved to Sir Henry Carr Ibbetson: for that power overrode all the limitations of the settlement.

An estate must be taken as it is found; unless an intention to the contrary, on the part of the person who eventually had the absolute ownership of it, can be discovered. *Stead v. Newdigate* (2 Mer. 521; see 531 and 532). No such intention can be collected in the present case. Indeed, during the whole of Sir Henry Carr Ibbetson's life, it was uncertain whether he would have issue male or not; and, therefore, during the whole of his life, it was for his interest to treat the settled estates as the primary fund for payment of the mortgage debts. Consequently it may be fairly contended that his intention would be disappointed if those debts were thrown on his personal estate. *Forbes v. Moffatt* (18 Ves. 384); *Ex parte Earl Digby* (Jac. Rep. 235. See the Lord Chancellor's judgment on the second point in the case, p. 239); *Wilson v. Earl of Darlington* (1 Cox, 172); *Scott v. Beecher* (5 Madd. 96).

[213] Mr. Wigram, Mr. G. Richards, Mr. Loftus Wigram and Mr. Walford, for the personal representatives of Sir Henry Carr Ibbetson and other parties in the same interest as the Plaintiff, cited *Clarke v. Samson* (1 Vez. 100).

Mr. Bethell and Mr. Koe, for Sir Charles Henry Ibbetson. Sir Henry Carr Ibbetson commences his will with charging his personal as well as his real estate with the payment of his debts, and he bequeaths the residue of his personal estate, after payment of his debts. The mortgages created by him before the settlement, as well as those which he created under the power, contain covenants by him to pay the mortgage debts: can it then be said that, as between him and any person not claiming under the settlement, he was not bound to pay those debts? The settlement has become inoperative except so far as Dame Alicia Mary Ibbetson is concerned; and the estates are greatly more than sufficient to pay her jointure.

The operation of the settlement cannot be extended beyond its proper object; and beyond that, it left the estate precisely as it stood before the settlement was made. The title of Sir Charles Henry Ibbetson is derived under the will, not under the settlement. He claims by virtue of the devise which passed the original ownership remaining in the devisor subject to the settlement; that is, he derives his title out of the original ownership of Sir Henry Carr Ibbetson, which was unaffected by the settlement. As then he is a devisee of the original estate remaining in Sir Henry Carr Ibbetson, and as the debts were unquestionably the debts of [214] that gentleman, they are payable out of his personal estate in the first instance.

The case of *Forbes v. Moffatt* bears no analogy to the present case. There a person who had a mortgage on an estate became the owner of the fee; and it was held that the mortgage did not merge in the fee, because it was reasonable to presume that the mortgagee did not intend that it should merge. That case, therefore, was decided on the intention of the party. But what manifestation or indication of intention can be found in this case, on the part of Sir Henry Carr Ibbetson, that, in the events which have happened, his real estates should be the primary fund to discharge these mortgages?

In *Stead v. Newdigate* a person covenanted, on his marriage, to convey an estate which he was entitled to in reversion to trustees in trust to sell as soon as the reversion should fall into possession. He died before that event happened, and, consequently, before he was in a capacity to elect whether the estate should or should not retain the quality of personalty which it had acquired under the articles: and the Court held that it did retain that quality. [THE VICE-CHANCELLOR. I understood that case to be cited in order to shew that, where an intention has been once expressed, it must be held to continue until the contrary is shewn.] In that case the parties claimed under the marriage articles, and could not shew that any person was in a capacity to alter the quality which the articles (which were still binding) had given to the property. But Sir Charles Henry Ibbetson's title does not arise under the settlement: that instrument has no operation beyond providing for the wife and the issue of the marriage. He [215] takes by virtue of the old ownership, and not by virtue of any contract.

The ground of the decision in *Ex parte Earl Digby* was that the debt, which was secured by the mortgage, was not legally the debt of the Duchess of Norfolk who made the mortgage; for, being a married lady, she could contract no debt. Then it was contended that the money borrowed was a debt as against the duchess's separate property; but no judgment was given on that point. Here the debts, at the time they were contracted, were unquestionably the debts of Sir Henry Carr Ibbetson, the mortgagor; and there is no evidence of intention on his part that, under all circumstances, they should remain charges on his real estates.

In *Wilson v. Lord Darlington* the decision proceeded entirely on the language of the will, which shewed that the testator intended to revoke the deed under which the charge had been created, except so far as the £2000, the sum charged, was concerned; that is, the will shewed that the testator intended the deed to remain in force, so far as it related to the £2000. But, in the present case, there is nothing whatever to shew that Sir Henry Carr Ibbetson intended that his personal estate should be exonerated from payment of the mortgage debts. The power to raise the £10,000 was inserted in the settlement merely to enable him to charge that sum *as against the issue of the marriage*. The only intention was that *the issue* who should take the estates under the settlement should take them subject to the charges to which they were then liable, and also to the charges which might be created by an exercise of the power.

[216] The case of *Scott v. Beecher* is simply an illustration of the ordinary rule, that where an estate descends to an heir subject to a mortgage which was not created by his ancestor, the heir must hold the estate *cum onere*. Here all the debts, except one, were the debts of Sir Henry Carr Ibbetson; and there is no evidence of intention as between him and parties claiming under his will.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The difficulty in this case is that, if you claim the benefit of the common rule, then you will have the personal estate of the settlor applied to exonerate the whole inheritance; and, therefore, it will be applied contrary to the intention of the settlor. For his widow is still alive; and therefore the effect will be to exonerate the settled estates in her favour.

It is very difficult to say that there was a divided intention on the part of Sir Henry Carr Ibbetson, namely, that the parties who were or might become interested in his estates under the settlement should take subject to the mortgages; but that his ultimate remainder in fee should be freed from the mortgages. Suppose that he had left a son; then that son would have been tenant in tail male of the estates; but it is not even pretended that he would be entitled to have the estates exonerated from the mortgage debts out of his father's personal estate. Can it then be said that, in case the son should die without issue male and the ultimate remainder in fee should vest in possession, a right would then arise to the owner of the fee to have the estates exonerated out of the personal estate?

As the settlement was made so as to manifest an intention on the part of the settlor that the whole [217] inheritance should bear the mortgages, as well those created before as those created under the power in the settlement, notwithstanding the parties who were the objects of the limitations were the wife and issue of the settlor, I think that that intention, having been once plainly manifested, must be

considered as existing until it is shewn to have been altered. And, as there is nothing in this case which shews that that intention was ever changed, my opinion is that the common rule does not apply.

[218] COMPORT v. AUSTEN. July 2, 1841.

[Distinguished, *In re Edmondson's Estate*, 1868, L. R. 5 Eq. 398.]

Remoteness. Will. Legacy. Trust.

Testator bequeathed £3000 to trustees, in trust, after certain life interests, "for all the children of T. F. (except Thomas the younger), William, Rebecca, Elizabeth, Sarah and Frances), equally to be divided between them, share and share alike; the share or respective shares of such children to become vested interests in and to be paid, assigned and transferred to them respectively, as and when they should attain their respective ages of twenty-five years:" provided that, if any of them died before their shares became vested and payable, leaving issue, their shares should go to their issue: and the trustees were directed, in the meantime, and until the shares of the children should become payable, assignable and transferable to them to apply the income for their maintenance. The testator also bequeathed £6000 to the same trustees, in trust, after certain life interests, "for all and every the children of T. F. born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their respective ages of twenty-five years, and to be subject to the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with the like power to apply the interest thereof for their respective maintenance, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore contained in relation to the several legacies hereinbefore given to or in trust for the said children respectively:" provided that, in case any person to or in trust for whom any bequest, to take effect in remainder or reversion or upon any contingency was made, should sell or encumber his interest under such bequest before the same should take effect in possession, all the bequests in favour of that person should become void. By a codicil the testator revoked a power which he had given by his will to the trustees to apply for the advancement of the legatees, the whole or part of the capital of their legacies, before they attained twenty-five, and directed that the legacies should vest in and be payable, assignable and transferable to them as if no such power were contained in his will. Held, that the trusts declared of both sums were void for remoteness.

John Boghurst made his will, dated the 12th of December 1809, and which was partly as follows:—

[219] "I give and bequeath the sum of £25,000 three per cent. consolidated Bank annuities, and also all and every the rest, residue and remainder of my goods, chattels, monies and securities for money and personal estate and effects whatsoever and wheresoever, unto my daughter Elizabeth Boghurst and Francis Barrow and Richard Boghurst, their executors, administrators and assigns, upon trust, as to and concerning £12,000 three per cent. consolidated Bank annuities, part of the said trust monies, to pay, assign and transfer the same unto the children hereinafter named of Thomas Fry the elder, and Elizabeth, his wife, and in the proportions following (that is to say), to Thomas Fry the younger, the sum of £3000 stock, to William Hough Fry, the like sum of £3000 stock, to Rebecca Fry, the sum of £1500 stock, to Elizabeth Ann Fry, the like sum of £1500 stock, to Sarah Fry, the like sum of £1500 stock, and to Frances Fry, the like sum of £1500 stock, making, in the whole, the said sum of £12,000 stock; such several and respective sums to become vested interests in the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, and to be paid, assigned and transferred to them respectively at their respective ages of twenty-five years, or the same or any part or parts

thereof respectively, to be sooner paid to them or any of them, or disposed of and applied for their or any of their preferment or advancement in the world, by my said trustees, during the lifetime and at the desire of my said daughter, Elizabeth, but not afterwards or otherwise. Provided always that, in case any one or more of them, the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry shall depart this life before his, her or their aforesaid legacy or legacies shall, pursuant to the trusts of this my will, become [220] vested and payable or have been sooner paid or disposed of and applied, having been married with the previous consent of my said daughter, if living, and, if dead, of my trustees or trustee for the time being, leaving lawful issue, then my will is and I do declare and direct that the legacy or respective legacies of him, her or them so dying and leaving lawful issue, having been married with such consent as aforesaid, shall go and be paid, assigned and transferred unto and equally between and among the respective issue of each of the legatees so dying, when and so soon as they can, by law, give good and effectual discharges for the same. Provided also, and my will is that, if any one or more of them, the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry shall die without leaving issue, or leaving any but having been married without such consent as aforesaid, before he, she or they shall attain his, her or their age or ages of twenty-five years respectively, then the share or shares of him, her or them so dying as last aforesaid, or so much thereof as shall not have been paid to him, her or them, or disposed of for his, her or their preferment or advancement in the world, shall, from time to time, go, accrue and belong to and vest in the survivors and survivor or others and other of them, in equal parts, shares and proportions, and be paid or assigned and transferred to them, him or her, or be disposed of and applied for their, his or her preferment and advancement in the world, at such time and times and in such manner and form as hereinbefore mentioned and expressed touching their, his or her original legacies or legacy : and upon this further trust, that they the said trustees do and shall, in the meantime and until the said respective legacies or shares of the said Thomas Fry the younger, William Hough [221] Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, or of the issue of any of them dying as aforesaid, of and in the said trust monies, shall become payable, assignable or transerable to them respectively, or be sooner paid to them or applied or disposed of for their respective preferment or advancement as aforesaid, pay, apply and dispose of the dividends, interest and annual produce thereof, or any part or parts thereof, for or towards their respective maintenance and education, in such manner as my said daughter, while living, and my said other trustees or trustee after her death shall, in their, her or his discretion think fit. And upon trust, as to and concerning the sum of £1000 three per cent. consolidated Bank annuities, other part of the said sum of £25,000 of like annuities, that they, my said trustees, shall and do pay the dividends of the said sum of £1000 three per cent. annuities, to Thomas Hider, during his natural life, and from and after his decease, shall and do pay the dividends of the said sum of £1000 three per cent. annuities, to Mary, the now wife of the said Thomas Hider, during her natural life, if she shall so long continue a widow, sole and unmarried ; and, from and after the decease of the survivor of them, the said Thomas Hider and Mary, his wife, or second marriage of the said Mary, which shall first happen, shall and do pay, assign and transfer the said sum of £1000 three per cent. annuities unto Thomas Hider the younger, the son of the said first-named Thomas Hider, if he shall be then living, to and for his own use and benefit, but, if the said Thomas Hider, the son, shall be then dead, then my said trustees shall stand possessed of the said sum of £1000 three per cent. annuities, for the use and benefit of the said Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, in such and the same [222] manner, and subject to the same rules, conditions and contingencies as are hereinafter mentioned and contained respecting the sum of £2000 of like annuities, after my said daughter's decease." The will then declared trusts of £1000 three per cent. consolidated Bank annuities, other part of the £25,000 like annuities, for William Scott the elder, for life, and, after his decease, for his son William Scott the younger, and directed the trustees, after the decease of the survivor of them, to transfer the £1000 three per cent. annuities, to Jane, the wife of Francis Jones, the

daughter of William Scott the younger. It then proceeded as follows: "And upon trust, as to and concerning the sum of £11,000 three per cent. consolidated Bank annuities, residue of the said sum of £25,000 of like annuities, and all and every the rest, residue and remainder of my personal estate and effects of what nature or kind soever and wheresoever, that they, my said trustees, shall and do pay the dividends of the said sum of £11,000 three per cent. annuities, and the dividends, interest and annual proceeds of the said residue of my personal estate and effects, to my said daughter Elizabeth, during her natural life, and from and after her decease, then upon trust, as to and concerning the sum of £3000 three per cent. consolidated Bank annuities, part of the said sum of £11,000 of the like annuities, that my said trustees shall and do, from such the decease of my said daughter, pay the dividends of the said sum of £3000 three per cent. annuities unto the said Thomas Fry the elder, and Elizabeth, his now wife, and the survivor of them, during their joint natural lives and the life of such survivor, and shall and do after the decease of the survivor of them, my said daughter, the said Thomas Fry the elder, and Elizabeth, his wife, stand possessed of and interested in the said sum of £3000 three per cent. annuities *in trust for all and* [223] *every the child and children of the said Thomas Fry the elder and Elizabeth, his wife (other than and except the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry) if more than one, equally to be divided between them, share and share alike, the share or respective shares of such child or children to become vested interests in and to be paid, assigned and transferred to them respectively as and when they shall attain their respective ages of twenty-five years.* Provided always that, in case any one or more of such children shall depart this life before his, her or their share or respective shares of and in the said last-mentioned trust monies and premises shall, pursuant to the trusts of this my will, *become vested and payable*, having been married with the previous consent of my said trustees, leaving lawful issue, then my will is and I do declare and direct that the share or shares of him, her or them so dying and leaving lawful issue, having been married with such consent as aforesaid, shall go and be paid, assigned and transferred unto and equally between and among the respective issue of such of them so dying, when and so soon as they can by law give good and effectual discharges for the same: provided also, and my will is that, if any one or more of such children shall die without leaving lawful issue, or leaving any but having been married without such consent as aforesaid, before he, she or they shall attain his, her or their age or ages of twenty-five years respectively, then the share or shares of him, her or them so dying as last aforesaid shall, from time to time, go, accrue and belong to *and rest in* the survivors and survivor or others and other of them, in equal parts, shares and proportions, *and be paid or assigned and transferred* to them, him or her, at such time and times, and in such manner and form as is hereinbefore mentioned and expressed touching their, [224] his or her original share or shares; and, upon this further trust, that they, the said trustees, do and shall, in the meantime and until the said respective shares of the said child or children of the said Thomas Fry and Elizabeth, his wife, of and in the said sum of £3000 three per cent. annuities, shall become *payable, assignable or transferable* to them respectively, pay, apply and dispose of the dividends, interest and annual produce thereof, or any part or parts thereof, for or towards their respective maintenance and education in such manner as my said trustees shall in their or his discretion think fit: and upon further trust that, in case all and every such child or children of the said Thomas Fry and Elizabeth, his wife (other than and except as aforesaid), shall happen to die before any of their shares of and in the said sum of £3000 three per cent. annuities *shall become payable*, and without leaving issue to whom the same shall according to the trusts of this my will become payable, then my said trustees shall and do stand possessed of and interested in the same sum of £3000 three per cent. annuities, in trust for the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, equally to be divided between them share and share alike, and to be paid, assigned and transferred to them in like manner and at the same time or times, and to be subject to the like accruer and benefit of survivorship and the like descent to the lawful issue of such as shall die under the age of twenty-five years, and under the like conditions and restrictions, and with like power to apply the dividends thereof in, for and towards their respective

maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the [225] sum of £12,000 three per cent. annuities hereinbefore given and bequeathed to or in trust for them, so far as the same shall be then applicable to them: and upon trust, after such the decease of my said daughter, that my said trustees shall and do stand possessed of and interested in the sum of £2000 three per cent. consolidated Bank annuities, other part of the said sum of £11,000 of the like annuities, in trust for the said Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, equally to be divided between them share and share alike, and to be paid, assigned and transferred to them in like manner and at the same time and times, and to be subject to the like accruer and benefit of survivorship among them and the said Thomas Fry the younger and William Hough Fry, and the like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like provisions and restrictions, and with like power to apply the dividends thereof in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the said sum of £12,000 three per cent. annuities hereinbefore given and bequeathed to or in trust for the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, so far as the same shall be then applicable to this present bequest. And upon trust, as to and concerning the sum of £6000 three per cent. consolidated Bank annuities, residue of the said sum of £11,000 of the like annuities, that my said trustees shall and do, from such the decease of my said daughter, pay the dividends of the said sum of £6000 three per cent. annuities unto my said nephew, John Boghurst, during his natural life, and from and [226] after the decease of the survivor of them my said daughter, Elizabeth, and nephew, John Boghurst, then upon trust, as to and concerning the said sum of £6000 three per cent. consolidated Bank annuities, and, after the decease of my said daughter, Elizabeth, only, as to and concerning the said residuum of my personal estate and effects, that my said trustees shall and do pay the dividends of the said sum of £6000 three per cent. annuities, and the dividends, interest and annual proceeds of the said residuum of my personal estate and effects to my said nephew, Richard Boghurst, during his natural life; and, from and after his decease, then upon trust that my said trustees shall and do stand possessed of and interested in the said sum of £6000 three per cent. annuities and the said residuum of my personal estate and effects, in trust for all and every the child and children lawfully begotten of my said nephew, Richard Boghurst, equally to be divided between them, if more than one, share and share alike, the share or respective shares of such child or children to become vested interests in, and to be paid, assigned and transferred to him, her or them respectively as and when he, she or they shall attain his, her or their age or respective ages of twenty-one years, and the dividends, interest and annual proceeds of his, her or their expectant share or respective shares, of and in the said last-mentioned trust monies and premises or any part thereof, to be in the meantime and until the same shall become payable, assignable or transferable to him, her or them respectively, paid, applied and disposed of for or towards the maintenance and education of such child or children respectively, in such manner as my said trustees shall in their or his discretion think fit; but, in case of the death of my said nephew, Richard Boghurst, without leaving lawful issue who shall live to [227] attain the said age of twenty-one years, then, upon trust, that my said trustees shall and do, from and after such the decease of my said nephew Richard Boghurst and failure of issue as last aforesaid, pay the dividends, interest and annual proceeds of the said residuum of my personal estate and effects to my said nephew, John Boghurst, during his natural life; and, from and after the decease of the survivor of them my said daughter and nephews, John Boghurst and Richard Boghurst, and failure of issue of the said Richard Boghurst as aforesaid, then, upon trust, that my said trustees shall and do stand possessed of and interested in the said sum of £6000 three per cent. annuities and the said residuum of my personal estate and effects, and the stocks, funds and securities in or upon which the same shall be invested, in trust

for all and every the children of the said Thomas Fry the elder and Elizabeth, his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their several and respective ages of twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with like power to apply the dividends, interest and annual proceeds thereof, in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and bequeathed to or in trust for the said children respectively, so far as the same shall be then applicable to this present bequest." The will then gave the testator's real estates to his daughter, Elizabeth Boghurst, for life, with remainder to [228] his nephew, Richard Boghurst, for life, with remainder to the children of the latter as tenants in common in fee, and, for want or in default of such issue, to the testator's nephew, John Boghurst, for life, with remainder to the trustees, in trust to sell and to stand possessed of the proceeds upon the same trusts and uses, and for the use and benefit of the same persons, in the same proportions, and to pay, assign, transfer and dispose of the same at the same times and in the like manner as he had thereinbefore or thereafter directed in respect to the residuum of his personal estate, or such of them as were then existing and capable of taking effect: and it declared that, in case any person or persons to or in trust for whom or for whose benefit any devise or bequest to take effect in remainder or reversion or upon any contingency was made and contained in the will should sell, mortgage or incumber, or treat or agree for the selling, mortgaging or incumbering his, her or their right, title, estate or interest in or to any such devise or bequest, or the benefit thereof, or any part thereof, while the same should continue to be in remainder or reversion or contingent, and before the same should take effect in possession, then all the devises and bequests thereby made to or in trust for such person or persons should cease and be void, as if he, she or they were dead.

The testator made seven codicils, each of which he directed to be taken as part of his will.

The first, which was dated the 10th of February 1810, after reciting that the testator had by his will bequeathed certain legacies, stocks or sums of money to or for the use or benefit of Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, [229] Sarah Fry and Frances Fry, and had authorised the trustees of his will, during the lifetime and at the desire of his daughter Elizabeth, to pay the same legacies, stock or sums of money, or part thereof, to them the said Thomas Fry the younger, W. H. Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry respectively, or dispose of and apply the same for their preferment or advancement in the world before their attaining their ages of twenty-five, revoked the authority given by the will, to the trustees, to pay to Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, or to apply for their benefit the principal of the legacies given to them by the will before those legatees should attain their respective ages of twenty-five years, and directed that their legacies should *vest and be payable, assignable and transferable* to them as if no such authority were contained in the will. The codicil then gave to the trustees the sum of £400 consols, upon trust to pay the dividends to Thomas Hider, for his life, in addition to the bequests made to or in trust for him by the will, and, after his decease, upon trust to stand possessed of the capital in trust for Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, and to assign and transfer the same to them, in equal parts, shares and proportions, and at the same time and times, and under the like rules, regulations, conditions and restrictions, in all respects, as were contained in the will, in relation to their several and respective shares of the £12,000 three per cent. Bank annuities thereby bequeathed to them.

The second codicil, which was dated the 23d of July 1810, directed the trustees of the will to stand seised of certain parts of the testator's real estates after the death of Elizabeth Boghurst, to the use of Thomas Fry the [230] elder, and Elizabeth, his wife, for their lives and the life of the survivor; with remainder to the use of a trustee for 500 years, and, subject thereto, to the use of the eldest child of Thomas and

Elizabeth Fry who should be living at the decease of his or her surviving parent, in fee. The trusts of the term of 500 years were for raising £100 for each of the younger children of Thomas and Elizabeth Fry who should be living at the last-mentioned time, and paying the same to them at their ages of twenty-one.

The third codicil, which was dated the 12th of August 1813, gave to Elizabeth Boghurst absolutely all the testator's ready money, goods, chattels and personal estate (except his capital stock and money in the funds) subject to the payment of his funeral and testamentary expenses and debts and the legacies therein mentioned. It then devised certain parts of the testator's real estates to the trustees (subject to the estate for life devised by the will, to or in trust for Elizabeth Boghurst), to the use of Thomas Fry the elder and Elizabeth, his wife, for their lives, and after their decease, in trust to sell and to stand possessed of the proceeds, in trust for all and every of the children of Thomas and Elizabeth Fry begotten or to be begotten (except Thomas, William Hough, Rebecca, Elizabeth Ann, Sarah and Frances and their issue), as should be living at the decease of the survivor of Thomas and Elizabeth Fry, and the issue of such of them as should be then dead leaving issue, equally to be divided between them, *per stirpes*, and not *per capita*, share and share alike, and to be paid to them respectively as and when they should respectively attain the age of twenty-one years, with benefit of survivorship amongst them in case any one or more of them should die under the age of twenty-one years [231] after the decease of Thomas and Elizabeth Fry; the surviving and accruing share or shares to be paid and divided in the same manner and at the same age and time as the original shares; and the income, in the meantime, to be applied for their maintenance, education and advancement, if the trustees should think fit.

The fourth codicil, which was dated the 18th of July 1815, revoked all the legacies and bequests by the will given to or in trust for William Hough Fry, and directed the trustees to stand possessed thereof, in trust for his sisters Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, equally to be divided between them, share and share alike, and to be payable, assignable and transferable to them at the same times, and under the like rules, regulations, conditions and restrictions as were contained in the will or any former codicil thereto, in relation to their shares of the £12,000 consols.

The fifth codicil, which was dated the 23d of December 1815, after reciting that the testator had, by his will, given to or in trust for Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, the sum of £1500 consols apiece, such legacies to become vested in and to be paid and assigned to them respectively at their respective ages of twenty-five years, or be sooner applied for their preferment or advancement, and with sundry other provisions concerning the same, ratified and confirmed the said bequests and the several provisions contained in the will or any former codicil thereto respecting the same; and, after reciting that the testator had, by his will and some former codicil or codicils thereto, given sundry other legacies, stock or sums of money and shares and interest in his property, to or in trust for the same persons, it declared that all such legacies, stock or sums of money, [232] and share or interest in the testator's property (other than the legacies of £1500 stock apiece), whether to take effect immediately after his decease or after the extinction of any antecedent interests therein, should, after the extinction of all such antecedent interests, vest in the trustees, in trust to pay the income thereof, in equal fourth parts, to Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, for their lives for their separate use, and after their respective deceases, upon trust to pay, assign and transfer the capital, in equal fourth parts, unto their respective children who should attain twenty-one, being sons, or attain that age or be married, being daughters, equally to be divided between them: and in case any of them should die without leaving any such sons or daughters, then, upon trust, to pay the income of the fourth parts of those so dying to Thomas Fry and Elizabeth, his wife, and the survivor of them, and, after the decease of the survivor, to pay, assign and transfer the principal to all and every the children of Thomas Fry and Elizabeth, his wife, except Thomas Fry the younger, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, equally to be divided between them, if more than one, and if but one, then the whole to such one, and to and for their, his or her own use and uses; the share or respective shares of such child or children to become a vested

interest or vested interests in, and to be paid, assigned and transferred to him, her or them respectively, when and as he, she or they should attain his, her or their age or respective ages of twenty-five years; provided that, in case any one or more of such children of Thomas Fry and Elizabeth, his wife, except as aforesaid, should die before their shares in the last-mentioned trust premises should become vested and payable leaving issue, then their shares should be paid, assigned and transferred to their issue respectively, as soon as they could give good discharges for the same; but [233] if any of such children should die without leaving issue and under the age of twenty-five, then that their shares should go to the survivors of them; provided that the income of the expectant shares of minors under that codicil should be applied for their maintenance and education until their shares should become payable.

The sixth codicil, which was dated the 22d of May 1816, after reciting that the testator had, by his will and the preceding codicil, given to or in trust for Rebecca Fry (who had then become the wife of Michael Comport) £1500 consols, to become vested in, and to be paid, assigned and transferred to her at her age of twenty-five, revoked that bequest and gave the £1500 consols to the trustees, upon certain trusts for the benefit of William Hough Fry.

The seventh codicil, which was dated the 18th of April 1817, after reciting that the testator had by his will bequeathed £3000 consols to or in trust for Thomas Fry the younger to become vested in, and to be paid, assigned and transferred to him at his age of twenty-five, revoked that bequest and bequeathed that sum to the trustees, in trust to pay the income of a part of it to Thomas Fry the younger, and the income of the remainder to Thomas Fry the elder, and Elizabeth, his wife, and after the decease of those three persons, to pay, assign and transfer the £3000 consols to Ann Fry, Mary Fry, Charlotte Fry, Emily Fry and Charles Fry, five of the children of Thomas Fry the elder, or such of them as should be living on the happening of those respective events, equally to be divided between them.

The testator died on the 1st of July 1818, leaving his daughter, Elizabeth Boghurst, his heir at law and sole [234] next of kin. Thomas Fry the elder and Elizabeth, his wife, had eleven children, namely, Rebecca, Elizabeth Ann, Thomas, William Hough, Sarah, Frances, Ann, Mary, Charlotte, Emily and Charles; eight of them were living at the date of the will: the other three were born afterwards; and all of them survived the testator. Some of them married after the testator's decease, with the consent required by the will, and had issue. In 1818 the Plaintiffs were appointed trustees of the will and codicils in the place of Philip and Richard Boghurst. Those two persons afterwards died; the latter of them never had any issue. John Boghurst, the other nephew of the testator, died in 1840. The testator's personal estate not specifically bequeathed was exhausted in paying his funeral and testamentary expenses, debts and pecuniary legacies; and his real estates remained unsold.

Elizabeth Boghurst (who was the only acting executrix of the will and codicils) died on the 4th of May 1820. By her will, dated the 10th of December 1819, after giving certain legacies, she bequeathed all the residue of her real and personal estate to Rebecca, the wife of Michael Comport, her heirs, executors, &c., and appointed Michael Comport and Francis Cobb Austen her executors.

The bill was filed against Francis Cobb Austen and Elizabeth Fry (who had survived her husband, Thomas Fry the elder), and also against the children and grandchildren of the two last-named persons. It prayed that the trusts of the will might be performed under the direction of the Court; and that the rights and interests of all parties under the same might be ascertained and declared.

[235] Mr. Bethell and Mr. Bird, for the Plaintiffs, the trustees of the testator's will and codicils:—The questions to be decided by the Court relate to the legacies of £6000, £2000, and £1000, to two of the legacies of £3000 given by the will, and to the legacy of £400 given by the first codicil; and also to the proceeds to arise from the sale, directed by the will, of that part of the testator's real estates which is not comprised in any of the codicils.

The principal objects of the testator's bounty were the children of Thomas Fry the elder and Elizabeth, his wife. They had eleven children; eight of whom were born at the date of the will, and three afterwards. All of them attained the age of

twenty-five. The same question affects all the legacies; and that is whether a gift to children, as a class, to vest in and to be paid, assigned and transferred to them as and when they shall attain twenty-five, is not too remote; and, with respect to the proceeds of the sale of the real estates, the question is to whom they belong, that is, what part of the will and codicils contains the disposition of the testator's residuary personal estate; for he has directed by his will that the proceeds of the sale of his real estates shall go to the same persons, and in like manner as he had thereinbefore or thereafter directed respecting the residue of his personal estate.

Three legacies of £3000 are given by the will; one to Thomas Fry the younger, another to William Hough Fry, and the third (which is not affected by any of the codicils) is given, in trust, after the decease of the testator's daughter, Elizabeth Boghurst, and of Thomas Fry the elder, and Elizabeth, his wife, for all the children of Thomas and Elizabeth Fry, except Thomas the [236] younger, William Hough, Rebecca, Elizabeth Ann, Sarah and Frances, equally to be divided between them, share and share alike, the shares to become vested interests in and to be paid, assigned and transferred to them as and when they shall attain their respective ages of twenty-five years; and provisions are made for the events of any of the legatees dying, leaving issue or not leaving issue, before their shares become vested and payable; and also for their maintenance and education until their shares become payable, assignable or transferable to them.

The other legacies given by the will, to which we now proceed to call the attention of the Court, are affected by one or more of the codicils. The testator, at the commencement of his will, disposes of a sum of £12,000 consols, part of a sum of £25,000 consols. He gives £3000 apiece to Thomas Fry the younger and William Hough Fry, and £1500 apiece to Rebecca, Elizabeth, Ann, Sarah and Frances Fry, making, in the whole, £12,000 consols; and he directs the sums so given to become vested interests in and to be paid, assigned and transferred to them at their ages of twenty-five. By the fourth codicil, he revokes the legacy of £3000 given to William Hough Fry, and gives that sum to Rebecca, Elizabeth Ann, Sarah and Frances Fry equally, share and share alike, and to be payable, assignable and transferable to them at the same times and in like manner as their shares of the £12,000 consols. By the fifth codicil the testator directs that all the legacies, stocks or sums of money and shares or interest in his property, given to the four last-named ladies (except their legacies of £1500 stock) shall be divided into equal fourth parts, and that one of those parts shall be in trust for the separate use of each of them for her life, and, after her [237] death, for her children; and, if any of them die without leaving a son who attains twenty-one or a daughter who attains that age or marries, then that her fourth part shall be in trust for Thomas Fry the elder and Elizabeth, his wife, for their lives and the life of the survivor, and, after the death of the survivor, in trust for all the children of Thomas and Elizabeth Fry, except Thomas the younger, Rebecca, Elizabeth Ann, Sarah and Frances, equally; the shares to become vested interests in and to be paid, assigned and transferred to them when and as they attain twenty-five. That direction affects also the interests of Rebecca, Elizabeth Ann, Sarah and Frances Fry, in the £1000 and £2000 given by the will, and in the £400 given by the first codicil.

Next, with respect to the £6000 consols. That sum is given, by the will, after the deaths of the testator's daughter, Elizabeth, and of his nephews, John and Richard Boghurst, and failure of issue of Richard, in trust for all the children of Thomas and Elizabeth Fry, born or thereafter to be born, equally to be divided between them, and to be paid, assigned and transferred to them at their ages of twenty-five. If that trust is valid, the direction in the fifth codicil before referred to will affect the shares which Rebecca, Elizabeth Ann, Sarah and Frances Fry take under it.

Lastly, with respect to the monies to arise from the sale of the testator's real estates. Those monies are given, by the will, upon the same trusts and in like manner as the testator had thereinbefore or thereafter directed in respect of the residuum of his personal estate. Now, in the preceding part of his will, he had given the residue of his personal estate in the same manner as the £6000 [238] consols; but, by the third codicil which he desires may be taken as part of his will, he gives the residue of his personal estate to his daughter; for he gives her all his personal

estate (except his capital stock and money in the funds), after payment of his debts, funeral and testamentary expenses and legacies.

Mr. Hodgson and Mr. Harwood, for Elizabeth Fry, Elizabeth Ann Simmonds, late Elizabeth Ann Fry, and her children, and for Thomas Fry, Frances Fry, Ann Wynne, late Ann Fry, Charlotte Fry, Emily Fry, and Charles Fry,(1) and for the personal representative of Mary Bulmer, late Mary Fry, deceased.

The rule in construing a will is to strive to put such an interpretation upon the language of it as will give effect to the testator's intention. That rule was acted upon in *Butler v. Lowe* (*ante*, vol. x. p. 317). There the bequest was to children of the testator's nephews, begotten *and to be begotten*; and your Honor held that the words "to be begotten" shewed only that the testator contemplated children to be born after the date of his will and before his death; and, consequently, that the bequest was good. It is true that, in the trust expressed as to the £3000 in favour of all the children of Thomas and Elizabeth Fry except the six named, the testator says that the shares of those children are to become vested interests in and to be paid and assigned to them as and when they shall attain twenty-five. But the word "vested" is a word of ambiguous import; it may mean [239] either vested in interest or vested in possession. In the maintenance clause the testator directs the trustees to apply *the whole* income of the shares of the children for their maintenance and education in the meantime and until their shares shall become payable, assignable or transferable to them, omitting the word "vested." That clause is sufficient to vest the interest in the shares. *Doe v. Ward* (9 Adol. & Ell. 582; see judgment, p. 604.) [THE VICE-CHANCELLOR. When do you say that the shares vested?] At the testator's death. Where a bequest has been held to be too remote, there has been either no direct gift or no person to answer the description; but those objections do not apply here; and, besides, there is the provision for maintenance.

We now come to the legacy of £6000. With respect to that legacy the testator says: "In trust for all and every the children of the said Thomas Fry the elder, and Elizabeth, his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, *and to be paid, assigned and transferred* to them at their several and respective ages of twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent to the lawful issue of such of them as shall die under the said age of twenty-five years, and under the like conditions and restrictions, and with the like power to apply the dividends, interest and annual proceeds thereof, in, for and towards their respective maintenance and education, and in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and [240] bequeathed to or in trust for the said children respectively, so far as the same shall be then applicable to this present bequest." The testator, therefore, means to put the £6000 upon the same footing as the £3000, but he does not say a word about vesting; therefore, the irresistible conclusion is that he meant to postpone the enjoyment and not the vesting of the shares. The maintenance clause, too, is in that as well as the other gifts.

Again, the testator in a subsequent part of his will provides that, in case any person to or in trust for whom or for whose benefit any devise or bequest to take effect in remainder or reversion, or upon any contingency, is contained in his will, shall sell, mortgage or incur his or her right, title or interest in or to any such devise or bequest, while the same continues to be in remainder, reversion or contingent, and before the same *shall take effect in possession*, then and from thenceforth all the devises and bequests to or in trust for such person shall cease, determine and be void, as if he or she were dead. That proviso evidently shews that the testator contemplated that the shares of the children would vest in interest before they vested in possession: and that, in the meantime, the children might disappoint his intention by selling, mortgaging or incumbering their shares; which they could not do unless

(1) Charlotte, Emily and Charles were born after the date of the will, but in the testator's lifetime.

their shares were vested in interest. This restraint on alienation, coupled with the provision for maintenance and the words "to be paid, assigned and transferred," prove irresistibly that the testator, when he used the word "vested," meant vested in possession.

In the third codicil, where the testator disposes of the proceeds of the sale of part of his real estates in favour [241] of the children of Thomas and Elizabeth Fry (except the six named), *who should be living at the decease of the survivor of Thomas and Elizabeth Fry*, he fixes the age of twenty-one as the time of payment. This shews that he knew that he must keep within the line of perpetuity when the gift was to be suspended. So also in the fifth codicil, where the parties who are to take the fourth shares of his daughters at their deaths are persons who are to come into *esse* at a future period, he fixes the age of twenty-one years as the time at which they are to become entitled.

The distinctions which were formerly made between the words "at, when and if," are now all given up, and the Court will go as far as it can to hold legacies to be vested. If they are given at a future time, with maintenance in the meantime, all that is suspended is the enjoyment. 1 Roper on Legacies, p. 494; *Fonereau v. Fonereau* (3 Atk. 645); *Hoath v. Hoath* (2 Bro. C. C. 3); *Walcott v. Hall* (*Ibid.* 305); *Lane v. Goudge* (9 Ves. 225); *Dodson v. Hay* (3 Bro. C. C. 404, Belt's edit.).

In this case, the words in which the children of Thomas and Elizabeth Fry (except the six named) are described are very ambiguous: they may mean either children living at the death, or children born after the death of the testator. In the one case they take vested interests at the death of the testator, and in the other the provision for maintenance makes them take vested interests on their births. In *Leake v. Robinson* (2 Mer. 363) (which will probably be cited by Mrs. Comport's counsel) the gift was to *such child or children as should* [242] attain twenty-five: consequently no persons answered the description until they attained twenty-five. In this case, however, the words may be satisfied by holding that they comprise such children only as should be born at the testator's death. In *Leake v. Robinson*, too, there was, as Lord Denman, C.J., observes in *Doe v. Ward*, no direct gift, but only a direction to the trustees to pay after the happening of the event. But here there is a direct gift to the children. In *Bull v. Pritchard* (1 Russ. 213) also, the individuals who were to take could not be ascertained until they attained twenty-three. That case, however, has been considered as an unsound authority. The case of *Bland v. Williams* (3 Myl. & Keen, 411), in which Sir J. Leach, M.R., disapproves of *Bull v. Pritchard*, is an authority in our favour. For in this, as well as in that case, the shares in many instances are not given over, simply on the children dying under twenty-five, but on their dying under twenty-five *without leaving issue*: and as Mr. Justice Patteson observed, in *Doe v. Ward* (9 Adol. & Ell. 604), that is the key to all the cases except *Bull v. Pritchard*: it was the ground upon which Sir John Leach decided in *Bland v. Williams*.

Mr. Sharpe, for William Hough Fry and Sarah Grabham, late Sarah Fry, and her children. The ultimate trust declared of the £3000 by the will is for all the children of Thomas and Elizabeth Fry, except the six eldest; therefore William Hough and Sarah are excluded from the benefit of that trust: and all that I have to contend for relates to the £6000 and the proceeds of the sale of the real estates directed to be sold by the will, which are not comprised in any [243] of the codicils. Those proceeds are directed by the will to be held upon the same trusts as the testator had thereinbefore or thereafter directed in respect of the residuum of his personal estate. The expression "thereinbefore or thereafter" is equivalent to "therein," and the only disposition of the residuary personal estate which is contained in the will is the same as the disposition of the £6000. The testator directs his trustees to stand possessed of that sum and the residuum of his personal estate and effects, in trust for all the children of Thomas Fry and Elizabeth his wife, born or thereafter to be born, equally to be divided between them, share and share alike. So that there is a direct absolute gift in the first instance to the children: and it is the payment, not the vesting of the shares, that is postponed until they attain twenty-five. This case, therefore, differs very materially from *Leake v. Robinson*: for in that case there was no gift to the children, except on their attaining twenty-five. Here too the

whole income of the shares is directed to be applied for the maintenance of the children until the time of payment arrives.

It will, however, be said that, as the testator has directed that the shares of the £6000 and of the residue shall be subject to the like accruer and benefit of survivorship among the children, and the like descent to the lawful issue of such of them as shall die under twenty-five, and under the like conditions and restrictions, and in all other points and respects, under and subject to the same rules, regulations, conditions and restrictions as were before mentioned and contained in relation to the several legacies thereinbefore given and bequeathed to or in trust for the said children, as far as the same shall be applicable to that bequest, and as the shares of the £3000 are to become vested interests in the children as [244] and when they shall attain twenty-five and not before, therefore their shares of the £6000 and of the residue are not to become vested interests in them until they attain twenty-five. But, where a bequest is good as it stands, the Court will not import into it words which will have the effect of making it void. Where a testator gives a legacy in a particular way, and says that it shall be subject to the same rules, regulations, conditions and restrictions as he had before mentioned in relation to certain other legacies, he means nothing more than that it shall be subject to such of those rules, &c., as are not inconsistent with the prior gift. [THE VICE-CHANCELLOR. Are not the legacies given to William Hough Fry revoked by the fourth codicil?] Yes. My argument applies to Sarah only.

The next question is, how far the gift in question is affected by the first codicil? The testator says: "Whereas I have, in and by my said will, given and bequeathed certain legacies, stock or sums of money to or for the use or benefit of Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, and have authorised and empowered the trustees of my said will, during the lifetime and at the desire of my daughter Elizabeth, to pay the same legacies, stock or sums of money or part thereof to the said Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, or dispose of and apply the same for their preferment or advancement in the world before their attaining their ages of twenty-five years: now I do hereby revoke and declare null and void the power and authority so given, by my said will, to my said trustees to pay, dispose of or apply the principal of the said legacies or any part thereof before the said legatees [245] shall attain their ages of 25 years; and do declare and direct that the said legacies shall vest and be payable, assignable and transferable to the said legatees as if no such power or authority were therein contained." Those words, however, do not import the word "vest" into the gift of the £6000 in the will. The only effect of the direction in the codicil is to take away from the trustees the power of advancing to the children any part of the capital of their shares during the lifetime of Elizabeth Boghurst, leaving the capital to vest as it would have done under the will, that is, on the death of the testator.

Mr. Knight Bruce, Mr. Jacob and Mr. Lee appeared for Rebecca Comport: but

THE VICE-CHANCELLOR [Sir L. Shadwell], without hearing them, said: The question whether the gifts of the £3000 and the £6000 are good gifts appears to me to be plain.

The general mode which the testator has adopted in disposing of his property is this: First, he speaks of having the sum of £25,000 consols. Then he takes up a portion of it, and gives that in certain shares among the six children, that is, the two eldest sons and the four eldest daughters, which, altogether, amount to £12,000; and he says, after he has divided the £12,000 into certain shares, "making in the whole the said sum of £12,000 stock: such several and respective sums to become vested interest in them:" then he names the six children, "and to be paid, assigned and transferred to them, respectively, at their respective ages of twenty-five years." And then he says that, in case any one or more of those six children shall depart this life before his, her or their legacy or legacies shall, pursuant to the trusts of his [246] will, become vested and payable, then his, her or their legacy or legacies shall go to his, her or their respective issue. Then he says that the trustees shall, in the meantime and until the respective legacies or shares of the six children shall become payable, assignable or transferable to them, pay, apply and dispose of the dividends for their maintenance. Now, *prima facie*, he has expressly directed, in positive words,

that the legacies shall become vested interests in and be paid, assigned and transferred to them at the age of twenty-five years. A legacy cannot vest at two different times; when it has once vested, it is vested for ever; and here the testator has, in the most express terms, said when the shares of these six children in the £12,000 shall vest in them, and he has made an express proviso for their shares going over in the event of their dying before their shares became vested and payable. Then, when he makes a provision for the maintenance of the children and points out the time during which the maintenance shall be payable by the expression, "until the legacies or shares shall become payable, assignable or transferable," I must, of necessity, take it that he is speaking of the time until they shall become vested; because he has before identified the paying, the transfer and the assignment with the vesting. I admit, if there was anything in the will which could control that, it ought to be taken into consideration; but I must say, so far from there being anything to control it, it rather appears to me that it is confirmed by what I shall hereafter point out.

Then the testator proceeds to make a division of the £11,000 consols; and he divides that sum in this way: he gives a sum of £3000 consols to the children other than the six eldest: he gives the sum of £2000 to the [247] four eldest daughters, and the residue of the £11,000, which is £6000, to all the children.

With respect to the £3000 he says: "In trust for all and every the child and children of Thomas Fry the elder and Elizabeth, his wife, other than and except the said Thomas Fry the younger, &c., if more than one, to be equally divided between them, share and share alike, the share or respective shares of such child or children to become vested interests in, and to be paid, assigned and transferred to them, respectively, as and when they shall attain their respective ages of twenty-five years." And then there is a proviso, giving the shares over in case the legatees die before their shares became vested and payable, in exactly the same language as he had used in the similar proviso with regard to the shares of the £12,000. The testator then says that the trustees shall, "in the meantime and until the respective shares of the said child or children of and in the said sum of £3000 shall become payable, assignable or transferable, pay, apply and dispose of the dividends, interest and annual produce thereof for their maintenance," in the same language as is before used with respect to the shares of the £12,000. Then he gives the £2000 to the trustees, in trust for the four eldest daughters, "equally to be divided between them, share and share alike, and to be paid, assigned and transferred"—there the word "vested," is not used—"to them in like manner, and at the same time and times, and to be subject to the like accruer and benefit of survivorship among them, &c., &c., and under the like provisions and restrictions, and with the like power to apply the dividends thereof for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same [248] rules, regulations, conditions and restrictions as are hereinbefore mentioned and contained in relation to the said sum of £12,000 hereinbefore given and bequeathed to or in trust for the said Thomas Fry the younger, &c., so far as the same shall be applicable to this present bequest." Now the £12,000 is given so that it shall become vested in the legatees when they attain the age of twenty-five years.

Next, with respect to the £6000 consols. After having made a gift of some preceding life interests, he says, "and, from and after the decease of the survivor of them, my said daughter and nephews, then upon trust that my trustees shall and do stand possessed of and interested in the said sum of £6000 and the said residuum of my personal estate, in trust for all and every the children of the said Thomas Fry the elder, and Elizabeth, his now wife, born or hereafter to be born, equally to be divided between them, share and share alike, and to be paid, assigned and transferred to them at their several and respective ages of twenty-five years." Now it is quite plain, upon the face of this trust, that the testator meant it to include all the children, that is, those who were then alive and those who might thereafter be born, whether they should be born in the lifetime of the testator or not. In a preceding part of his will he has made an express distinction between the living children and the future children; and, here, he means to blend them altogether, and give an interest in the £6000, both to living children and to future children whenever born. Then he says, "to be paid, assigned and transferred to them at their several and respective ages of

twenty-five years, and to be subject to the like accruer and benefit of survivorship among all of them, and like descent, &c., &c., and with the like power to [249] apply the dividends, interest and annual proceeds thereof, in, for and towards their respective maintenance and education, and, in all other points and respects, under and subject to the same rules, regulations, conditions, and restrictions as are hereinbefore mentioned and contained in relation to the several legacies hereinbefore given and bequeathed to or in trust for the said children respectively, so far as the same shall be then applicable to this present bequest." In my opinion, those very words of reference do make the children, who were to be the participants in the £6000, take precisely in the same manner as those persons were to take who were to take shares in the £12,000 and in the £3000.

If there were any doubt upon that point, the language of the first codicil has put it beyond dispute; because the testator says: "Whereas I have, in and by my will, given and bequeathed certain legacies, stock or sums of money for the use or benefit of Thomas Fry the younger, William Hough Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry"—which includes everything the six eldest children are to take, either where legacies are given to them exclusively of the others, or where legacies are given to them in community with the after-born children—"and have authorized and empowered the trustees of my will, during the lifetime and at the desire of my daughter, Elizabeth, to pay the said legacies, stock or sums of money, or part thereof, to the said Thomas Fry the younger, &c., or dispose of and apply the same for their preferment or advancement in the world, before their attaining their respective ages of twenty-five years: now I do hereby revoke and declare null and void the power and authority so given, by my said will, to my said trustees to [250] pay, dispose of or apply the principal of the said legacies, or any part thereof, before the said legatees shall attain their respective ages of twenty-five years, and do declare and direct that the said legacies shall vest and be payable, assignable and transferable to the said legatees respectively, as if no such power or authority were therein contained." There the testator blends together, as constituting the same fact, the vesting, the paying, the assigning and the transferring; and he does that with respect to everything which those children might take by way of legacy. It is therefore language which expressly applies to the gift of the £6000, as well as to the gifts of the £2000, the £3000 and the £12,000: and the same observation may be made with regard to the language of the fifth codicil. Therefore he has shewn most clearly that, though he has not used the term "vested" in the bequest of the £6000 among all the children, yet that he intended that the words "pay, assign and transfer," which are found in the bequest of the £6000, should be taken to denote the time of vesting. All the children to whom the £6000 was given were to take in the same manner; consequently the irresistible conclusion is that, with respect to that bequest, the children were to take so as that their shares should vest in them at twenty-five.

Then, if their shares were to vest in them at twenty-five, and the members of the class who were to take would not, of necessity and at all events, come into *esse* during a life in being, the vesting is made to depend upon an event which would not necessarily happen within a life in being and twenty-one years afterwards. Consequently this legacy falls precisely within the scope of Sir William Grant's decision in *Leake v. Robinson*. It is impossible to separate children who might [251] afterwards come into *esse* from those who were already in existence.

I think, therefore, that the legacy of £6000 as well as the legacy of £3000 is void for remoteness.(1)

Declare that the trusts expressed in the will, concerning the £3000 consols, part

(1) His Honor did not pronounce any express decision upon the question respecting the proceeds of the sale of the real estates not comprised in the codicils. If those proceeds passed by the third codicil, Elizabeth Boghurst was entitled to them under that codicil; but if the trusts declared of them by the will were not affected by the third codicil, it may be inferred from His Honor's judgment that those trusts were void for remoteness, and, consequently, Elizabeth Boghurst was entitled to them as the testator's heir. See the extract from the decree above.

of the £11,000 consols therein mentioned, which were intended to take effect after the decease of the survivor of Elizabeth Boghurst, Thomas Fry the elder, and the said Defendant, Elizabeth Fry, are void for remoteness, and that the Defendant, Rebecca Comport, is entitled to the said sum of £3000 consols, as residuary legatee of Elizabeth Boghurst and her sole next of kin, subject only to the life interest therein of the Defendant, Elizabeth Fry: Declare that the trusts expressed in the will, concerning the £6000 consols, which were intended to take effect after the decease of the survivor of Elizabeth Boghurst and of the testator's nephews, John and Richard Boghurst, and after the failure of issue of the said Richard Boghurst, are void for remoteness, and that the Defendant, Rebecca Comport, is entitled to the said sum of £6000 consols, as residuary legatee and sole next of kin of Elizabeth Boghurst: Declare the trusts expressed in the codicil [252] of the 23d of December 1815 (the fifth codicil), in favour of the children of Thomas Fry the elder, and Elizabeth, his wife, except Thomas Fry, Rebecca Fry, Elizabeth Ann Fry, Sarah Fry and Frances Fry, concerning the fourth share or shares in the said codicil mentioned of and in £3000 consols, part of £12,000 like annuities originally given to William Hough Fry, and of and in the £1000 consols and the £2000 consols respectively bequeathed, by the said testator's will, and of and in £400 consols bequeathed by the codicil, dated the 18th of July 1815 (10th February 1810, *qu.*), are void for remoteness, and that Rebecca Comport is entitled thereto as residuary legatee and sole next of kin of Elizabeth Boghurst, subject to the prior trusts and interests therein declared by the last-mentioned codicil: Declare that the trusts expressed in the will, concerning the monies to arise by sale of such of the testator's real estates devised by his will as are not comprised in the codicils of the 12th of August 1813 (the third) and the 18th of April 1817 (the seventh), are void for remoteness, and that the Defendant, Rebecca Comport, as the devisee named in the will of Elizabeth Boghurst, the only child and heir at law of the said testator, is entitled to such real estates and to the rents and profits thereof accrued since the decease of the said John Boghurst: Order the Plaintiffs to convey the said estates to the said Rebecca Comport: Declare that the real estates comprised in the codicil of the 12th of August 1813, and in the codicil of the 18th of April 1817, are subject to the trusts thereof declared by the said codicils respectively.(1)

[253] STRICKLAND v. STRICKLAND. June 10, 15, 1841.

Plea. Pleading.

A bill by legatees stated that A. and B. (the executors named in the will) proved it: that B. afterwards died, having appointed A. his executor, and A. proved B.'s will. The Plaintiffs then filed a bill of revivor and supplement against A., stating that the statement in the original bill, that A. had proved the first testator's will, was incorrect, and that B. alone had proved it: that A., by proving B.'s will, had become the personal representative of the first testator as well as of B., and that he had possessed certain of the effects of that testator. A. put in a plea to the bill of revivor and supplement, stating that he had never intermeddled with the original testator's estate, and that in B.'s lifetime and also since his death he had renounced probate of the testator's will, and that, therefore, the testator's personal representative was not a party to the suit. Held, that the plea was not double; the averment that A. had never intermeddled with the testator's estate being necessary in order to meet the allegation in the bill that he had possessed certain of the testator's effects, and that averment and the other contents of the plea, amounting only to this, namely, that the character of executor of the first testator was never in A. An incorrect statement in an original bill is not displaced by a statement to the contrary in a bill of revivor and supplement, filed by the Plaintiffs in the suit. The incorrect statement ought to be struck out of the original bill by amendment.

(1) See *Elliott v. Elliott*, *post*, p. 276.

A bill of revivor and supplement in this suit stated that, on the 21st of May 1838, the Plaintiffs filed their original bill, which was afterwards amended, and which, when so amended, was against Sir George Strickland, Bart., Eustachius Strickland and Charles William Strickland : and that it stated that Sir William Strickland, deceased, by his will, dated the 16th of October 1833, gave and bequeathed divers legacies, and, amongst others, he left to his brother, the Plaintiff Henry Eustachius Strickland, £100, and to his, the testator's granddaughter, the Plaintiff Frances Strickland, £500 ; and appointed his sons, the Defendants Sir George Strickland and Eustachius Strickland, executors of his will : that the testator died on the 8th of January 1834 ; and soon after his decease his will was proved by the said Defendants, Sir George Strickland and Eustachius Strickland, in the proper Ecclesiastical Court, and that they [254] possessed themselves of his personal estate and effects to a considerable amount and more than sufficient for the payment of his funeral and testamentary expenses and the legacies given by his will : and that it was thereby prayed that an account might be taken, under the direction and decree of the Court, of what was due to the Plaintiffs respectively, for principal and interest, in respect of their legacies of £100 and £500 ; and that the Defendants, Sir George and Eustachius Strickland, might be decreed to pay what should be found due, on the taking of such account, to the Plaintiffs respectively, out of the personal estate of the testator, Sir William Strickland ; and that, in case the Defendants, Sir George and Eustachius Strickland, should not admit assets of the said testator come to their hands sufficient to answer and pay what should be found due and coming to the Plaintiffs respectively in respect of their said legacies, then that an account might be taken, under the like direction and decree, of the personal estate and effects of the said testator possessed by or come to the hands of the Defendants, Sir George Strickland and Eustachius Strickland, or either of them, or to the hands of any other person or persons by or for their or either of their order or use, and of their application thereof.

The bill of revivor and supplement then stated that the Defendants duly appeared and put in their answers to the original bill : that the statement therein, that the Defendant Sir George Strickland proved the testator's will, was incorrect, Eustachius Strickland having alone proved the same : that before any further proceedings were had in the original suit, and on the 4th of May then last, Eustachius Strickland died, having made his will, dated the 15th of February 1837, whereof he appointed [255] his brother, Sir George, sole executor ; who, soon after the decease of Eustachius, duly proved his will in the proper Ecclesiastical Court, and thereby became and then was the legal personal representative of Eustachius and also of Sir William Strickland. The bill then stated, by way of supplement, that Sir George had, since the decease of Eustachius Strickland, possessed his personal estate and effects to a considerable amount and more than sufficient for the payment of all his funeral and testamentary expenses and just debts, and, particularly, the amount which was coming from his estate as the executor of Sir William Strickland ; and had also possessed certain of the effects of Sir William to a very considerable amount : and that the Plaintiffs were advised that the suit and proceedings had become abated by the death of Eustachius Strickland as the legal personal representative of Sir William, and that the same ought to stand revived against Sir George Strickland, as the personal representative of Eustachius and Sir William Strickland. The bill prayed that Sir George Strickland might be decreed to pay what should be found due, on the taking such account as by the original bill was prayed to the Plaintiffs respectively, out of the personal estate of Sir William Strickland ; or that, in case Sir George should not admit assets of Sir William come to his hands sufficient to pay what should be found due to the Plaintiffs in respect of their legacies, then that an account might be taken of the personal estate and effects of Sir William Strickland, possessed by Sir George Strickland or any person or persons by his order or for his use, and of the application thereof ; and that Sir George might either admit assets of Eustachius Strickland come to his hands sufficient to answer what might be found due from his estate, to the estate of Sir William [256] Strickland, or that an account might be taken of the personal estate and effects of Eustachius Strickland possessed by Sir George or any person, &c., and of the application thereof, and also of his outstanding personal estate (if any) : and that the suit and proceedings so abated as aforesaid might stand revived against Sir

George Strickland, as the legal personal representative of Eustachius and Sir William Strickland.

Sir George Strickland put in a plea to the bill of revivor and supplement, averring that he was not the personal representative of Sir William Strickland, and never intermeddled with Sir William's personal estate: that he did, in the lifetime of Eustachius Strickland, renounce the probate and execution of Sir William's will: and that, since the death of Eustachius, he, having become the sole survivor of the executors named in Sir William's will, did, by writing under his hand and seal, renounce his right, title and interest in and to the probate and execution of the said will, and also in and to letters of administration, with the said will annexed, of the goods, chattels and credits of Sir William: that Sir William's personal representative was not made a party to the bill, nor was process thereby prayed against him; although, upon the complainant's own shewing, such personal representative was a necessary party thereto.

Mr. Knight Bruce and Mr. Shadwell, in support of the plea, cited *Arnold v. Blencowe* (1 Cox, 426); *Scott v. Briant* (6 Nevile & Mann. 381), and *Pawlet v. Freak* (Hardr. 111).

[257] Mr. Bethell, in support of the bill, said that the fact that no person sustaining the character of personal representative to Sir William Strickland was a party to the suit appeared on the face of the bill of revivor and supplement; and, therefore, Sir George ought not to have pleaded to the bill on that ground, but ought to have demurred to it: that, if Sir George was entitled to avail himself of the defect in the bill by pleading to it, the plea was double; as it averred not only that Sir George Strickland never proved Sir William's will, but also that he never intermeddled with Sir William's personal estate.

Mr. Knight Bruce, in reply, said that as the bill of revivor and supplement alleged that Sir George had possessed assets of Sir William, the plea would not have been a defence to the bill, unless it had negatived that allegation; for the possessing of assets would have been an acceptance of probate; and that the non-acceptance of the probate and the renunciation of it constituted but one fact.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case, a bill of revivor and supplement was filed, which stated that in May 1838 the Plaintiffs exhibited their original bill against Sir George Strickland, Eustachius Strickland and Charles William Strickland, stating that Sir William Strickland made his will, by which he left a legacy to each of the Plaintiffs, and appointed Sir G. Strickland and Eustachius Strickland his executors; that the will was proved by both the executors, and that they possessed themselves of the testator's personal estate and effects: and the relief asked by that bill was that an account might be taken of what was due to the Plaintiffs in respect of their [258] legacies; and that the executors might be decreed to pay to the Plaintiffs what should be found due to them on the taking of that account out of the assets of the testator possessed by them; and, if they should not admit assets sufficient for that purpose, then that an account might be taken of the testator's personal estate and effects possessed by them. The bill of revivor and supplement then stated that the Defendants appeared and put in their answers to the original bill; that the statement that both the executors proved the will was incorrect, and that Eustachius Strickland alone proved the same; that, before any further proceedings were had in the original suit, Eustachius Strickland died, having made his will and appointed Sir George Strickland his executor; that Sir George Strickland proved the will, and thereby became and now is the legal personal representative of Eustachius Strickland and also of Sir William Strickland, the original testator: the bill then stated that Sir George Strickland had since the death of Eustachius possessed his personal estate and effects; and also had possessed certain of the effects of Sir William Strickland; but it did not state *when* he possessed those effects. The bill then prayed for payment by Sir George Strickland out of the assets of Sir William of what should be found due to the Plaintiffs in respect of their legacies; and, if necessary, that an account might be taken of the assets of Sir William and also of the assets of Eustachius possessed by Sir George: and that the suit and proceedings might stand revived against Sir George Strickland as the personal representative of Eustachius and of Sir William Strickland.

To that bill a plea has been put in by Sir George Strickland, which states that the Defendant is not the [259] personal representative of Sir W. Strickland, and that he never intermeddled with the personal estate of Sir W. Strickland; and that he did in the lifetime, and that he has since the death of Eustachius Strickland renounced probate and execution of the will of Sir W. Strickland: And the plea then says that the personal representative of Sir W. Strickland is not made a party to the bill, and that process is not prayed against him.

Now it is objected, first, that this plea is bad as being double; and, also, that the defect on which it is founded is apparent on the face of the bill, and should therefore have been brought before the Court by way of demurrer, and not by plea.

The law as laid down in *Hensloe's case* (9 Rep. 37 a.) has been followed in *Pawlet v. Freak*, *Arnold v. Blencowe*, and other cases; and it has never varied. The law is thus laid down in *Hensloe's case*: "And the Court took this difference: when many are named executors, and some of them refuse and some of them prove the will, those who refuse may afterwards, at their pleasure, administer, notwithstanding this refusal before the Ordinary: but if all refuse before the Ordinary, and the Ordinary commits administration to another, there they cannot afterwards administer. And this difference is proved by our books in 21 Edward 4, 24a, where it is resolved by the Justices, that if twenty are named executors and one proves the will, it sufficeth for them all; and the refusal before the Ordinary is not any estoppel against them to administer after, when they please, in our law; and we have no regard in this [260] point to the law of the church: and the executor who proves ought to name them who refuse in every action to recover the testator's debts, and they may release the whole debt: and it is clear that they who refuse shall have an action by survivor. But it is held in 36 Hen. 6, 8a, that if a man makes two executors and both refuse before the Ordinary, now they can never after administer as executors by force of the will; for now the testator dies intestate: otherwise, when one proves and the other refuses before the Ordinary, the other may administer with him when he will."

Now, although the bill of revivor and supplement states that the statement in the original bill, that Sir George Strickland proved Sir William's will, was incorrect, yet it seems to me that the proper mode of correcting that statement was not by making an averment to the contrary in the bill of revivor, but by amending the original bill by striking out of it that incorrect statement: for, as the record now stands, there is an inconsistency between the two bills: and as there is no reason why credit should be given to the one rather than to the other, the Court cannot tell which of the two statements is to be taken as the correct one.

Moreover, it is observable that, though the bill of revivor and supplement states in effect that Sir George Strickland did not prove the will of Sir William, yet it alleges that Sir George proved the will of Eustachius: and it further alleges that Sir George had possessed certain of the effects of Sir William; and, as it so alleges, it throws on Sir George the character of executor of Sir William; and makes it imperative upon him in order to meet the allegation in the bill, that he became the personal representative of Sir William [261] Strickland, not only to state that he renounced the probate of Sir William's will, both in the lifetime and also after the death of Eustachius; but also to aver that he never intermeddled with the estate of Sir William. For that averment gets rid of the conclusion of law, which must have been drawn from the statement in the bill of revivor, which amounts to his having taken upon himself the character of executor of Sir William Strickland.

My opinion is that the averments in the plea amount only to this, that the character of executor of Sir William never was in Sir George Strickland.

I think that the plea is not liable to either of the objections which have been insisted upon in argument, and that it is a good plea, and must be allowed.

Plea allowed, with liberty to amend.

[262] ANON. *June 17, 1841.*

Taxation. Solicitor and Client. Costs.

If a person out of the jurisdiction petitions for the taxation of his solicitor's bill, he must give security for the costs of the taxation, and also for the balance that may be found due from him.

THE VICE-CHANCELLOR [Sir L. Shadwell] ruled that where a person who is out of the jurisdiction of the Court petitions to have his solicitor's bill taxed, he must give security to be approved of by the Master for the costs of the petition, and also for the balance that may be found due from him on the taxation.

[262] In the Matter of 52 GEO. 3, c. 101. *June 25, 1841.*

Charity. Trustees.

On a petition for the appointment of new trustees of a charity, the Court directed that in the deed appointing the new trustees a power should be inserted for appointing new trustees in future.

This was a petition presented under Sir Samuel Romilly's Act, for the appointment of new trustees of charity property.

Mr. Goodeve appeared in support of the petition; and, at his request,

THE VICE-CHANCELLOR [Sir L. Shadwell] ordered that, in the deed appointing the new trustees, provision should be made for the appointment of new trustees in future.

[263] LUMSDEN *v.* FRASER. *June 25, 1841.*

[S. C. 10 L. J. Ch. 362.]

Heir and Executor. Intermediate Rents.

An agreement was made for the sale of an estate at a future time. Before that time arrived the vendor died intestate. Held, that the rents accrued between the vendor's death and time for completing the contract belonged to the vendor's heir and not to his executor.

A contract was entered into for the sale of an estate which was to be completed at a future time. Before that time arrived the vendor died intestate as to the estate agreed to be sold. On his death his heir entered into the receipt of the rents of the estate, and continued to receive them until the time for completing the contract arrived. The question was whether he was entitled to retain the rents which he had received, or ought to account for them to the vendor's personal representative.

THE VICE-CHANCELLOR [Sir L. Shadwell]. If a contract for the sale of an estate is to be performed at a future time, and, before that time arrives, the vendor dies, the law casts the whole legal estate upon his heir in the meantime: and if, by virtue of the interests which so devolves upon him, he receives the rents of the property until the time for performance of the agreement arrives, the question is whether any equity then arises to the personal representative of the vendor which entitles him to what the heir has received?

The law favours the heir rather than the executor: and my opinion is that what the heir has received he is entitled to keep.

Mr. Knight Bruce, Mr. Stuart, Mr. Sidebottom, Mr. Daniel and Mr. W. K. Bayley were counsel in the cause.

[264] EDWARD JOSEPH CHRISTIAN v. JAMES EDWARD DEVEREUX, THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS IN IRELAND AND OTHERS; and THE COMMISSIONERS OF CHARITABLE DONATIONS AND BEQUESTS IN IRELAND v. JAMES EDWARD DEVEREUX AND OTHERS. July 8, 1841.

[On point as to stop-order, see *Lord v. Colvin*, 1867, L. R. 3 Eq. 742.]

Stop-Order. Stamp on Letters of Administration. Administrator. Statute of Limitations (3 & 4 Will. 4, c. 27). *Residue. Executor.*

A. claimed a fund in Court as his father's administrator; but the letters of administration were not stamped to a sufficient amount. The Court refused to grant him a stop-order until he had procured the letters to be sufficiently stamped.

The word "legacy," in 3 & 4 Will. 4, c. 27, s. 40, includes a residue or share of a residue: *semble*.

An executor is entitled to a residue or share of a residue bequeathed to him, although he has not proved the will.

A petition presented by Edward Joseph Christian, the Plaintiff in the cause first above mentioned, stated the will and codicil of James Fanning deceased, dated respectively in 1802 and 1804, under which (as the petition stated) and in consequence of Januarius Fanning, one of the residuary legatees, having died in the testator's lifetime, Edward Christian and the Defendant, Devereux, who were the other residuary legatees and the executors of the will and codicil, became entitled to the whole residuary personal estate of the testator. The petition then stated that the testator died in 1806, and that in 1817 Devereux alone proved the will and codicil and took upon himself the whole execution thereof: that Devereux afterwards made divers assignments of his share of the testator's residuary estate by indentures, the dates and substance of which were stated, and thereby severed the joint-tenancy which had existed between him and Edward Christian in the testator's residuary estate, and he and E. Christian thereby became tenants in common thereof: that the bill in the cause secondly above mentioned was filed for an account of what was [265] due in respect of a bequest made by the testator for the benefit of the poor of certain parishes in Ireland: that, pursuant to orders made in March 1823 and in May and July 1827, certain sums had been paid into Court in the last-mentioned cause, and invested in the three per cents.; and that, by the decree in that cause, dated the 8th of August 1827, the Master was ordered to take an account of what was due in respect of the charitable bequest in the testator's will: but that no account of the testator's personal estate was directed to be taken, nor was any inquiry directed to be made as to the testator's debts; and that such account had never been taken, nor had any such inquiry ever been made: that the Master, by his report made in pursuance of the decree, found that the sum of £34,286 consols was due in respect of the charitable bequest; and, by an order of the 2d of June 1841, made, in the secondly above-mentioned cause, on the petition of the Plaintiffs in that cause, the report was confirmed, and it was ordered that £34,286 consols, part of £46,286, 14s. 8d. like stock standing in the name of the Accountant-General in trust in the last-mentioned cause, should be transferred to the Plaintiffs in that cause.

The petition then stated that Edward Christian was not made a party to the last-mentioned suit, or to any suit concerning the testator's estate and effects: and that he was never informed, by Devereux or by any other person, that he had any interest therein, or was entitled to any gift or benefit under the testator's will and codicil or either of them: that the last-mentioned suit was instituted and carried on wholly unknown to Edward Christian, and was so framed and conducted as that no inquiry was directed or advertisement published so as to give him any chance of hearing of that suit: that, towards the latter part of his life, he resided at Hammersmith, and died about the 20th of February 1837, intestate, and, on the 25th of June 1841, letters of administration to his estate were granted to the Petitioner, who was one of his children: that the Petitioner remained totally

ignorant of the matters aforesaid (excepting Edward Christian's death and intestacy) until the beginning of June 1841, when he was for the first time informed thereof; and thereupon took out the letters of administration: that the Commissioners of Charitable Donations, &c., had full knowledge that Edward Christian was entitled as before mentioned; but, acting in collusion with Devereux, they abstained from making him a party to the suit instituted by them, and never gave him any notice thereof: that Devereux had possessed property and effects of the testator to the amount of £6000 and upwards, which he had applied to his own use: that he well knew that Edward Christian was entitled as before mentioned, but he never, in his answer put in in the last-mentioned suit, suggested or referred to Edward Christian's rights and interests, or suggested that he should be made a party to that suit, or gave him any notice thereof or informed him that he was in any way interested therein or in the property the subject thereof: that the sum of £46,286, 14s. 8d. consols still remained in Court in trust in the secondly above-mentioned cause: that, if that fund should be paid out, the Petitioner would be deprived of the means of recovering the share of the testator's estate and effects which he was entitled to: that he had applied to Devereux to account for the testator's personal estate and effects, and also had requested the Commissioners of Charitable Donations, &c., to forbear the distribution of so much of [267] the testator's estate as was represented by the fund in Court, until the proper accounts of the testator's estate should have been taken and the rights of all persons interested therein should have been determined in a suit to which such persons should have been made parties; but that they had refused to comply with the Petitioner's requests: that he had lately filed his bill in the first above-mentioned suit, stating the matters before mentioned, and praying that it might be declared that the bequest to Januarius Fanning lapsed by his death and became part of the testator's residuary estate; that an account might be taken of the testator's personal estate and effects possessed by Devereux, and that the clear residue of the testator's estate might be ascertained; and that the Petitioner, as Edward Christian's personal representative, might be declared entitled to one-half of such residue, and that the same might be paid to him, either out of the fund in Court, or by Devereux; and, if necessary, that the decree of the 8th of August 1827 and the order of the 2d of June 1841, might be reversed and discharged; and that, in the meantime, the Defendants to the first above-mentioned suit might be restrained from acting on the order of the 2d of June 1841, and from accepting or receiving any transfer or payment of or out of the fund in Court.

The petition prayed that it might be declared and ordered that no part of the fund in Court ought to be paid out or distributed until the first above-mentioned suit should have been heard and decided; and that such payment or distribution might be restrained by the order of the Court; and that the Defendants to such suit might be restrained from acting on the order of the 2d of June 1841, and from accepting or receiving any [268] transfer or payment of or out of the fund in Court until after the taking of the accounts in the same suit.

On the petition coming on to be heard, it appeared that, having regard to the amount of the property claimed by the Petitioner, the stamp duty paid on the letters of administration granted to him was much less than the Stamp Act (55th Geo. 3, c. 184, sched. part 3) required; and it was contended that, on that account, the petition ought to be dismissed.

It was contended also that, if any share of the testator's residuary estate was given to Edward Christian, the payment of it could not be enforced; first, because he had not proved the testator's will; and, secondly, because his right to it was barred by the Statute of Limitations (3d & 4th W. 4, c. 27).⁽¹⁾

. Mr. Wakefield and Mr. Bacon appeared in support of the petition.

(1) The 40th section of that Act enacts that no action or suit shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, &c., &c.

Mr. Knight Bruce, Mr. Jacob, Mr. Wigram, Mr. James Russell, Mr. Willcock, Mr. Anderdon and Mr. Loftus Wigram opposed it.

With respect to the objection that Edward Christian had forfeited his right to the share of the residue bequeathed to him, by not proving the will,

[269] THE VICE-CHANCELLOR [Sir L. Shadwell] said, in the course of the argument, that, on a former occasion, he had considered the point, and that the conclusion which he had come to was that the rule as to a legacy given to an executor who did not prove the will did not apply to a residue; and that there was no case which decided that an executor should be deprived of his right to a residue or a share of a residue given to him, because he did prove the will. (See *Griffiths v. Pruett*, ante, vol. xi. p. 202.)

With respect to the objections founded on the insufficiency of the stamp affixed to the letters of administration, and on the Statute of Limitations, the counsel for the petitioner said that, before the Petitioner could apply to have any part of the fund in Court paid out to him, he must obtain and produce letters of administration, having a stamp of sufficient amount on them; but, as the Petitioner did not ask on the present occasion to have any part of the fund paid to him, or even to have his right to any portion of it declared, but asked merely for a stop-order, that is, that the Court would not part with the fund until the Petitioner's claim had been decided on, it was sufficient for him to produce letters of administration, on which the lowest amount of duty required by the Stamp Act had been paid. Secondly, that the Statute of Limitations applied, not to a residue or a share of a residue, but merely to a legacy.

The Respondents' counsel said that letters of administration with an inadequate stamp upon them could not be produced, in a Court of Justice, for any purpose [270] whatever. *Hunt v. Stevens* (3 Taunt. 113); *Carr v. Roberts* (2 Barn. & Adol. 905); *Thynne v. Protheroe* (2 Mau. & Sel. 553).

Secondly, that a person to whom a residue or a share of a residue was bequeathed was a legatee; and, consequently, the term "legacy" in the Statute of Limitations included a residue or a share of a residue, as well as a sum of specified amount; and that no reason could be assigned why the right to the former should not be barred by length of time, as well as the right to the latter.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case divides itself into two parts. There is, first of all, the application as against the Commissioners of Charitable Donations; and then there is the application against Mr. Devereux; and it appears to me that there is a very considerable difference between the two. [Mr. Wakefield. I admit that I cannot support the petition as against the Commissioners of Charitable Donations.] THE VICE-CHANCELLOR. Then, as to them, it is admitted that no order can be made; and, as to them, therefore, the petition must be dismissed with costs.

Then the question is with respect to the surplus of the £46,286, 14s. 8d., after handing over to the Commissioners of Charitable Donations what the Master finds is their share. The claim which is made by the Petitioner is in his character of administrator of Edward Christian, who was the co-joint-tenant with Mr. Devereux of the general residue; and my opinion is that [271] there has not been a sufficient denial by the affidavit of Mr. Devereux of that general statement which is made in Mr. Christian's affidavit, as to the effect of the assignments which Mr. Devereux is alleged to have made of his moiety of the residue; so that it is impossible to decide what is the effect of the deeds which he has executed without seeing them: and it seems to me that it would have been as well for Mr. Devereux to have gone somewhat further in his denial than he has done. I think, therefore, that, on the affidavits, it must be taken to be a point not concluded.

Next, with regard to the question as to the meaning of the word "legacy," in the 3d & 4th Will. the 4th, c. 27, s. 40. I am inclined to think that, where the Act speaks of a legacy, it does, in effect, speak of a share of a residue; and it does not make any difference between a share of a residue and a legacy. But then that appears to me to be a very important point, on which I am not bound to give an opinion now.

It strikes me that there is a very wide difference between retaining a fund, which the Court has already got possession of, until a grave question has been decided; and taking a fund out of the possession of a person until the decision of the question,

when, perhaps, it may not appear that the applicant has any title at all to the fund. The two cases appear to me to be extremely dissimilar. Therefore, if I only find that there is a grave question which cannot be determined until the hearing of the cause; and that the fund in dispute is in this Court, I think that the same principle which (where an application is made by a party, whose title is not admitted, to have the possession from another of a fund which the applicant claims as his) would lead [272] me to say that the fund should remain where it is, would also lead me to say, where the fund is in Court, that it shall remain in Court; because the Court is not taking the fund from any person, but is merely keeping that which it has possession of until the grave question is determined.

It strikes me also that there is this difficulty in this case. The bill in the Petitioner's suit is filed impeaching the order which was made in June last; and it is filed, not in the shape of a bill of review, nor in the shape of a bill asking relief against an order or a decree, on the ground that it was obtained by fraud. I use that particular phrase, because, though the bill does aver collusion, yet there is no passage in the affidavit which supports the bill in that respect; and, therefore, I must take it to be a bill not proceeding on the ground of collusion; and it seems to me that there may be a very great difficulty in interfering with an order made in a cause, where the bill which is filed to impeach it is not a bill of review, nor a bill proceeding on the ground of fraud. But, notwithstanding there may be a very considerable difficulty on those grounds, I think that it is a difficulty which ought to be dealt with at the hearing.

Then the application which is made in this case is made by a party who makes the strength of his case and the hardship of his case to consist in this, that, if the Court does not interfere, he will lose several thousand pounds; but notwithstanding the cogency of his case in respect of the largeness of the fund that he may lose, he yet contents himself with coming forward in the shape of what may almost be called a pauper administrator; he comes here with letters of administration [273], having no higher stamp on them than is required for the smallest amount of property mentioned in the Stamp Act. At the same time, I am willing to admit that, in cases where a claim has been made by a Plaintiff as administrator, and the suit has gone on without any objection being made, this Court has allowed the party to recover at the hearing, if, at the time of the hearing, a proper administration is produced. I think, therefore, that it would be too harsh to say that this petition must be dismissed merely because the letters of administration at the present moment are not sufficiently stamped; and that a reasonable time ought to be allowed to the party who makes the application by petition to come to the Court with a sufficient administration.

It therefore appears to me, on the whole, that the fair thing is to let this petition stand over for a certain short time, giving leave to the Petitioner in the meanwhile to procure his letters of administration to be adequately stamped; which, if he does, the proper course will be to make an order which will have the effect of retaining in Court the difference between the £46,286, 14s. 8d. and that share of it which clearly belongs to the Commissioners of Charitable Donations.

[274] CHARLTON v. WRIGHT. July 9, 1841.

[Observed upon, *Turner v. Cox*, 1853, 8 Moo. P. C. 288; 14 E. R. 111.]

West India Estate. Stat. 5 Geo. 2, c. 7. Assets. Administration. Debtor and Creditor.

Notwithstanding *West India estates* are made legal assets by 5 Geo. 2, c. 7, s. 4, they may be devised so as to make them equitable assets.

The testator in this cause devised an estate which he had in the West Indies to his executors, in trust to sell and apply the proceeds in payment of his debts. The question was whether that estate was to be considered and dealt with as equitable or as legal assets of the testator.

By the fourth sect. of 5 Geo. 2, c. 7 (for the more easy recovery of debts in His

Majesty's plantations and colonies in America), it is enacted that the houses, lands, negroes and other hereditaments and real estates, situate or being within any of the said plantations belonging to any person indebted, shall be liable to and chargeable with all just debts, duties and demands, of what nature or kind soever, owing by any such person to His Majesty, or any of his subjects, and shall and may be assets for the satisfaction thereof, in like manner as real estates are, by the law of England, liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies, proceedings and process, in any Court of law or Equity in any of the said plantations, respectively, for seizing, extending, selling or disposing of any such houses, lands, negroes and other hereditaments and real estates, towards the satisfaction of such debts, duties and demands, and in like manner as personal estates in any of the said plantations respectively are seized, extended, sold or disposed of for the satisfaction of debts.

[275] That enactment and the construction put upon it by Sir T. Plumer in *Thomson v. Grant* (1 Russ. 540, note) were relied upon by

Mr. Knight Bruce and Mr. Berkeley, who contended that the estate was made legal assets by the Act of Parliament, and that it was not in the power of the testator to make it equitable assets.

Mr. Jacob, Mr. Blunt and Mr. Cole were the other counsel in the cause.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, as the Act of Geo. 2 had not taken away the power which testators had before the passing of that Act to dispose of their estates so as to make them equitable assets, that power still remained; and, consequently, the estate in question was equitable assets.

[276] ELLIOTT v. ELLIOTT. July 16, 1841.

[S. C. 10 L. J. Ch. 363. Followed, *In re Coppard's Estate*, 1887, 35 Ch. D. 350. See *In re Wenmouth's Estate*, 1887, 37 Ch. D. 270. Distinguished, *In re Mervin* [1891], 3 Ch. 203.]

Will. Construction. Remoteness.

Testator gave the residue of his personal estate unto and among all and every the children, sons and daughters, of his daughter Elizabeth, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years. Held, that the children of the testator's daughter living at the testator's death were the only objects of the bequest; and, consequently, that it was not void for remoteness.

The testator in this cause gave a legacy of £1000 to his daughter Elizabeth Elliott, and all other his personal estate and effects unto and among all and every the children, sons and daughters, of his said daughter, in equal shares and proportions, as and when they should attain their respective ages of twenty-two years; and he directed the interest on their respective shares to be accumulated and to be paid to them as and when the principal should be payable.

Mrs. Elliott had four children living at the testator's death, and one born four years afterwards.

Mr. J. H. Palmer, for the Plaintiff Mrs. Elliott, who was the testator's sole next of kin, said that the residue was given to *all* the children of Mrs. Elliott as a class; and, as their shares were not to vest in them until they attained the age of twenty-two, the gift was wholly void for remoteness. *Leake v. Robinson* (2 Mer. 363); *Vawdry v. Geddes* (1 Russ. & Myl. 203; see *Comport v. Austen*, ante, 218).

Mr. Knight Bruce and Mr. Hare, for the children of Mrs. Elliott, said that where a bequest was made to A. for life, and after A.'s death to his children, the testator was taken to mean all the children who might come into existence during A.'s life; but, where no prior life interest was given, the testator must be supposed [277] to mean all the children who might be in existence at his death. *Viner v. Francis* (2 Cox, 190), and *Davidson v. Dallas* (14 Ves. 576).

Mr. W. K. Ellis, for the executor.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I see no objection, in principle, to holding that by the description "all and every the children, sons and daughters of my daughter Elizabeth Elliott," the testator meant those children who were then living or might be living at his death; and then there is no objection to the gift.

When a testator speaks of the children of his daughter, the reasonable construction is that he means such children as his daughter has at his death, at which time the will speaks.

Declare that the gift in question is a gift to such of the children of the testator's daughter as were living at the testator's death.

[278] WALTERS v. JACKSON.(1) July 16, 19, 1841.

Infant Heir. Decree.

In a decree for raising legacies against an infant heir of a devisee whose estate was charged with the legacies, a sale to raise the requisite amount will be directed, but the infant will not then be declared a trustee, so as to enable the Court to order a conveyance under the 6th and 18th sections of 1 Will. 4, c. 60.

In this case a bill was filed by legatees whose legacies were charged on land of which the infant heir of a devisee under the will was seised. The object of the bill was to have the legacies (on a deficiency of personal estate) raised by sale of a competent portion of the land.

All the accounts having been taken and the amount to be raised out of the infant's estate having been ascertained, the cause came on for further directions; when, a sale of a part of the infant's estate being necessary, a question arose as to the form of the order to be pronounced.

Mr. G. Richards and Mr. Renshaw, for the Plaintiffs, contended that it was proper under 1 Will. 4, c. 60, ss. 6 and 18 (the 1 W. 4, c. 47, not applying to the case) that the infant should at once be declared to be a trustee, for the legatees, to the extent of the sum to be raised for them, and that a sale and conveyance should be ordered. (See *Broom v. Broom*, 3 M. & K. 443.)

Mr. Lee, for the infant, mentioned a case of *Godfrey v. —*, in which Lord Langdale, M.R., directed a sale, and declared that, upon the sale taking place, the infant would become a trustee for the purchaser of the estate.

[279] THE VICE-CHANCELLOR [Sir L. Shadwell] refused then to make any further order than for a sale of a competent portion of the property; and said that the direction for sale would be a good ground for the declaration which might be made on a petition to be presented for a conveyance after the sale should have taken place. He mentioned a MS. case in 1836, in which, under similar circumstances, he had made the like order.

[279] PLUNKETT v. LEWIS. July 22, 1841.

Practice. Exceptions. Report.

Plaintiff served Defendant with an order confirming a report *nisi*: and on the eighth day after, exclusive of the day of service, he applied for the registrar's certificate of no cause shewn, but which the registrar declined to give without the production of counsel's brief on a motion to make the order absolute, which (it was said) could not be made until the then next seal. On the ninth day the Defendant filed exceptions to the report. Held, that the exceptions were regularly filed.

Motion by Plaintiff that exceptions filed, on behalf of the Defendant, to the

(1) *Ex relatione.*

Master's report, dated the 16th of June 1841, might be taken off the file for irregularity.

The affidavit in support of the motion stated that the order confirming the report *nisi* was obtained and served on the 23d of June 1841; that the deponent applied at the Report Office on the 1st of July, being the eighth day after the order *nisi* was served exclusive of the 23d of June, for the registrar's certificate of no cause shewn; but which was declined without the production of counsel's brief on a motion *to make the order absolute*, which (it was said) could not be made until the then next seal; that the deponent had been informed and believed that the order to set down the exceptions, which was dated the 1st of July 1841, was not served upon the Plaintiff's Clerk in Court until the second of [280] that month; in which case the said order was not served in due time according to the practice of the Court.

Mr. Knight Bruce, in support of the motion, cited *Manners v. Bryan* (1 Myl. & Keen, 453), and *Mole v. Smith* (1 Jac. & Walk. 665).

Mr. Wakefield and Mr. K. Parker, for the Defendant, said that, as the exceptions were filed before the certificate of no cause shewn was obtained, they were filed in due time.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I rather think that the right meaning of the order *nisi* is that the order will be made absolute if no cause is shewn *and that fact is certified*. (See 2 Smith's Pract. 2d edit. 363, 364.)

[281] BEATSON v. BEATSON. July 23, 30, 1841.

Volunteer. Voluntary Settlement. Revocation.

A single lady having, under a will, a general power of appointment over a fund, made a voluntary appointment of it to trustees, in trust for her separate use for life; remainder for any husband whom she might marry, for life; remainder for her children by any husband or husbands whomsoever. A few months afterwards she, being still unmarried, revoked the appointment (although she had not reserved to herself any power to do so), and made another voluntary appointment of the fund to other trustees, in trust as she should appoint by deed or will. She then married; and *afterwards*, by virtue of the power reserved to her by the last deed, she executed another voluntary deed, by which she declared that the trustees of the prior deed should stand possessed of the fund in trust as she and her husband should appoint, and, in default, in trust for her husband and herself for their lives successively, remainder for their children. The fund still remained in the names of the trustees of the will. The Court, in a suit by the wife and the last-mentioned trustees, against the husband, the trustees of the will and the trustees of the first-mentioned deed, decreed (with the husband's concurrence) the trustees of the will to transfer the fund to the trustees of the last deed upon the trusts thereof. *Sloane v. Cudogan* observed upon.

Maria Theresa Nowell bequeathed two-seventh parts of her residuary personal estate to trustees in trust to pay the interest thereof to her niece, Margaret Marion Humfrays, spinster, for her life for her separate use, and after her decease, in trust to pay the principal to such person or persons, &c., as she should by deed appoint.

Margaret Ursula Humfrays bequeathed to trustees £8675, three and a half per cent. Reduced annuities, in trust to pay the dividends to her daughter, the said Margaret Humfrays, so long as she should continue unmarried; and in the event of M. M. Humfrays' marriage, the testatrix directed £5000 Reduced annuities, part of the £8675 like annuities, to be transferred to her or to such person or persons and upon such trusts as she, either before or after her mar-[282]-riage, should by deed appoint: and the testatrix directed that the trustees should stand possessed of the residue of the £8675, in the event of her daughter's marriage, as part of the residue of her own estate.

By an indenture of settlement, dated the 13th of June 1839, and made between Margaret Marion Humfrays and certain persons who were trustees of the settlement,

after reciting that Margaret Marion Humfrays, being about to embark for India where she was engaged to be married, had then lately determined, in contemplation of her intended marriage, to make such several appointments and settlement of the £5000 Reduced annuities, and of her two-seventh parts of Mrs. Nowell's residuary estate as thereinafter stated; and that, in pursuance of such determination, by a deed-poll of even date with the settlement, she had absolutely and irrevocably appointed that, from and immediately after her *marriage with any person whomsoever*, the trustees of Mrs. Nowell's will should transfer the said two-seventh parts to the trustees of the settlement upon the trusts thereby declared thereof; and that, in further pursuance of her said determination, by another deed-poll of even date with the settlement, she had absolutely and irrevocably appointed that, immediately after her marriage with any person whomsoever, the trustees of her mother's will should transfer £406 Reduced annuities, part of the £8675 like annuities, to the trustees of the settlement upon the trusts thereby declared thereof; and that, by the same deed-poll, she had appointed that, immediately after her marriage with any person whomsoever, the trustees of her mother's will should transfer the sum of £1000 Reduced annuities, making, together with the £4000 like annuities, the sum of those annuities over which she had a power of appointment, to the person [283] with whom she should have intermarried, for his own absolute use: it was agreed and declared that the trustees of the settlement should stand possessed of the two-seventh parts of Mrs. Nowell's residuary estate and of the £4000 Reduced annuities, in trust for Margaret Marion Humfrays for her life, for her separate use, and, after her death, for any husband with whom she might have intermarried, for his life; and, subject thereto, in trust for her children *by any husband or husbands whomsoever*, and if she should not leave any child or any husband surviving her, in trust for her executors, &c.; but if she should leave a husband, then in trust for her next of kin exclusive of her husband.

Margaret Marion Humfrays sailed for India in July 1839, and arrived there in November following.

Soon after her arrival she became dissatisfied with the settlement and deeds-poll of June 1839, and was desirous of revoking and annulling them; and accordingly an indenture of the 30th of December 1839 was made between her and Alexander Humfrays, R. W. Beatson and C. Becher, which recited that, when she executed the deeds of June 1839, she was not fully aware of their nature and effect, or how they affected her own rights or the rights of any husband whom she might marry, and that she received no valuable consideration for executing them; but was under an erroneous impression that it was necessary and imperative upon her to execute them before she left England, and that they would not, and that she never intended that they should, be binding on her unless the provisions of them should be approved of by such husband as she might marry; and that, accordingly, she caused the following memorandum to be indorsed, for the [284] signature of such husband in case he should approve of the same on an attested copy of the settlement furnished to her previously to her leaving England: "I hereby approve of and allow, ratify and confirm the settlement which was made and executed by my intended wife, Miss Margaret Marion Humfrays, previously to her quitting England, and of which the within is certified to be an attested copy:" that she executed the deeds of June 1839 under the belief that she could, at any time before her marriage, revoke the same or alter the provisions or limitations thereof, and substitute other provisions or limitations for the same, if the same should not be approved of by such husband, and that no transfer of the trust funds would be made to the trustees of the settlement of June 1839 until the solemnization of any such marriage; and that, at the times of executing the settlement and deeds-poll and of making the indorsement on the attested copy of the settlement, she was under the impression and belief that those deeds were not and would not be complete and delivered deeds and binding on her or any husband with whom she might intermarry, until the indorsement should be signed by such husband, but that the said deeds would remain in the nature of escrows, and would be held by the trustees of the settlement as such, and not as binding and operative deeds, until such consent and approval should be given by such husband: that since her arrival in India she had had the settlement fully explained to her, and that she was then made fully aware, and then, for the first time, fully understood the true

nature and legal effect of it and of the deeds-poll; and being dissatisfied with the same and the contents of the settlement, by reason of the effect there being contrary to what she intended at the time of executing the said deeds, she being still [285] unmarried, had resolved to revoke and set aside the settlement and deeds-poll and the trusts, &c., therein contained, and instead thereof, to make and substitute such appointments, directions, trusts, &c., as in the indenture now in statement were mentioned; and that the endorsement still remained unexecuted. The indenture of December 1839 then witnessed that, for the causes and considerations therein mentioned, and for certain other good and valuable considerations her thereunto moving, and in consideration of 10s., Margaret Marion Humfrays did thereby revoke the settlement of June 1839, and all the uses, trusts, &c., therein contained, and also the two deeds-poll and the appointments thereby made; and by the same indenture she directed the trustees of Mrs. Nowell's will not to transfer the two-seventh parts of the residue of that testatrix's estate, and the trustees of her mother's will not to transfer the £5000 Reduced annuities to the trustees of the settlement of June 1839, but to transfer such two-seventh parts to Alexander Humfrays and R. W. Beatson and C. Beeher, upon such trusts, &c., as she, whether she should be then sole or covert, should, by any deed or deeds, to be by her sealed, &c., appoint; and in default of such appointment, then as she, whether then sole or covert, should by her will appoint; and in default of any such appointment, in trust for such person as should be her husband at the time of her decease; or, in case she should die unmarried or without leaving any husband her surviving, then in trust for her next of kin.

In February 1840 Margaret Marion Humfrays married W. Fergusson Beatson in India; and by a settlement, dated the 12th of August 1840, she and her husband directed A. Humfrays, R. W. Beatson and [286] C. Beeher to stand possessed of the two-sevenths of Mrs. Nowell's residuary estate, and also of the £5000 Reduced annuities, in trust as she and her husband should jointly appoint, and in default of such appointment, in trust for her husband and herself for their lives successively, and subject thereto in trust for the children of their marriage, and in default of children, in trust as she and her husband or the survivor of them should appoint, and subject thereto, in trust for the survivor absolutely.

The bill, which was filed by Mrs. Beatson and the trustees of the last-mentioned settlement against W. F. Beatson and the trustees of Mrs. Nowell's and Mrs. Humfray's wills and of the settlement of June 1839, after stating as above, alleged that under the circumstances aforesaid, the settlement and deeds-poll of June 1839 were revoked and annulled, and ought to be delivered up to Mrs. Beatson to be cancelled, and that the trustees of the two wills ought to transfer the two-sevenths and the £5000 Reduced annuities to the trustees of the indentures of December 1839 and August 1840; that the deeds of June 1839 were not (as the Defendants pretended), absolute and irrevocable, and were not binding on Mrs. Beatson or any husband whom she might marry, but that she had power to revoke and annul the same; that she never intended those deeds to bind herself or any future husband whom she might marry, but intended that the provisions thereof should be approved of by any person whom she should intend to marry; and that she fully believed and was convinced that in case the husband whom she should intend to marry should not approve of them, or in case she should become dissatisfied therewith, she had full power to revoke and annul the same and to make and [287] substitute any new appointment of the trust funds; and that she executed the deeds of June 1839 under the circumstances and in the belief aforesaid.

The bill prayed that the trusts of the deeds of December 1839 and August 1840 might be established; and that the deeds of June 1839 might be declared inoperative; and that the trustees of the wills might be decreed to transfer the trust funds to the trustees of the deeds of December 1839 and August 1840.

The trustees of the settlement of June 1839, after admitting by their answer that that deed and the deeds-poll were to the effect stated in the bill, said that Mrs. Beatson, soon after her arrival in India, did resolve to revoke those deeds, not for the reasons alleged by the bill, but because she and her then intended husband were desirous to have the power of defeating the provision thereby made for her and her children

in the event of her marriage; and that the deeds of December 1839 and August 1840 were made for that purpose; that the deeds of June 1839 were in their (the Defendants') possession; and that they had received at different times various letters relating thereto, all of which, except those contained in the schedule, they had destroyed before the bill was filed, supposing them to be of no importance. They added that they were advised that the last-mentioned deeds were not revocable by Mrs. Beatson, but that she and her children would be entitled in equity to the benefit of the provision thereby intended to be made for them. It did not, however, appear that Mrs. Beatson had any issue.

Mr. Knight Bruce and Mr. Loftus Wigram, for the Plaintiffs. No doubt can be entertained as to the inefficacy of [288] the deeds of June 1839; they were mere voluntary dealings with two chosens in action, without any communication made to the trustees of them. [Mr. Teed, for the trustees of the settlement of June 1839. I am instructed that the trustees of Mrs. Nowell's and Mrs. Humfrays's wills had notice of the deeds of June 1839.] That fact is not stated, nor is there any evidence of it; but whether the trustees had notice of it or not Mrs. Beatson remained mistress of the funds. [THE VICE-CHANCELLOR. I presume that the funds remained all along as they originally stood.] Yes, they remained in the names of the original trustees. In *Bill v. Cureton* (2 Myl. & Keen, 503), which probably will be cited in support of the settlement of June 1839, the legal title to the fund in dispute was complete in the trustees.

Mr. Jacob and Mr. Kyle, for William Fergusson Beatson. The appointment and settlement of June 1839 were not made in favour of any existing husband and children, but a husband and children *quando acciderint*. A Court of Equity will not give effect to an assignment or disposition of a chose in action, made without consideration. *Edwards v. Jones* (*ante*, vol. vii. p. 325; and 1 Myl. & Cr. 226); *Tufnell v. Constable* (*ante*, vol. viii. p. 69).

Mr. Teed and Mr. Wood, for the trustees of the settlement of June 1839. When the deeds-poll and the settlement of June 1839 were executed, and notice of those instruments was given to the trustees of the funds (as we are in-[289]-structed was the case), everything was done that could be done to give effect to those instruments; and the trustees of the funds then became trustees for the objects and purposes of that settlement. Mrs. Beatson did not reserve to herself any power to revoke the deeds of June 1839, and, consequently, it was not in her power to revoke them. Moreover, the parties who now ask the Court to set aside the voluntary deeds of June 1839 are themselves volunteers. This case falls within the principle of *Bill v. Cureton*, *Petre v. Espinasse* (2 Myl. & Keen, 496), and of Sir William Grant's judgment in *Sloane v. Cadogan* (Sugd. on Vend. 9th edition, Appx. No. 26).

THE VICE-CHANCELLOR. Before I decide this case I will read over the deeds that have been executed.

July 30. THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case an unmarried lady had a power of appointment over a fund under her mother's will, and also a power to dispose of a fund, after her death, under the will of her aunt, Mrs. Nowell: and, being in this country, but being about to go to India, she executed two instruments, one of which purported to be an execution of the power over the fund given by the mother, and the other to be an execution of the power over the fund given by Mrs. Nowell. After reciting that she was going to India, where she was engaged to be married, she executed the two powers by appointing the funds to three persons, who were to be the trustees of an indenture which professed to be her marriage settlement: and, by that indenture, after taking [290] notice of the fact that she was engaged to be married, but not mentioning to what person, she proceeded to declare that the trustees should hold the funds in trust for herself for her separate use for life, and, after her decease, in trust for any husband that she might happen to leave surviving her, for his life, entirely overlooking the person to whom she was engaged to be married: and then there followed trusts for the benefit of the children she might have by any husband or husbands whomsoever.

Then it appears that she went to India; and there she was advised that all that she had done was very absurd and ought to be revoked: and, accordingly, she executed some instrument which professed to be an instrument of revocation; and, after that,

she married: and then, having married, she executed an instrument, which professed to be a new settlement in favour of herself and the husband that she then had, and the children of that marriage.

The bill was filed by her and the persons who were named as trustees in the second marriage settlement, for the purpose, as I understand, of taking the funds out of those trustees in whom they had been vested under her mother's will, and under Mrs. Nowell's will, and of having those funds transferred to the trustees of the second settlement. The pleadings were not handed to me, and therefore I took the effect of them from the statement made at the Bar: but, upon reading over these instruments, I find that, among the recitals of the second settlement, there is a recital which, if it be true, makes the suit wholly unnecessary. That recital is that both the funds were then standing in the names of the trustees of the second settlement. Now, if that recital be true, the whole suit is superfluous. But the case [291] was argued before me at the Bar, as if no such circumstance had taken place: and I do not wonder, seeing the five strange instruments which this lady has executed, that the last one should have this recital in it; though it is manifestly false. [Mr. K. Bruce. It is a mistake.] THE VICE-CHANCELLOR. I take it to be so: but then the question is whether this lady having, in effect, before her marriage, executed the powers of appointment in the way I have mentioned, and having made that first settlement in the year 1839, which was evidently without any contract with any human being and altogether voluntary, not to say grossly absurd—the question, I say, is whether this Court can treat the whole as a nullity, and direct that the funds over which she had the powers of appointment should, so far as circumstances will admit, be transferred to the trustees of her new settlement? There was some discussion upon it at the Bar; and reference was made to the case of *Sloane v. Cadogan*; and it was considered that that case was an authority upon the point that there might be a voluntary settlement made, without a transfer of the fund to trustees, which this Court would not allow to be disturbed, but would consider as perfectly good against the settlor. But, upon looking into the case of *Sloane v. Cadogan*, as it is stated at length in the Appendix to Sir E. Sugden's Treatise on Vendors and Purchasers, it does not appear to me that, though the point was argued at the Bar before Sir William Grant, the point, in effect, did ever arise.

The case, in substance, was this: A settlement was made upon the marriage of Lord Cadogan; and that settlement professed to be a declaration of the trusts of a sum of £20,000, which was vested in trustees in some way or other (though it does not exactly appear how), [292] by means of which Mr. William Bromley Cadogan, who was one of the sons of Lord Cadogan, became, subject to his father's life interest, entitled to one-fourth of that sum. Then Mr. William Bromley Cadogan, in the lifetime of his father and after he was married, and apparently without any consideration, executed an instrument by which he declared certain trusts of his one-fourth of the £20,000; and, in particular, it is to be observed that he declared the trust, as to £1000, part of that one-fourth, in substance, for himself; and the rest was to go to his wife for her life, then to their children, and, in default of issue, as Mr. Cadogan should appoint by deed or will, and, in default of appointment, to Lord Cadogan. Then Mr. Cadogan made a will; and one of the questions that arose before Sir W. Grant was whether that will was a good execution of the power contained in the voluntary settlement. By his will he gave all the residue of his estate and effects to his wife, and appointed her sole executrix. The will did not take notice of the settlement. But afterwards he executed a testamentary instrument which did take notice of the settlement in express terms; and which, in a certain way, seems to me to have disposed of the £1000, which was part of the fund, upon the face of this settlement, settled by him, that is, reserved to himself. After his death the will and the testamentary paper were proved by Mrs. Cadogan. Then she filed a bill against the persons who represented Lord Cadogan; from which it appears that, in the meanwhile, the fund had been lent to Lord Cadogan upon mortgage: so that those who represented him had the legal interest in the fund. The bill was filed by Mrs. Cadogan, insisting that she was entitled to the fund in question which was settled; because, she said, there was a good execution of the power; and, if not, then the argument was raised at the [293] Bar that the settlement was altogether voluntary,

and that, therefore, she, as the executrix of Mr. Cadogan, was entitled to have the fund. I collect from the argument that though that particular point was argued by Sir Edward Sugden, and probably by the other counsel who were with him, yet the answer to it was that the bill did not raise any such case; because it stated the settlement, and claimed under the settlement. The bill was not a bill by the executrix merely, treating the matter as if there had been no settlement, and leaving the Defendants to set up the settlement and avail themselves of it; but it stated, substantially, the settlement, and endeavoured to have the benefit of it; and it does not appear that relief was prayed in the alternative. So that the relief which was asked by means of the argument that the settlement ought to be altogether considered as a nullity was, in effect, inconsistent with the case made by the bill. And it further struck me, on reading the case, that, though it might have been possible that Mr. Cadogan, in his own lifetime, might, notwithstanding the settlement, have requested that the holders of the fund should be declared trustees for him; yet the case varied from the mere case of a claim by Mr. Cadogan in this respect, that Mr. Cadogan had died, and, by his testamentary papers, which were proved by the executrix and had bound her, he had taken notice of the settlement as an existing instrument; and it occurred to me, therefore, though it does not appear to have been noticed by Sir William Grant, that the decision of that learned Judge might have been supported upon that ground: because the party who claimed to set aside the settlement was the personal representative of a party who, by his testamentary papers, had acknowledged the settlement.

[294] The language that is put into the mouth of Sir William Grant is this: he says: "But, as against the party himself and his representatives, a voluntary settlement is binding." That is true, provided that the subject of the settlement is completely vested in those persons who are to take under it, or in certain persons as trustees, who are to hold it for other parties. His Honor then goes on to say: "The Court will not interfere to give perfection to the instrument, but you may constitute one a trustee for a volunteer." That is true. "Here the fund was vested in trustees." That is true with respect to the original fund itself. "Mr. William Cadogan had an equitable reversionary interest in that fund, and he has assigned it to certain trustees, and then the first trustees are trustees for his assigns, and they may come here; for, when the trust is created, no consideration is essential, and the Court will execute it, though voluntary."

Now I cannot but think, if Sir William Grant did use that language, that it was inaccurate; because the voluntary settlement which was executed by Mr. William Cadogan left the fund as it existed at the time when the settlement was made; and nothing whatever passed by the voluntary settlement to the persons who were named as trustees of it; and it seems to me that, but for the other circumstances which I have noticed, His Honor's decision would not have been right. But, attending to what actually was the state of the record before him and what were the circumstances of the case, it appears to me that the decision was perfectly right. Therefore, the only thing that I should consider as inaccurate is the expression that Mr. Cadogan had assigned the fund to certain trustees; whereas, in effect, he assigned [295] nothing; for they took nothing; the fund remained just where it was.

I do not, therefore, consider that *Sloane v. Cadogan* is, in effect, any sort of authority for the position in support of which it was cited. And I observe that my Lord Chancellor, in giving his judgment upon the appeal in *Edwards v. Jones*, says (1 Myl. & Cr. 238): "In *Sloane v. Cadogan* the claim was not against the donor or his representatives, for the purpose of making that complete which had been left imperfect; but against the persons who had the legal custody of the fund; and the question was whether the transaction constituted them trustees of the fund for the *cestui que trusts*. Sir William Grant came to the conclusion that it did; and the consequence was that they were bound to account. That case has been considered by Sir Edward Sugden as going a great way; but, upon the principle stated by Sir William Grant, it is free from all possible question; for there was no attempt in that case to call in aid the jurisdiction of this Court."

It is true that, upon the principle stated by Sir William Grant, it was right. The only question is whether the mere principle, as it stands expressed in the judgment,

independent of the facts of the case, was a principle that could be correctly applied to the case; and I rather think that it was not. Taking the principle to be right, the decision certainly is right.

In this present case it appears to me that the lady, having made what I should call an imperfect voluntary settlement without any contract whatever with any [296] human being, was at perfect liberty to call upon those who were the holders of the fund and say: "I have executed my powers of appointment, but all the trusts I have declared are clearly void: I choose to annul them." And I cannot but think, inasmuch as the funds have not (which I take to be the fact notwithstanding the recital in the last indenture) passed from the persons who were the holders of the funds under the will of the mother and under the will of Mrs. Nowell that those persons do now hold the funds in trust for such purposes as Mrs. Beatson may now choose to declare. Therefore, when she has filed a bill in conjunction with those gentlemen who are named as trustees of her second settlement, making the husband a party to the record, and he does not object to the relief asked by the bill, this Court ought to interfere and ought to do this, namely, not to direct that both the sets of trustees shall hand over the funds to the new trustees; but that the trustees of the mother's will shall hand over the fund to the new trustees; because the fund is given by the mother's will, absolutely, according to the appointment of Mrs. Beatson; but as, with respect to the fund which is given by the will of Mrs. Nowell, the first trust declared is that it shall be in trust for the separate use of Mrs. Beatson during her life, and the trustees are to transfer the fund, after her decease, in such manner as she shall appoint; it appears to me that it would be inconsistent with the trust declared by the will of Mrs. Nowell that the trustees should, in the first instance, part with the fund. My opinion is that, according to the true construction of their trusts, they must hold that fund during the life of Mrs. Beatson, unless they choose to give it up; and no duty can be imposed upon them to transfer the fund at all until after her death.

[297] Therefore, I think that those persons who are trustees under the mother's will should be directed to transfer the fund to the nominees of Mrs. Beatson under her last instrument; and that it should be declared that the trustees under Mrs. Nowell's will do, as to the two-sevenths of her residuary estate to which Mrs. Beatson is entitled, stand possessed of them in trust for her separate use during her life, and, after her death, upon trust to assign them to the trustees of Mrs. Beatson's second settlement.

Declare that, in the events which have happened, the deeds-poll of appointment and the indenture of settlement of the 13th of June 1839 have become inoperative, and that the indenture of revocation and new appointment of the 30th of December 1839 and the indenture of settlement of the 12th of August 1840 ought to be carried into effect: order the trustees of Mrs. Nowell's will to transfer the two-sevenths of her residuary estate, and the trustees of Mrs. Humfrays's will to transfer the £5000 Reduced annuities, to the trustees of the indentures of the 12th of August 1840.(1)

Reg. Lib. (A.) 1840, fo. 1451 b.

[298] CORNEWALL v. CORNEWALL.(2) July 31, 1841.

[S. C. 10 L. Ch. 364; 5 Jur. 744. Overruled on point as to payment of debts, *Gervis v. Gervis*, 1847, 14 Sim. 654.]

Administration. Priority. Devisee and Legatee. Will. Construction. Books.

Specific legacies are to be applied in payment of specialty debts in priority to real estates devised. *Long v. Short* observed upon.

(1) As the decree directed the trustees of Mrs. Nowell's will to transfer the two-sevenths of that testatrix's residuary estate to the trustees of the deed of August 1840, it is presumed that they had consented to make the transfer.

(2) *Ex relatione*, Mr. Nicholl.

Testator gave to his son all his plate, jewels, trinkets and all his furniture and other articles of domestic use and ornament. By a codicil he gave to his wife all his provisions, wines, carriages, horses and all his musical instruments, and the use of all his books, and all his money in his dwelling-house and in his banker's and land steward's hands, for her own sole use and benefit. Held, that the books were given to the son absolutely; subject to a life interest in the wife.

By indentures of lease and release of September 1815 real estates were settled and assured to Sir G. Cornwall for life, with remainder to his first and other sons in tail male. By indentures of lease and release of July 1816 other real estates were conveyed and assured to trustees, upon trust to raise thereout, by sale, mortgage or otherwise, monies sufficient to defray certain scheduled charges and incumbrances, and, subject thereto, to the use of Sir G. Cornwall in fee.

Sir G. Cornwall, by his will, dated in November 1818, devised all the estates comprised in the last-mentioned indentures to such and the same uses as the estates comprised in the first-mentioned indentures should stand settled and assured to at the time of his decease; and, as to all his personal estate and effects whatsoever which should remain after payment of his just debts (exclusive of the debts specially charged on his real estates) and his funeral expenses, he gave the same to his wife and appointed her sole executrix.

By a codicil of March 1835 the testator gave to his eldest son all his plate and family jewels and trinkets and ornaments of the person, and all his furniture and other articles of domestic use and ornament.

By a second codicil the testator bequeathed several articles specifically to his wife.

[299] By a third codicil the testator devised certain tithes to trustees, in trust to sell and divide the proceeds thereof amongst his younger children.

The testator died in 1835, and thereupon certain real estates of which he was seised in fee, and which were not comprised in either of the above-mentioned indentures, descended to his eldest son. The testator left several younger children.

The bill was filed by the younger children of the testator, for the administration of his estate, against the heir at law, the widow the executrix, and the trustees of the indentures of 1815 and 1816.

On the hearing for further directions, a question arose whether the personalty specifically bequeathed to the widow by the second codicil and to the eldest son by the first codicil ought to contribute, rateably with the devised real estates, to the payment of such of the testator's specialty debts as the general personal estate and the real estates descended had proved insufficient to pay, or whether the specific legacies must not be resorted to and exhausted before any application of the devised real estates.

Mr. Griffith Richards and Mr. Freeling, for the Plaintiffs, and Mr. Jacob and Mr. De Gex, for the eldest son and heir at law, (1) in support of the proposition that the specific legacies must be first applied. Prior to the Statute of Fraudulent Devises (3 & 4 Will. [300] & Mary, c. 14), a specialty creditor could in no case have come against devised real estates, but must have resorted to the specific legacies. That statute was passed for the benefit of creditors, not of legatees. *Galton v. Hancock* (2 Atk. 430). The fifth resolution in *Haslerwood v. Pope* (3 P. Will. 322) is an express decision in favour of the proposition we are contending for. *Clifton v. Burt* (1 P. Will. 679) shews that a specific devisee is more favoured in equity than a specific legatee is. The case of a widow's *paraphernalia* furnishes a very strong argument in support of the same doctrine; for it has been repeatedly held that a widow, whose paraphernalia have been taken by a specialty creditor, has no equity to come upon devised realty for a contribution. *Ridout v. Lord Plymouth* (2 Atk. 104); *Probert v. Clifford* (Amb. 6; 2 P. Will. 544, note); *Tipping v. Tipping* (1 P. Will. 729); *Graham v. Lord Londonderry* (3 Atk. 393). The case of *Snelson v. Corbet* (3 Atk. 369) shews that *paraphernalia* are to be preferred to specific legacies. The principle of a Court

(1) It was considered most for the benefit of the heir as tenant in tail of the devised real estates that the debts should be defrayed out of the specific legacies, though his specific legacies were of considerable value.

of Equity has always been to exhaust the personalty before resorting to realty, in payment of debts.

Mr. Nicholl, for the testator's widow. This point has been decided by *Long v. Short* (1 P. Will. 403; 2 Vern. 756) and *Silk v. Prime* (1 Dick. 384; 1 Bro. C. C. 138, note). In both those cases it was held that, to pay specialty debts, specific legacies and specifically devised realty were to contribute rateably. *O'Neal v. Mead* (1 P. Will. 693) and *Irvine v. Ironmonger* (2 R. & Myl. 531) are to the same effect. *Haslewood v. Pope* does seem at first sight [301] opposed to *Long v. Short*; but Mr. Roper, in his Treatise on Legacies (vol. 1, p. 829), thus reconciles the two decisions. He says: "It is presumed that Lord Talbot (in *Haslewood v. Pope*), in the expression, '*the specific legatee shall not stand in the place of the bond creditors to charge the land devised*,' must have intended, not that the devisee should not contribute, but that the specific legatee had no right to have the assets so marshalled against the specific devisee as to throw the bond debt exclusively, upon the real estate devised, to the exoneration of the personalty specifically bequeathed." The decision in *Haslewood v. Pope* may be thus further explained. It had been established, long anterior to that decision, that a mere pecuniary and, *à fortiori*, a specific legatee could marshal assets against a descended estate; the fourth resolution in that case carried the doctrine a step further, and Lord Talbot then held that it was equally a case for marshalling where the estate was devised subject to payment of debts. By the fifth resolution in that case, it would seem that an attempt was made to extend further the rule just established by the fourth resolution, and to throw the *whole* of the specialty debt on the devised realty, to the entire, and not simply *pro rata*, exoneration of the specific legacy; this Lord Talbot refused to do. But had Lord Talbot been asked whether he intended, by such refusal, to decide that the specific legacy was to bear the *whole* of the debt, the answer would have been that *Long v. Short* had already established that the debt must be borne, rateably and *pari passu*, by both subjects of gift. *Clifton v. Burt* is the case of a mere pecuniary legatee, and furnishes no authority either way. To derive any argument from the case of *paraphernalia*, it must be shewn that the proposition that *paraphernalia* stand in a preferable situation to [302] specific legacies is universally true; but *Burton v. Pierpoint* (2 P. Will. 78) is an express authority that it is not so. *Probert v. Clifford* is opposed by *Boynatun v. Boynatun* (1 Cox, 106). *Snelson v. Corbet* by no means bears out the proposition attempted to be derived from it. With regard to the argument of *principle* in the application of assets, how does that principle exist when descended real estates are applied before specifically bequeathed personalty?

Mr. Richards, in reply. If the authorities are conflicting, resort must be had to principle. There can be no question on which side the preponderance of principle is to be found.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I have my own copy of Peere Williams's Reports in Court, and I see that many years ago I had my attention called to the conflicting decisions on this point; and I find that, in my copy, I have added this note to the case of *Long v. Short*: "*Quære* however, if the statute against fraudulent devises was not made for the benefit of creditors and not of legatees." Then I see I have made a reference to *Galton v. Hancock*. I must say that the weight of authority has always appeared to me to be in favour of the decision of Lord Talbot. I have always heard Lord Talbot spoken of as an excellent lawyer, conversant with the law of the Court in which he sat. Lord Eldon has frequently expressed that opinion of him; added to this, his is the later decision, and is entirely supported by principle. If I find two decisions, one of one Lord Chancellor and another of another Lord Chancellor, and the second of the two decisions is quite consonant to principle, I think [303] the later decision must be the one to stand. I have therefore no difficulty in holding that the specific legacies must be exhausted before the real estates are resorted to.

The other questions in the cause were whether the testator's books passed to his eldest son by the first codicil; and whether his widow took more than a life interest in them under the second codicil.

Under the will, the widow was residuary legatee of the testator's personal estate.

By the first codicil, the testator's plate, family jewels and trinkets and ornaments of the person, furniture *and all his other articles of domestic use or ornament*, were given to his eldest son. By the second codicil the testator gave to his wife all the provisions and wines in his dwelling-house, and all his pleasure-carriages and horses, musical instruments *and the use of all his books*, and all the money in his dwelling-house, in his banker's and land steward's hands at the time of his decease, for her own sole use and benefit.

THE VICE-CHANCELLOR. The testator must be taken to have known that, by his will, he had given his general personal estate to his wife. By his first codicil he gives to his eldest son all his plate, family jewels, trinkets and ornaments of the person, and all his furniture and other articles of domestic use or ornament. By the second codicil he gives to his wife all the provisions and wines in his dwelling-house, &c., and *the use of all his books*, &c., &c. Now books, if they are used, are articles of domestic use: if they are not used, they are articles of domestic ornament. Consequently they are included in the [304] bequest made to the eldest son by the first codicil. With respect to the second codicil, it is observable that the testator gives to his wife all his provisions, wines, carriages, horses and musical instruments; but when he mentions his books he changes the form of expression; for he does not give to her all his books, but *the use of all his books*. Therefore, the true construction of the two codicils is that the son takes the books absolutely, subject only to the wife's right to the use of them during her life.

[304] LOMBE v. STOUGHTON. LOMBE v. JODRELL. July 30, 31, 1841.

[For subsequent proceedings, see 17 Sim. 84. See *Mathews v. Kelle*, 1867-68, L. R. 4 Eq. 472; L. R. 3 Ch. 691.]

Accumulation. Thellusson Act (39 & 40 Geo. 3, c. 98).

Testator, after devising his estates in strict settlement, directed that, in case he should not erect a mansion-house on his estates in his lifetime, his trustees should, *forthwith after his death*, erect the same according to such plan as he should approve of in his lifetime; or, if he should die before such plan should be prepared and completed, then according to such plan as his trustees, with the consent of the person, for the time being beneficially entitled to the immediate freehold of his estates, should think proper to adopt: and he gave £20,000 to the trustees, to be applied in erecting the house, and, *in the meantime*, to be laid out in the funds *and the dividends to be accumulated*, and the accumulations as well as the original fund to be applied in erecting the house, and the surplus (if any) to be laid out in the purchase of lands to be settled to the same uses as the devised estates. Owing to opposition on the part of the tenant for life, the trustees did not build the house until more than twenty-one years after the testator's death; and they invested the £20,000 and accumulated the income of it during the whole of the interval. Held, that the direction for accumulation was not within the Thellusson Act, but that the whole of the accumulated fund was applicable to purposes directed by the will.

Sir John Lombe, Bart., by his will, dated the 18th day of November 1814, devised all his manors, lands, &c., situate in Norfolk or elsewhere, whether freehold, [305] copyhold or leasehold, unto and to the use of the Defendants Stoughton and Mitchell, their heirs, executors, &c., upon trust to raise out of the rents, during the term of ten years from his decease, an annual sum of £1000, and to apply the same upon the trusts thereafter declared; and he directed that, subject to the raising of that sum, the trustees should stand seised and possessed of the manors, &c., in trust for the Defendant, Edward Lombe the elder, for life, and, after his death, in trust for his eldest son, the Plaintiff, Edward Lombe the younger, for his life, and, after his death, in trust for his first and other sons successively in tail male, with remainder in trust for the second and other sons of Edward Lombe the elder, who should be born

in the testator's lifetime, successively for their lives, with remainder in trust for their first and other sons successively in tail male, with remainder in trust for the sons of Edward Lombe the elder, who should be born after the testator's death, successively in tail male, with remainders in trust for several other persons for their lives successively, and their first and other sons in tail male, with the ultimate remainder in trust for the testator's great-niece, Lucy Marsham, in fee. In a subsequent part of the will, the following clause was contained:—"And whereas it is my wish and intention that a mansion-house and suitable offices, fit for the residence of the owner of my estate, shall be erected on some convenient spot in the parish of Bylaugh, in the county of Norfolk, either in my lifetime or after my death, and that, if I shall not erect the same in my lifetime, then that my said trustees shall, *forthwith after my death*, erect the same according to such plan as I shall, in my lifetime, approve of, or, if I shall die before such plan shall be prepared and completed, then according to such plan as the trustees or trustee for the time being under this [306] my will, with the consent of the person for the time being beneficially entitled to the immediate freehold of my said manors, &c., under this my will, shall think proper to adopt, adhering as closely as possible (situation and other incidental circumstances being considered) to the plan of the house now the residence of Robert Marsham, Esquire, at Stratton Strawless in the said county of Norfolk: Now, therefore, in order to provide a fund for the erection of the said mansion-house and offices after my death, in case I shall not erect the same in my lifetime, I give and bequeath, unto the said James Stoughton and John Mitchell, their executors, &c., in the event of my not erecting or completing the erection of the said mansion-house in my lifetime, the sum of £20,000 sterling money, to the intent to be applied for the purposes aforesaid, and, in the meantime, to be laid out by them, in their names, in the purchase of stock in some or one of the public stocks or funds of Great Britain, or at interest on real security; and also that my said trustees shall, from time to time, receive the interest, &c., of the said stocks, funds and securities, and lay out such interest, &c., in the purchase of other stocks or funds as aforesaid, so as for the annual income and produce of the said stocks or funds to accumulate, in the nature of compound interest, until the said money shall be wanted for the purpose hereinbefore and also hereinafter mentioned: and I also further declare and direct that my said trustees or trustee for the time being shall and do stand possessed of the said annual sum of £1000, hereinbefore directed to be received and retained by them by and out of the rents and profits of my said manors, &c., for the said term of ten years next after my decease, upon trust that they or he do and shall add the said annual sum of £1000, from time to time to be raised as aforesaid, to the said sum [307] of £20,000 hereinbefore bequeathed for the purpose aforesaid, to the intent to be holden upon the same trusts and to accumulate therewith, and to become, in all respects, as part thereof; and I do hereby expressly direct that my said trustees shall, *forthwith after my death*, in case I shall not erect or complete the said mansion-house and offices in my lifetime, commence and proceed with the erection thereof in the manner hereinbefore expressed, and apply the said sum of £20,000 so bequeathed as aforesaid and the accumulations thereof, and also the said annual sum of £1000, to be from time to time raised as aforesaid and the accumulations thereof respectively, in defraying the expenses of erecting the said mansion-house and offices in the manner aforesaid; and I do hereby declare and direct that if, after the erection and completion of the said mansion-house and offices, any part of the said sum of £20,000 or the accumulations thereof, or of the said annual sum of £1000, to be raised and received as aforesaid, or of the accumulations thereof, shall remain unapplied and not be wanted for such purpose, then that my said trustees shall stand possessed thereof upon the like trusts as are herein declared concerning the residue of my personal estate herein-after bequeathed." The testator then empowered his trustees to take, from his estate, timber, brick-earth and any other materials which might be wanted for erecting the mansion-house and offices, or for repairing any of the buildings on his estates; and he gave his residuary personal estate to the trustees, in trust to invest it in the purchase of lands to be settled to the same uses as the devised estates; and, until such purchase should be made, to invest it in the funds, and pay the dividends to such person or persons as should, by virtue of his will, be [308] entitled to the rents

of the lands directed to be purchased ; and he appointed Edward Lombe the elder and Mitchell executors of his will.

The testator died on the 27th of May 1817 without having built or approved of any plan for building the mansion-house and offices at Bylaugh ; and, after his death, his executors laid out £20,000, part of his personal estate, upon securities, in the names of Stoughton and Mitchell, to be applied for the purpose of erecting such mansion-house and offices ; and Stoughton and Mitchell from time to time laid out the income of that sum and the annual sum of £1000, out of the rents of the devised estates, to accumulate for the last-mentioned purpose. They also caused a plan of the mansion-house and offices to be prepared by an architect ; but Edward Lombe the elder objected to their being erected at Bylaugh, and declared his intention not to inhabit them if they should be erected, but to remain in the mansion-house then on the estates ; and consequently he did not give his consent to the plan which had been prepared. The Plaintiff, however, was desirous that a mansion-house and offices should forthwith be erected at Bylaugh ; and accordingly (on the 21st of April 1828) he filed his bill, praying that Stoughton and Mitchell might be ordered to transfer the building fund, then standing in their names, into Court, and that, by means thereof, a mansion-house and offices might be forthwith, or at some other convenient time, erected at Bylaugh, pursuant to the directions of the will and under the decree of the Court ; and that so much of the building fund as should not be wanted for the purpose aforesaid might be laid out according to the directions of the will in that behalf.

[309] By an order in the cause, dated in July 1828, Stoughton and Mitchell were ordered to transfer into Court the sum of £43,548, 18s. 1d., which was admitted by them to be invested in their names on account of the building fund ; and it was ordered that the dividends to accrue due on that sum, and on all accumulations thereon, should be laid out in consols. Stoughton and Mitchell accordingly transferred the £43,548, 18s. 1d. into Court. In February 1829 the suit was heard, and the Court then ordered that Stoughton and Mitchell should not commence or proceed with the erection of the mansion-house and offices at Bylaugh until the further order of the Court.

In September 1839 the Plaintiff filed a bill of supplement, to which the testator's co-heirs at law, customary heirs and next of kin, as well as Stoughton and Mitchell and Edward Lombe the elder, were made Defendants, stating (amongst other things) that the period of 21 years from the testator's death expired on the 27th of May 1838 ; and that Edward Lombe the elder insisted that no accumulation of the building fund could take place beyond that period, and claimed the accumulations from that time. The supplemental bill prayed that the trusts of the will might be performed under the direction of the Court ; that the rights and interests of all parties who, in the opinion of the Court, were interested in the building fund (which then amounted to £63,507, 14s. 11d. consols) and the dividends thereof, or in any part thereof, might be ascertained and declared ; that a mansion-house and offices might be forthwith erected at Bylaugh under the direction of the Court ; and that a competent part of the fund might be applied for that purpose, and that the [310] remainder of it might be laid out pursuant to the directions of the will in that behalf.

By the decree made on the hearing of the supplemental cause, it was ordered (amongst other things) that Mitchell (who had survived his co-trustee Stoughton) should continue to search for and dig sufficient quantities of brick-earth, sand and materials in and upon the testator's estates, and to make sufficient quantities of bricks, with a view to building a mansion-house and offices at Bylaugh ; and that, at the proper season of the year, he should mark timber upon the estates fit to be felled and used in erecting the mansion-house and offices.

On the original and supplemental causes coming on to be heard for further directions, the question was whether the trust or direction in the will for accumulating the building fund came within the Thellusson Act (39th & 40th Geo. 3, c. 98). That Act enacts : "That no person or persons shall, after the passing of that Act, by any deed or deeds, surrender or surrenders, will, codicil or otherwise howsoever, settle or dispose of any real or personal property, so and in such manner that the rents, issues,

profits or produce thereof shall be wholly or partially accumulated for any longer term than for the life or lives of any such grantor or grantors, settlor or settlers, or the term of 21 years from the death of any such grantor, settlor, devisee or testator, or during the minority or respective minorities of any person or persons who shall be living or in *ventre sa mere* at the time of the death of such grantor, devisee or testator, or during the minority or respective minorities only of any person or persons who, under the uses or trusts of the deed, surrender, will or other assurances [311] directing such accumulations, would, for the time being, if of full age, be entitled unto the rents, issues and profits, or the interest, dividends or annual produce so directed to be accumulated; and, in every case where any accumulation shall be directed otherwise than as aforesaid, such direction shall be null and void; and the rents, issues, profits and produce of such property so directed to be accumulated shall, so long as the same shall be directed to accumulate contrary to the provisions of this Act, go to and be received by such person or persons as would have been entitled thereto if such accumulation had not been directed."

Mr. Jacob and Mr. Messiter, for the Plaintiffs, and Mr. Boteler and Mr. Elmsley, for Defendants, in the same interest, said that, in order to bring the case within the operation of the Thellusson Act, it must be shewn that the will contained a positive direction to accumulate the building fund, which was contrary to the provisions of the Act: but the will did not direct the fund to be accumulated beyond the time allowed by the Act, or indeed for any definite period whatever; on the contrary, it directed the house, &c., to be erected *forthwith* after the testator's death; and that the accumulation which had taken place was owing not to any direction in the will, but to the act of the Court, and to the refusal of the first tenant for life to consent to the plan which had been prepared. (1)

[312] Mr. Bethell, Mr. Lovat, Mr. Parry, Mr. Romilly, Mr. Collyer, Mr. Steere and Mr. Glasse appeared for the other parties. They cited *Lord Southampton v. The Marquis of Hertford* (2 V. & B. 54); *Piper v. Piper* (3 Myl. & Keen, 159); *Sitwell v. Bernard* (6 Ves. 520); *Webb v. Webb* (2 Bev. 493); *Gravenor v. Hallam* (Amb. 643); *Tregonwell v. Sydenham* (3 Dow, P. C. 194); *Griffiths v. Vere* (9 Ves. 127).

July 31. THE VICE-CHANCELLOR [Sir L. Shadwell]. The real question in this case is whether the testator has directed that, at all events, a house shall be built: that is the sole point as I understand it.

[313] The testator commences his will by devising all his freehold, leasehold and copyhold tenements to the Rev. James Stoughton and Mr. John Mitchell in fee, as far as the freeholds and copyholds are concerned. Then he, first of all, directs that for ten years after his death they shall take yearly a sum of £1000 out of the rents, and then he proceeds to limit the trusts, which create estates for life, in succession, with

(1) The Vice-Chancellor made the following observations in the course of the argument:—

With respect to the accumulation, it is said that there is no direction to accumulate beyond the time allowed by the Act. But there are nine tenants for life. Suppose that the trustees had proposed a plan to the first tenant for life; and, whilst it was under his consideration, he had become lunatic, and before any commission had been taken out he had died: that might occupy a year: and then the next tenant for life would come into possession; and then a similar thing might happen; and so it might go on; and the last tenant for life might die, leaving fifteen or sixteen sons, who are to take in succession; and the same event might happen to each in succession: so that twenty-five or twenty-six years might pass before there was any method by which a plan could be adopted. Is there to be no accumulation during that time? I must say that it appears to me, on the plain words of this will, that an accumulation is directed in the intermediate time. Here the testator has, in terms, directed an accumulation, though I admit not for a definite time. He has expressly directed an accumulation; and he has so constituted the terms under which the house is to be built that this accumulation might go on for an indefinite time. I cannot but think, where he has directed an accumulation to be made, and circumstances might be such as to prolong the accumulation beyond 21 years, there the Act would step in and say it should not go beyond the 21 years.

remainders to the first and other sons, of all the tenants for life except the first. Then, having exhausted the limitations, he says: "And whereas it is my wish and intention that a mansion-house and suitable offices fit for the residence of the owner of my estate, shall be erected in some convenient spot in the parish of Bylaugh, in the county of Norfolk, either in my lifetime or after my death; and that, if I shall not erect the same in my lifetime, then my trustees shall forthwith, after my death, erect the same according to such plan as I shall in my lifetime approve of; or, if I shall die before such plan shall be prepared and completed, then according to such plan as the trustees or trustee for the time being under this my will, with the consent of the person for the time being beneficially entitled to the immediate freehold of my said manors, &c., under this my will, shall think proper to adopt, adhering as closely as possible, situation and other incidental circumstances being considered, to the plan of the house now the residence of Robert Marsham, Esq., at Stratton Strawless, in the said county of Norfolk: now, therefore, in order to provide a fund for the erection of the said mansion-house and offices after my death, in case I shall not erect the same in my lifetime, I give and bequeath unto the said James Stoughton and John Mitchell, their executors, administrators and assigns, in the event of my not erecting or completing the [314] erection of the said mansion-house in my lifetime, the sum of £20,000, to the intent to be applied for the purposes aforesaid; and, in the meantime, to be laid out by them, in their names, in the purchase of stock in some or one of the public stocks or funds. . . . And I also further declare and direct that my said trustees or trustee for the time being shall and do stand possessed of the said annual sum of £1000, hereinbefore directed to be received and retained by them out of the rents and profits of my said manors, messuages, lands and hereditaments for the said term of ten years next after my decease, upon trust that they or he do and shall add the said annual sum of £1000, from time to time to be raised as aforesaid, to the said sum of £20,000 hereinbefore bequeathed for the purpose aforesaid, to the intent to be holden upon the same trusts, and to accumulate therewith, and to become in all respects as part thereof; and I do hereby expressly direct that my said trustees shall, forthwith after my death, in case I shall not erect or complete the mansion-house and offices in my lifetime, commence and proceed with the erection thereof in the manner hereinbefore expressed, and apply the said sum of £20,000, so bequeathed as aforesaid, and the accumulations thereof, and also the said annual sum of £1000 to be from time to time raised as aforesaid, and the accumulations thereof respectively, in defraying the expenses of erecting the said mansion-house and offices in the manner aforesaid." Then he makes the disposition of the surplus of the fund which may remain after the erection of the house.

It appears to me to be impossible to read this passage in the will without seeing that there is, in the plainest language, an express trust for the erection of the mansion-house, which the trustees are forthwith, [315] after his death, to commence and to proceed with the erecting of. I cannot conceive any words more plain.

Then the question subordinately arises, whether, inasmuch as the testator has directed that the trustees shall build the house according to a plan to be approved of by them, with the consent not of a given individual, but of that accidental personage who may, according to various circumstances, be either an adult or an infant, that is, the person entitled to the immediate freehold of the manors, &c.—whether that is to have the effect of preventing what is the express, clear, declared intent from being carried into execution.

Now, I cannot but think that if the Court had been called upon to deal with the case at the request of any one of the parties interested in the estate—if the Court had been called upon to say, "Let the house be built," and had found, either from incapacity arising from the infancy of a tenant in tail, from the absence abroad of the tenant for life in possession, who was adult, or from his perverseness, or from his loss of understanding, or from any other cause, the plan could not be approved of in the manner in which the testator had directed it to be approved of, the Court would have interfered, and said that the trustees should not stop merely because there was the obstacle to the approbation of the plan; and would have taken care that there should be a proper plan, and would have referred it to the Master, as a matter of course, to approve of a plan according to the directions of the will.

If that is the true construction of the will, there is an end to all the other questions: because I consider all those directions which the testator has given about the [316] accumulation of the fund until it is actually applied are so much surplusage, and are, in effect, consequences which would necessarily have resulted from the direction that, in the first place, there should be sequestered from the general personal estate the sum of £20,000 and, from the rents of the real estate, the yearly sum of £1000. It would have been the duty of the trustees, when they had any extra sum lying idle, to invest it, and to take care that it should accumulate. And the mere circumstance that the testator has inserted in his will a direction to prevent the accidental waste of his property during the time which necessarily would be occupied in the building of the house appears to me to be merely an incident to the creation of the fund for that purpose, which must occupy some considerable time.

For these reasons I do not think that this is an accumulation within the meaning of the Thellusson Act: and if, by reason of disputes, negligence or inadvertence, the fund had been paid into this Court and gone on accumulating to the end of a century, my opinion is, that the matter would have remained just exactly as it was before, namely, that out of the accumulated fund, whenever the Court came to operate upon it, the house would be directed to be built according to the declared trust; and that the Court would have dwelt with the surplus of the fund according to the trust declared of that surplus. Consequently neither the heir at law nor the next of kin of the testator have any interest whatever in the subject.

[317] SMITH v. SMITH. July 29, August 2, 1841.

[*Dictum* (12 Sim. 326) disapproved, *In re Saunder's Trust*, 1857, 3 K. & J. 152.]

Will. Construction. Next of Kin.

By a marriage settlement, a fund was settled on the wife, if she should survive her husband, for her life, remainder to their children who, being sons, should attain twenty-one, or being daughters, should attain that age or marry; and the trustees were directed to apply a portion of the income of the children's expectant shares for their maintenance, and to accumulate the surplus for the benefit of such person or persons as should be entitled thereto, by virtue of the settlement: provided that, if no son should attain twenty-one, nor any daughter should attain that age or marry, then the fund should be in trust for such person or persons as the husband should by deed or will appoint; and, in default of appointment, in trust for *his next of kin according to the Statute of Distributions and as if he had died intestate*. There was issue of the marriage one son only. The husband died first, without having exercised the power reserved to him: then the son died under twenty-one; and, lastly, the wife died. Held, that the fund vested in the son as his father's next of kin at the father's death, and not in the persons who were the father's next of kin at the son's death.

Alexander Falconer, of Calcutta, by the settlement on his marriage with Josephine Hume, dated the 25th of February 1825, after reciting that, on the treaty for the marriage, it was agreed that 80,000 sicca rupees, the amount of certain insurances on his life, should be settled, by him, *for the benefit of Josephine Hume and the issue of the marriage*, assigned the monies to be received under the policies to the trustees of the settlement, in trust for Josephine Hume, if she should survive him, for her separate use for her life, and, after her decease, in trust for the child or children of the marriage who, being a son or sons, should attain twenty-one, or being a daughter or daughters should attain that age or marry under it: provided that, after the decease of Josephine Hume and until the shares of the children should become payable, the trustees should apply such part of the interest of the trust funds as therein mentioned for the maintenance and education of such child or children, in such proportions as the [318] trustees should think fit; and should permit the residue of the interest of the share or shares of such children or child to accumulate *for the benefit of such person or persons*

as should be entitled thereto by virtue of the settlement: provided that it should be lawful for the trustees, at any time or times after the death of Josephine Hume, to pay any part of the share or shares of any such child or children, being a son or sons, for placing him or them in any trade or profession, or for his or their advancement in the world, notwithstanding he or they should not then have attained twenty-one: provided that, in case there should be no child of the marriage or, there being such, every son should die under twenty-one and every daughter under that age and unmarried, then the trustees should stand possessed of the trust fund, or the residue thereof, and the accumulated interest and proceeds thereof, in trust for such person and persons, and to and for such uses, intents and purposes, and in such manner as Alexander Falconer, by deed or by his will, should appoint; and, in default of such appointment, in trust for his next of kin according to the Statute for the Distribution of Intestates' Estates and as if he had died intestate.

Alexander Falconer died in July 1826, intestate, leaving Josephine, his wife, and a son named Alexander Freer Falconer, who was the only issue of their marriage, him surviving. Alexander Freer Falconer died in October 1827, and letters of administration to his estate were granted to the Plaintiff. In the same year Josephine Falconer married the Plaintiff. On the 29th of April 1839 she died, and letters of administration to her estate were granted to the Plaintiff.

The bill, after stating as above, alleged that Alexander Falconer never exercised the power of appointment [319] given to him by the settlement, in the event of there being no child of the marriage, or, there being such, every son should die under twenty-one, and every daughter under that age and unmarried; which event took place upon the death of Alexander Freer Falconer, the only child of the marriage, under the age of twenty-one years; that Alexander Freer Falconer was the sole next of kin of Alexander Falconer living at the death of the latter; that the Plaintiff, as administrator to his wife, claimed the dividends of the trust fund accrued during her life and remaining unpaid; and that, as administrator to Alexander Freer Falconer, he claimed to be entitled to the *corpus* of that fund; that Alexander Falconer had a brother and six sisters living at his death, who would have been his next of kin if A. F. Falconer had died in his lifetime, and the said brother and sisters were living at the time of A. F. Falconer's death, and were the sole next of kin of A. Falconer living at the last-mentioned time; but the brother and two of the sisters had since died; that administration to the estate of Alexander Falconer had been granted to Alexander Rogers, who was a creditor of Alexander Falconer at the time of his death, and, in that capacity, he procured the letters of administration to be granted to him; and that he claimed as such administrator to have the *corpus* of the trust fund and all the dividends accrued thereon since the death of Josephine Smith paid over to him for the purpose of being applied in payment of A. Falconer's debt; that, in consequence of the said conflicting claims, the trustees of the fund (who, together with the surviving sisters and the personal representatives of the deceased brother and sisters of A. Falconer and A. Rogers, were the Defendants to the bill) were unable to administer the trust fund without the direction of the Court.

[320] The bill prayed that the rights and interests of all parties in the trust fund might be ascertained, and that the same might be paid over and transferred to the persons entitled, according to their respective rights.

A. Rogers, in his answer, said that Alexander Falconer was indebted to various individuals at the time when he executed the settlement, and that some of the debts which he then owed were still unsatisfied: and he submitted that the settlement, except so far as it was a provision for A. Falconer and Josephine, his wife, and the issue of their marriage, was voluntary and void as against A. Falconer's creditors; and that such creditors were entitled to be paid their debts out of the *corpus* of the trust fund before any person, other than A. Falconer and Josephine, his wife, and the issue of their marriage, could take any interest under the settlement. He added that, as the administrator of A. Falconer, he claimed to have the *corpus* of the trust fund and the dividends accrued thereon since the death of Josephine Smith paid over to him, for the purpose of being applied in payment of A. Falconer's debts.

Mr. Knight Bruce and Mr. James Russell, for the Plaintiff. The Court in this case has to deal not with a will but with a deed. The ultimate trusts of the deed are for such persons as the settlor shall appoint by deed or will, and, in default of appoint-

ment, for his next of kin as if he had died intestate; consequently, everything was to be determined at the death of the settlor. It would then appear whether any appointment had been made or not; and, if none was made, the trustees were to hold the fund in trust for the settlor's then next of [321] kin. For the trust in default of appointment is for the next of kin of the settlor *as if he had died intestate*: and no next of kin of an individual can take as if that individual had died intestate, except his next of kin living at his death. *Harrington v. Harte* (1 Cox, 131); *Stert v. Platel* (5 Bing. N. C. 434); *Pearce v. Vincent* (2 Bing. N. C. 328; and 2 Myl. & Keen, 800); *Doe v. Lawson* (3 East, 278); *Holloway v. Holloway* (5 Ves. 399); *Masters v. Hooper* (4 Bro. C. C. 207).

The cases of *Butler v. Bushnell* (3 Myl. & Keen, 232), *Briden v. Hewlett* (2 Myl. & Keen, 90), and *Bird v. Wood* (2 Sim. & Stn. 400), probably will be cited for the Defendants: but those cases, supposing that they are rightly decided (which is very questionable) are distinguishable from the present case: for the words "as if he had died intestate" are wanting in all of them: and, besides, in *Briden v. Hewlett* and *Bird v. Wood*, the power of appointment was given to the tenant for life of the fund; but here it is reserved to the settlor himself. Moreover, the decision in *Bird v. Wood* proceeded on a ground which is not noticed in the report of the judgment in that case, but is referred to by Sir John Leach, M.R., in *Elmsley v. Young*.⁽¹⁾

[322] Mr. G. Richards and Mr. Macqueen, for A. Rogers. The question is whether the only son of the settlor, who died under twenty-one, became entitled to the trust fund under the ultimate limitation in the settlement. [THE VICE-CHANCELLOR. The first question is what is the natural meaning of the words in which the ultimate trust is expressed: and the second question is whether there is anything in the settlement to prevent their having their natural effect?] The case of *Harrington v. Harte* is no authority for the point now under consideration; for the question whether the fund was to go to the persons who were the next of kin of the testatrix at her death, or to those who were her next of kin at the death of her daughter, was not argued, but was given up by the Defendant's counsel. Besides, the will contained no provisions or limitations adverse to the construction which the Plaintiff's counsel contended for. In *Doe v. Lawson* the property, with respect to which the question arose, was real estate, and the Courts always struggle to hold limitations of real estate in remainder, to give vested interests: moreover, there was nothing in the will in that case which militated against that construction. In *Pearce v. Vincent* the testator expressly directed that the next of kin who were to take under the ultimate trust in his will should be the next of kin living at his decease. And the observations which Sir John Leach made on the certificate returned by the Barons of the Exchequer in that case must not be overlooked. (2 Myl. & Keen, 811.) *Stert v. Platel*, like *Doe v. Lawson*, was a case of real estate, and was decided on the same principle as that case was.

[323] In the clause which provides for the maintenance and education of the children, the trustees are directed to accumulate the surplus interest of the children's shares of the fund, for the benefit of such person or persons as should be entitled thereto by virtue of the settlement. Then the settlement, after providing for the advancement of the children, directs, in case there should be no child who should attain twenty-one, nor any daughter who should attain that age or marry, that the trustees should stand possessed of the fund or the residue thereof, and the accumulated interest thereof, in trust for such person and persons as A. Falconer should appoint, and, in default of appointment, in trust for his next of kin. We submit that that part of the maintenance clause which relates to the accumulation, coupled with the subsequent part of the settlement, clearly shews that some persons other than the children were intended to be the objects of the ultimate trust. All the benefits

(1) 2 Myl. & Keen, 82; see 89. Sir John Leach there says that the report of *Bird v. Wood* is too short; and that the circumstance which governed the decision in that case, though noticed in the statement of the case, is omitted in the judgment. The fact, however, is that the judgments in all the cases reported by Messrs. Simons & Stuart were copied from Sir John Leach's own notes, and, moreover, were perused by His Honor before they were published.

which the children were to take were conferred upon them by the preceding part of the settlement. A son was not to take anything unless he attained twenty-one; but, according to the construction which the Plaintiff contends for, he will take whether he attains that age or not. The trust for the next of kin is not to take effect except in default of appointment; and the power to make that appointment is not to arise except in the event of there being no child to take: can it then be said, with any regard to consistency, that a child is to take under the trusts for the next of kin, or, in other words, that a party who is not to take if he dies under twenty-one is to take under a limitation which is not to take effect unless he dies under twenty-one? The proper course, in construing this as well as every other instrument is to take the whole of it together; and then it will be seen that the settlor, having [324] exhausted the issue of the marriage, provides in words which have reference to a future period for those persons who are to take in the event of there being no issue to take. *Jones v. Colbeck* (8 Ves. 38). Every observation made by Sir W. Grant in that case applies to the present. *Miller v. Eaton* (Coop. 272); *Bird v. Wood*; *Briden v. Hewlett*; *Butler v. Bushnell*.⁽¹⁾

August 2. THE VICE-CHANCELLOR [Sir L. Shadwell]. This case was first brought before me a few days ago, and I have since had an opportunity of looking into the settlement. It is material to observe that the question arises upon a deed; and one of the first points to be considered is whether the words, as they stand by themselves, admit of a clear meaning. If they do not, then we must look into the other parts of the instrument to see what is the construction that ought to be given to the words that are not clear.

The words are: "In trust for the next of kin of the said Alexander Falconer according to the Statutes for the Distribution of Intestates' Estates, and as if the said A. Falconer had departed this life intestate." Now, *prima facie*, those words create no ambiguity. They create a trust for the next of kin. Then it is said that, if we look into the body of the instrument, we shall find that those words which have a clear meaning ought [325] not to have that clear meaning attributed to them. That, therefore, is looking into the settlement not for the purpose of clearing up a doubt, but for the purpose of creating a doubt and substituting a forced construction instead of the plain one.

Then the question is whether the words in the body of the instrument do create that doubt? Now, in the first place, it is observable that this settlement (which was an ante-nuptial settlement), recites, expressly, at its commencement, that it had been agreed that the sum in question should be settled by Alexander Falconer for the benefit of his intended wife and the children of the marriage. Therefore, the objects of favour were the wife and the children: but the result of the construction that was contended for is to take away the favour intended for the children. Then the recital, as far as it goes, does support that construction which would have the effect of making the ultimate limitation take effect for the benefit of the children.

But it was said that the Court ought not to adopt that construction, because one of the clauses in the operative part of the instrument militates against that construction, namely, a clause which gives a power to the trustees to maintain and educate the children out of the interest of the fund, and then directs the surplus to be accumulated. The words of that clause are "upon trust that the trustees, from and after the decease of the said Josephine Hume, should, in the meantime, and until the share or shares of such child or children as therein mentioned should become payable by virtue of the now-reciting indenture, pay and apply such part of the interest and proceeds of the said trust funds and securities as therein mentioned, for and [326] towards the maintenance and education of such child or children, in such proportions as they, the said trustees or trustee, should, in their or his discretion, think fit, and should permit and suffer the surplus and residue of the interest and proceeds of the share or shares of such children or child, respectively, to accumulate for the benefit of

(1) In the course of the argument, it was stated that the Plaintiff, as the administrator of A. F. Falconer, had come to a compromise with the surviving sisters and the representatives of the deceased brother and sisters of the settlor, and therefore the case was not argued by counsel on their behalf.

such persons as should be entitled thereto by virtue of the now-stating indenture." That clause, it was said, points, of necessity, to some other persons than the children. But put this case. Suppose there were six children; three or four might be otherwise provided for; and it might be unnecessary to apply any portion of the interest of their expectant shares for their maintenance; and then there is to be an accumulation. Is it meant to be said that the objects of the accumulation are not the children themselves? It is plain those words, "to such person or persons," have as much reference to the children, some or one of whom may ultimately become entitled, as it has reference to other persons who may not sustain the character of children.

The last observation which I have to make is that it is impossible to read the clause in which the ultimate trust is expressed without seeing that the person who framed it has omitted one or two words which are generally inserted in clauses of the like nature, and which have been at last adopted for the purpose of excluding any question. If the draftsman had only gone on to say, "as if the said Alexander Falconer had departed this life intestate and unmarried;" then it would have been quite clear what was meant: the children would have been excluded. But there is an omission of those two words which have been introduced for the purpose of determining what next of kin are to take. Whether those words were omitted by accident or on [327] purpose I am not to consider. The language which has been adopted by conveyancers has been adopted for the purpose of excluding the question. Therefore, when I find the words not introduced, I must suppose that the party did mean, upon the face of the deed, that the words should operate according to their natural meaning, which is the next of kin living at the death of the settlor, though that next of kin might happen to be a child.

[327] GRIFFITHS v. GALE. Feb. 23, 1844.

[See S. C. 12 Sim. 354 (with note).]

Appointment. Lapse. Construction. New Will Act, 7 W. 4 and 1 Vict. c. 26.

The enactment in the New Will Act, that a bequest to a child of the testator, who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, does not apply to a testamentary appointment. *Semble.*

A widow, having a power to appoint a fund, by deed or will, unto and amongst all and every or one or more of her children, appointed a share of it, by her will, to one of her sons. By the deed creating the power, the fund was limited, in default of appointment, to all her children as tenants in common. The son died intestate a few days before his mother, leaving several children, who survived their grandmother.

The son's administrator presented a petition claiming the appointed share under the New Will Act, 7 Will. 4 and 1 Vict. c. 26. The first section (the interpretation clause) enacts that the word "will" shall extend to a testament and to an appointment, by will or by writing, in the nature of a will in exercise of a power; and the 33d sect. enacts that a devise or bequest to a child of the testator, who dies in the testator's lifetime, leaving issue living at the testator's death, shall not lapse, but shall take effect as if the child had died immediately after the testator.

Mr. Bethell, for the Petitioner, relied on the first and 33d sections of the Act.

[328] Mr. Simons appeared for the parties entitled in default of appointment.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The words used in the 33d section are "devised or bequeathed;" but property passing by the execution of a power is neither devised or bequeathed. That section, too, enacts that the devise or bequest shall not lapse: therefore, I cannot think that it was meant to apply to a testamentary appointment. The Legislature could not have intended to vary the rights of the parties who the donor of the power had declared should be entitled in default of appointment.

The point, however, is a very important one, and I will allow the petition to stand over for further argument.(1)

MEMORANDUM.—The decree in *D'Aglié v. Fryer*, the first case in this volume, was affirmed by Lord Cottenham, C.

[329] *In re PARKE'S CHARITY.* July 30, 1841 ; April 18, 1842.

[See *In re Christchurch Inclosure Act* [1894], 3 Ch. 216.]

Charity. Jurisdiction. Stat. 52 Geo. 3, c. 101.

If it appears to be for the benefit of a charity that part of the estates belonging to it should be sold, an order for that purpose may be made on a petition presented under 52 Geo. 3, c. 101.

This was a petition presented under Sir Samuel Romilly's Act (52 Geo. 3, c. 101), by two of the inhabitants of the town of Wisbech, in the Isle of Ely, stating that, in 1628, Thomas Parke devised a house in Ship Lane, Wisbech, with the buildings thereto belonging to the corporation of that town, to the use of the poor of the parish of Wisbech for ever, that the house and premises were copyhold of the manor of Wisbech ; and that, some years ago, a piece of land in Crab Marsh in Wisbech, containing two acres and two roods, had been allotted under an Inclosure Act, in respect of the house ; and that, at the time when the petition was presented, the charity estate consisted of a public-house, with the yard, stables, outbuildings, and two tenements adjoining, and also of the allotment in Crab Marsh ; that of late years the rent of the estate had progressively diminished, notwithstanding the estate had been let from time to time by auction ; and that the lessees of the principal part thereof had given notice of their intention to quit the same at [330] Michaelmas then next ; that the public-house and the two tenements adjoining were very old and dilapidated, and required the outlay of a very large sum of money to put them into a state of good and substantial repair ; that they abutted upon the principal entrance into Wisbech from Lynn, the river Nene being on the opposite side of the road ; that the road, where the said charity premises abutted on it, was of the width of 16 feet only, and was bounded on the side next the river by a wharf, which was perpendicular for several feet in depth, and was kept in repair at the expense of the Corporation of Wisbech and of the charity estate in equal proportions ; that by reason of certain alterations having been made a few years since in the outfall of the river Nene, the channel of it had been greatly scoured out and deepened ; by reason whereof the wharf had become insecure and had a tendency to slip into the channel of the river ; that such deepening of the channel was still in progress, and would, in all probability, proceed for some time to come before the channel of the river had attained its greatest depth ; that, by reason of the circumstances aforesaid, the reparation of the wharf had been of late years a source of great expense to the charity estate ; and that, in February then last, a great portion of the wharf gave way, and the road over it became impassable, and the same had been repaired merely in a temporary manner ; but, nevertheless, at a large expense to the charity estate ; that, to repair and rebuild the wharf and road so as to secure the same and the charity premises from danger, owing to the increased depth of the river, would require a large outlay of money and be attended with a very heavy expense to the charity estate : that the devised premises were copyhold, fine arbitrary ; and that Thomas Clarkson, the sole surviving tenant thereof, was of the [331] advanced age of 80 years, and that the admittance

(1) In *Johnson v. Johnson*, the only other case in which a construction has been put on the 33d section of the Act, Vice-Chancellor Wigram, in M. T. 1843, held that the issue of a testator's deceased child could not claim the property bequeathed to their parent ; but that the parent's personal representative was entitled to it as part of his personal estate.—2 Jarman on Wills, 726 and 727.

of a new set of tenants would be attended with a very heavy expense; that the Corporation of Wisbech were desirous of purchasing the premises in Ship Lane for the purposes of widening and improving the river Nene and the navigation thereof, and of effecting a permanent improvement to the town of Wisbech, and of widening and improving the road from Wisbech to Lynn; and that they had applied to the charity trustees to set a price upon the same with a view to the purchase thereof; that, under the aforesaid circumstances, it would be highly beneficial to the charity to dispose of the premises in Ship Lane, and to treat with the corporation for the sale thereof at a valuation by two indifferent persons or their umpire; and to lay out the purchase-money in the purchase of other lands to be conveyed upon the trusts of the charity estate; but the trustees, although they were willing to act in the premises under the sanction of the Court, declined to take upon themselves to treat with the corporation.

The petition prayed that such directions might be given as, under the above circumstances, might be deemed necessary and proper for the management of the charity estate and premises, so as to prevent the same from falling into decay, and the income of the charity thereby becoming further diminished; and that it might be referred to one of the Masters of the Court to approve of a scheme for such management, with liberty to consider and report upon the propriety of the proposed purchase, or of some other mode of disposing of the last-mentioned premises which might be most advantageous to the charity.

Mr. Metcalfe appeared in support of the petition.

[332] Mr. Campbell, for Thomas Clarkson, the surviving tenant of the copyhold part of the charity estate, submitted that the Court had no jurisdiction to order, on a petition presented under 52 Geo. 3, c. 101, any part of a charity estate to be sold; but that an information ought to be filed for the purpose of obtaining that object. (See 2 Swanst. 302.)

THE VICE-CHANCELLOR [Sir L. Shadwell]. The Act empowers the Lord Chancellor to make an order on petition in a summary way, in every case of a breach of any trust created for charitable purposes, or whenever the direction or order of a Court of Equity shall be deemed necessary *for the administration of any trust for charitable purposes*.

If it had been made a question in this case whether there was any trust for a charitable purpose, then an information would have been necessary. But the trust is admitted; and the relief asked has reference only to the mode of *administering* the charity property.

Refer it to the Master to inquire and state whether it is most fit and proper, regard being had to the will of Thomas Parke and to the objects of the charity, that the charity premises in the petition mentioned, or any and what part thereof should be sold or otherwise disposed of; or whether the same, or any and what part thereof, or the appurtenances thereto, should be repaired. If the Master shall be of opinion that it is most fit and proper that the said charity premises or any part thereof should be sold or otherwise disposed of, then let him inquire and state to the Court what mode of sale or [333] other disposition thereof will be most fit and proper; and let the Master be at liberty to receive proposals for the purchase of the said charity premises, or any part thereof, from the Corporation of Wisbech, in the petition mentioned, or from any other corporate body, person or persons willing to purchase the same or any part thereof, and let him report upon such proposal or proposals, with his opinion thereon, to the Court. And if the Master shall be of opinion that it is most fit and proper that the said charity premises or any part thereof, or the appurtenances thereto, should be repaired, then let him inquire and state to the Court what, in his opinion, ought to be the nature and extent of such repairs, and what expenses ought to be incurred in and about such repairs, and by and out of what funds the same ought to be borne and paid.

On the 5th of February 1842 the Master reported that it would be most fit and proper, regard being had to the will of Thomas Parke and to the objects of the charity and to the nature and circumstances of the charity estates, that so much of the charity premises as consisted of the public-house with the yard and outbuildings

and two tenements adjoining, should be sold to the Corporation of Wisbech for £1200: and, on the 18th of April 1842, the report was confirmed and an order was made in conformity to it.

Mr. Metcalfe appeared for the Petitioners, Mr. Craig for Thomas Clarkson, and Mr. Phillips for the trustees of the charity estates.

[334] BRYDGES AND ANOTHER v. BRANFILL AND OTHERS. BRYDGES AND ANOTHER v. BRYDGES AND OTHERS. *August 4, 10, Nov. 15, 1841.*

[S. C. 11 L. J. Ch. N. S. 12. For subsequent proceedings, see 12 Sim. 369.]

Commission to Examine Witnesses. Depositions. Practice. Amendment. Interrogatories.

An order for a commission to examine witnesses was made, on the application of the Plaintiffs, in a cause in which Sir J. Brydges and another were Plaintiffs, and C. E. Branfill and others were Defendants, by original and amended bill: and in which Sir J. Brydges and another were Plaintiffs, and Lady Brydges and others were Defendants, by bill of revivor and supplement. The commission was made out in *a cause* in which Sir J. Brydges and another were Plaintiffs, and C. E. Branfill and others were Defendants, by original bill and bill of revivor and supplement. In the title to depositions taken under that commission, both the original and amended bill and the bill of revivor and supplement were mentioned, and the names of the parties to each bill were set forth at length. A motion by the Defendants to suppress the depositions, grounded on the variance between the title of the commission and the title of the depositions, was refused.

Commissioners for examining witnesses need not sign every skin of the interrogatories; it is sufficient if they sign the last skin.

Although it is usual to express in the title to depositions, that they have been taken by virtue of a commission, "to us (naming only the acting commissioners) and others directed," yet, if the names of *all* the commissioners are inserted, the depositions will not be suppressed because they are not signed by all the commissioners, provided they are signed by those who acted.

Commissioners for examining witnesses omitted to certify, in their return to the commission, that they and their clerks, before acting, took the oaths annexed to the commission. The Court at first ordered the depositions to be suppressed; but on being satisfied, by the affidavit of one of the commissioners, that the oaths had been duly taken, allowed the return to the commission to be amended by inserting that fact.

The original bill was filed in March 1836 by John William Egerton Brydges, a lunatic, by F. D. Swann, the committee of his estate, and by F. D. Swann, the said committee, against C. E. Branfill and several other persons. The answers of all the material Defendants were filed prior to November 1837. In Sep-[335]-tember of that year Sir S. E. Brydges, Bart., who was one of the Defendants and the father of the Plaintiff J. W. E. Brydges, died; and in December following another of the Defendants died. In February 1838 the Plaintiffs amended their bill by adding 900 folios and three new Defendants, which made a new engrossment necessary. The answers of the material Defendants to the amended bill were filed previously to November 1838. In September 1839 the Plaintiffs filed a bill of revivor and supplement against Lady Brydges, the widow and executrix of Sir S. E. Brydges, and eight other persons, one only of whom was a party to the original and amended bill.

In February 1840 the Plaintiffs obtained an order for a commission to examine witnesses. That order was intitled thus: "Between Sir John William Egerton Brydges, Bart., late J. W. E. Brydges, a lunatic, by F. D. Swann, the committee of his estate, and the said F. D. Swann, Plaintiffs, and C. E. Branfill, &c., &c. (naming all the other Defendants), Defendants, by original and amended bill; and between the said Sir J. W. E. Brydges, by the said F. D. Swann, the said committee of his

estate, and the said F. D. Swann, Plaintiffs, and Dame Mary Brydges, &c., &c. (naming all the other Defendants to the bill of revivor and supplement), Defendants, by bill of revivor and supplement." The commission which was issued in pursuance of that order purported to be a commission to examine witnesses in a *cause* wherein Sir J. W. E. Brydges, Bart., by his committee, and another were Plaintiffs, and C. E. Branfill and others were Defendants by original bill and bill of revivor and supplement. So that neither the amended bill, nor the names of the parties to the supplemental bill, were mentioned. The short title of [336] the supplemental suit was: "*Brydges and Another against Brydges and Others*;" and no person of the name of Branfill was a party to it. In the title to the depositions taken under the commission, the amended as well as the original bill and the bill of revivor and supplement were mentioned, and the names of all the parties to the original and amended bill and to the bill of revivor and supplement were set forth. The Plaintiffs exhibited fifteen skins of interrogatories for the examination of their witnesses under the commission; but the commissioners signed the last skin only.

In June 1840 the Plaintiffs obtained an order for another commission. That order was intituled: "Brydges and Another, Plaintiffs, against Branfill and Others, Defendants, by original and amended bill; Brydges and Another, Plaintiffs, against Brydges and Others, Defendants, by bill of revivor and supplement." The commission that was issued under that order purported, as the previous commission did, to be for the examination of witnesses in a *cause* wherein Sir J. W. E. Brydges, Bart., by his committee, and another, were Plaintiffs, and C. E. Branfill and others were Defendants, by original bill and bill of revivor and supplement: and the depositions taken under it were intituled in the same way as the depositions under the previous commission. The commissioners returned the second commission without certifying that they and their clerks, before they acted, took the oaths annexed to the commission. (See 2 Dan. Pract. 510.) Moreover, the depositions under that commission purported to be taken by all the commissioners (who were seven in number); although four of them only qualified and acted; and those four alone signed the depositions.

[337] A motion was now made on behalf of William Grane, one of the Defendants to the original and amended bill, that the depositions taken under the commissions might be suppressed.

Mr. G. Richards, Mr. Anderdon and Mr. Stinton, in support of the motion, said, first, that the title of the commissions did not tally with the title of the orders under which they were issued: secondly, that the heading of the depositions did not correspond with the title of the commissions under which they were taken: thirdly, that the commissioners ought to have signed all the skins of interrogatories: fourthly, that, where some only of the commissioners acted, the practice was to express that the depositions had been taken by virtue of a commission, "to us!(naming those who acted) and others directed;" but the depositions under the second commission, purported to have been taken by all the commissioners, and yet they were signed by only four of them: and, fifthly, that the commissioners, in returning that commission, had omitted to certify that they and their clerks had taken the required oaths; they added that, in consequence of the above irregularities, an indictment for perjury could not be sustained against any of the witnesses who might have sworn falsely. *Perry v. Silvester* (Jac. 83); *Pritchard v. Foulkes* (2 Beav. 133); *Campbell v. Dickens* (3 You. & Coll. 720); 1 Smith's Prac. 2d edit. 369; 2 Dan. Prac. 510; Hind. Prac. 345 and 236.

Mr. Wigram and Mr. James Russell appeared for the Defendant Branfill.

[338] Mr. Bethell, for the Plaintiffs, objected that counsel for the Defendant Grane were alone entitled to be heard in support of the motion. But

THE VICE-CHANCELLOR said that every one of the Defendants might have an interest in the question whether the depositions ought to be suppressed or not; and, therefore, that their counsel must be heard.

Mr. Knight Bruce and Mr. Barry, for the Defendant Brooks, supported the motion on the same grounds as the counsel for the Defendant Grane had relied on, and added that the first commission authorized the commissioners to examine witnesses in one cause only, namely, *Brydges v. Branfill*; but that they had examined witnesses in two

causes, namely, *Brydges v. Branfill*, by original and amended bill, and *Brydges v. Brydges*, by bill of revivor and supplement. *Robert v. Millechamp* (1 Dick. 22).

Mr. Wakefield appeared for the Defendants Cooper, White and Sterry.

Mr. Bethell and Mr. Hubback, for the Plaintiffs, said that commissions for the examination of witnesses were not seen by the solicitors of the parties who sued them out: but were sealed up and sent to the commissioners; and, consequently, the parties were not responsible for the form adopted by the officer of the Court in making them out: that no one could deny that *Brydges v. Branfill* was an original cause, and one in which a bill of revivor and supplement had been filed; that, in drawing up orders, commissions and other proceedings in a [339] cause, all that was requisite was to insert the title of the cause, and to refer to the bills existing in it; for, by giving the title of the cause, it was identified and distinguished from any other cause; and, therefore, the commissions in this case were perfectly regular. [THE VICE-CHANCELLOR. The motion now before me is to suppress the depositions; and, therefore, I have nothing to do except to determine whether the depositions are right. The propriety of the orders and the commissions issued under them is not called in question by the notice of motion; therefore, they must be taken to be right for the present purpose.]

Argument for the Plaintiff continued. If the commissions are to be taken as correct, in what respect are the depositions wrong? They mention both the causes and the names of the parties to them; and the heading of the interrogatories corresponds precisely with the heading of the depositions.

The next objection is that the commissioners signed the last skin only of the interrogatories. The answer to that objection is that there is no rule of the Court which requires them to do more; and even that seems to be superfluous; for the interrogatories are sufficiently identified by being returned with the commission.(1)

[340] The next objection is that the commissioners in their return to the second commission have not certified that they and their clerks have taken the oaths. But the commission does not impose upon them the necessity of certifying those facts in their return. All that it requires them to return is the examination of the witnesses closed up and under their seals, together with the interrogatories, "and this writ." If the authority of the commissioners was dependent upon their taking the oaths, then it might be necessary to mention the taking of them in the return. But their authority is quite independent of their taking the oaths: that step is not made a preliminary condition to their acting under the commission.

The only other objection is that, although the names of all the seven commissioners are mentioned in the heading of the depositions taken under the second commission, yet only four of them signed the depositions and the return to the commission. Now the commission authorizes any two or more of the commissioners to examine the witnesses, and it directs the return to be made by two or more of them. In this case, four of the commissioners qualified and acted, and those four signed the depositions, and also signed and sealed the return. Therefore, the requisition of the commission was fully complied with.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the objections that the commissioners omitted to certify when they returned the second commission that they and their clerks, before they acted, took the oaths annexed to the commission, I wish to ascertain, before I pronounce any decision upon it, what [341] was done in the case of *Mackellar v. Mackellar* (not reported): but I will dispose of the other objections now.

The first objection is grounded on the variance between the title of the cause as mentioned in the commissions and in the depositions returned by the commissioners.

In the course of the argument a good deal of observation was made upon the com-

(1) Lord Bacon's 68th Order directs that "All commissions for examination of witnesses shall be *super interr. inclusis* only; and no return of *depositions* into the Court shall be received, but such only as shall be either comprised in one roll, subscribed with the name of the commissioners, or else in divers rolls, whereof each one shall be so subscribed." Beam. Ord. 30. For the form of a commission, and the mode of proceeding under, and the return to it, see 2 Dan. Pract. 498-515.

missions and the orders under which they were obtained ; but I consider that I am not now required to give any opinion as to the propriety of those proceedings. All that I am required to do, by the notice of motion, is to suppress the depositions. That is all that is asked ; and I must take the orders and the commissions to be right until they are directly attacked.

The first question, then, that I have to decide, is whether there is such a variance, in the particulars which I have mentioned, between the commissions and the depositions that I must suppress the latter.

The first commission was issued for the examination of witnesses in a cause in which Sir John W. E. Brydges, by his committee and another, were Plaintiffs, and C. E. Branfill and others were Defendants, by original bill and bill of revivor and supplement. But in the return made by the commissioners to that commission, the depositions taken under it are described as depositions in a cause wherein Sir John W. E. Brydges, Bart., late John W. E. Brydges, a lunatic, by F. D. Swann, the committee of his estate, and the said F. D. Swann, are Plaintiffs, and C. E. Branfill, J. S. Brooks (naming [342] all the other parties), are Defendants, by original *and amended* bill : and wherein the said Sir J. W. E. Brydges, by the said F. D. Swann, the committee of his estate, and the said F. D. Swann, are Plaintiffs, and Dame Mary Brydges, A. E. Brydges (naming all the other parties) are Defendants, by bill of revivor and supplement. So that, in the commission, the cause is spoken of, shortly, as a cause in which Sir J. W. E. Brydges, by his committee and another, were Plaintiffs, and C. E. Branfill and others were Defendants, by original bill and bill of revivor and supplement : but, in the depositions returned by the commissioners, the description is amplified by giving the names of all the parties. I think, however, that that is only an amplification ; and my opinion is that there is a sufficient identification of the cause mentioned in the commission with the cause in which the return states the depositions to have been made.

I also think that it is immaterial whether the bill in *Brydges v. Branfill* was termed original and amended, or original only ; for an original and amended bill are but one record.

In the second commission the cause is spoken of in the same terms as it is in the first commission ; and, in the depositions taken and returned under the second commission, the cause is described in the same manner as it is in the depositions taken and returned under the first. Therefore the observations which I have made respecting the return to the first commission will apply to the return to the second ; and the consequence is that the objections founded on the variance between the commissions and the returns to them cannot be sustained.

The next objection is that the commissioners have not signed every skin of the interrogatories. With [343] respect to that objection, I have to remark that I know of no order of the Court which requires that commissioners for the examination of the witnesses should sign all the skins of interrogatories. There are two orders of the Court which require interrogatories for the examination of witnesses (1) to be signed by counsel ; but it always has been considered that that order is sufficiently complied with if counsel sign the last sheet of the interrogatories. Besides, Lord Bacon's Order requires that all commissions for the examination of witnesses shall be *super interrogatoriis inclusis*, and the commissioners return the interrogatories with the depositions : I do not, therefore, see that there is the slightest reason for contending that the commissioners ought to have done more, in this case, than they have done : consequently, as far as the objection now under consideration goes, I cannot suppress the depositions.

The last objection is that the depositions returned with the second commission, though signed by only four of the commissioners, were intituled as follows :—“Depositions of witnesses produced, sworn and examined, on Wednesday the 7th day of October 1840, at the house of John Jennings in the City of Canterbury, by virtue of a commission issuing out of Her Majesty's High Court of Chancery, *to us*, Thomas Wilkinson, W. Sladden, John Starr, Stephen Plummer, T. T. Delasaux, R. Furley and John Mumbray directed, for the examination of witnesses in a cause,” &c. In

support of that objection it was said that the title of the depositions ought to have stated that they were taken by virtue of a commission, "to us (naming the four commissioners who qualified and acted) and others directed;" and [344] that, in that case, it would not have been necessary for any of the commissioners, except the four who were named, to sign the depositions. The commission, however, authorized any two or more of the commissioners to execute it; and, as four of them qualified and acted, it was quite sufficient for those four to sign the depositions and the return.

I have thus disposed of all the objections, except that which relates to the oaths.

August 9. On this day THE VICE-CHANCELLOR said he had ascertained that the depositions in *Mackellar v. Mackellar* were ordered to be suppressed, because the commissioners had omitted to certify that they and their clerks had taken the required oaths; and, therefore the like order must be made with respect to the depositions taken under the second commission in this case.

His Honor, however, on the application of Mr. Bethell (who stated that the commissioners who acted under the second commission and their clerks, did, in fact, take the required oaths before they acted), gave the Plaintiffs permission to move that the return might be amended by adding a certificate to that effect: and, in pursuance of that permission, the Plaintiffs served the following notice of motion: "That the commissioners who acted under a certain commission for the examination of witnesses in this cause, bearing date at Westminster the 9th day of September in the 4th year of the reign of Her present Majesty, and which commission was executed at the City of Canterbury on the 6th and several subsequent days of October last, may be at [345] liberty to amend their return to the said commission, by adding thereto a certificate that they did, previously to swearing or examining any witness or witnesses under the said commission, take the oath first specified in the schedule to the said commission annexed; and that all and every the clerks and clerk employed in writing, transcribing or engrossing the depositions of witnesses examined by virtue of the said commission, did, before they or he were permitted to act or to be present at such examination, severally take the oath last specified in the said schedule; and that the said commission and all proceedings thereunder may be taken off the file and delivered to the said commissioners, or any one of them, for the purpose of being so amended, and, when so amended, may be filed."

In support of that motion, an affidavit was made by one of the commissioners, which stated that the commission was duly executed at Canterbury on the 6th and several subsequent days of October 1840, and that the deponent and Thomas Wilkinson, Thomas Thorpe de Lasaux and Stephen Plummer acted as commissioners in the execution of the said commission: that, before any witness was sworn or examined under the said commission, the deponent and also the said Thomas Wilkinson, Thomas Thorpe de Lasaux and Stephen Plummer severally took the oath first specified in the schedule to the said commission annexed; and that every clerk employed in writing, transcribing or engrossing the deposition of any witness examined by virtue of the said commission did, previously to such clerk being permitted to act as clerk or be present at such examination, severally take the oath last specified in the said schedule.

[346] The motion was made on the 10th of August, but was ordered to stand over in order that search might be made for precedents.

Nov. 15. The motion was now renewed by Mr. Bethell and Mr. Hubback; and was opposed by

Mr. Wakefield, Mr. G. Richards, Mr. Russell and Mr. Stinton.

The Plaintiff's counsel relied on the three following cases, which had been extracted from Reg. Lib. :—

Dixie v. Dixie. Rolls. May 4, 1702.

Whereas, upon the Plaintiff's humble petition preferred to the Right Honourable the Master of the Rolls, the 1st instant, shewing that on Tuesday the 5th day of February last, a commission for examination of witnesses was executed in this cause,

at the house of Judith Mathews, widow, in Market Bosworth, in the county of Leicestershire, wherein the Defendants joined and examined one witness and cross-examined most of the Defendant's (Plaintiff's *qu.*) witnesses, and the commissioners on both sides signed and certified the commission and the interrogatories and depositions on both sides, and the Defendant's commissioners brought the commission up to London and delivered the same into Court: that, upon opening the commission, it appeared that the clerk who took the depositions, through inadvertency, omitted to set down the day of taking the depositions in the title thereof, and only mentioned the same to be taken at the house of the same Judith Mathews, which being [347] not taken notice of by the commissioners, the same was, with that omission, certified and returned into Court: wherefore, and for that it appeared, by the certificate of the commissioners and affidavit thereto annexed, that the execution of the commission was begun on the day aforesaid and continued four days, it was prayed that the said mistake might be rectified, and the day of the month and year of our Lord inserted therein, and the record amended accordingly; which was ordered accordingly unless cause on this day: and the Clerks in Court on both sides this day attending, and the Defendant's Clerk in Court consenting that the said mistake should be rectified: his Lordship, on hearing the said petition read, doth order that the said mistake be rectified and amended, and that, between the word (taken) and the words (at the house of Judith Mathews, widow), in the title of the said depositions, be inserted these words, viz. (on Tuesday the 5th day of February, in the 13th year of the reign of our Sovereign Lord William the Third, by the grace of God King of England, Scotland, France and Ireland, Defender of the Faith, &c., anno Dom. 1701); and that the Plaintiff's Six Clerk do insert the same and amend the same accordingly.—A. 1701, fol. 271.

Chapman v. Chapman. Before the Lord Keeper.

Upon motion this day made unto this Court by Mr. Carter, being of the Plaintiff's counsel, in the presence of Mr. Brown, being of the Defendant's counsel, it was alleged that the commissioners for examination of witnesses in this cause have, in the commission by them executed, omitted the name of William Carpenter, exa-[348]-mined as a witness at the said commission, with his place of abode and age: that this cause is set down to be heard before his Lordship on the 4th day of July next; but the Plaintiff cannot be prepared for hearing on that day: it was therefore prayed that the commissioners for examination of witnesses in this cause may amend the said depositions by inserting the name, age and place of abode of the said William Carpenter; and that the cause may be adjourned over to be heard some time after the term: whereupon and upon hearing of what could be alleged on both sides: it is ordered that this cause do stand adjourned over to be heard on the fourth day of causes after this term; and that in the meantime the said commissioners be at liberty to amend the said commission by adding the name, age and place of abode of the said William Carpenter thereto.—A. 1711, fol. 453.

West and Others v. Yerbury and Others. Before the Lord Chancellor.

Whereas, by an order of the 19th day of November last for the reasons therein contained, it was ordered that the depositions taken in this cause, on the part of the Plaintiffs at Bridgewater in the county of Somerset on the 11th day of September 1711, should be discharged, and that the Plaintiff West or Mr. Jos. Dancey, the minister of Barton St. David's in the said county, or one of them, should produce the register books of the said parish at the hearing of this cause unless the Plaintiff West and the said Dancey, having notice thereof, should, at the second general seal after the last term, shew unto this Court good cause to the contrary. Now, upon opening of the matter this present [349] day unto the Right Honourable the Lord High Chancellor of Great Britain, by Mr. Attorney-General, Mr. Samuel Pratt, Mr. Fortescue and Mr. Mead, being of the Plaintiffs' counsel, who came to shew cause against the said order in the presence of Mr. Samuel Hooper, Sir Peter King, Mr. Vernon and Mr. How, being of the Defendants' counsel; it was alleged that the said

commission was regularly executed at Bridgewater and afterwards adjourned to Shepton Mallett in the said county of Somerset, where Abigail Provis and Hester Hodges were duly sworn and examined by virtue of the said commission on such adjournment, the 14th day of September, as witnesses on the Plaintiff's behalf, as by the affidavit of the Plaintiffs' commissioner and the clerk who attended the execution of the said commission appeared; but the commissioners having by mistake omitted to endorse, on the commission or depositions taken by virtue thereof, that the same was adjourned to Shepton Mallett, the Defendants endeavoured to procure the said Provis and Hodges, who are very old women, to make affidavit that they never were at Bridgewater in their lives nor examined at the said commission on the Plaintiffs' behalf, and had procured affidavits that the said Provis and Hodges had so declared; and, thereupon, obtained the said order of the 19th day of November for suppressing the said depositions; and as to the register book required by the Defendants to be produced, the same (if any such there be) was that which was kept in the late great Rebellion and never was in the custody of the said Dancey or ever seen by him, as by his affidavit appeared, nor did the Plaintiff West, nor his agent, Mr. Symons, ever see such book, or use any endeavours to have the same concealed, as by their affidavit appears. And, therefore, it was prayed that the said order of the 19th day of November may be dis-[350]-charged: Whereupon and upon hearing the Defendants' counsel and reading several affidavits, and hearing what was alleged on both sides: his Lordship allowed the cause now shewed; and doth order that the order of the 19th day of November last be discharged, and that the Plaintiffs' commissioners or either of them be at liberty to amend the said commission or depositions taken by virtue thereof, by endorsing or inserting that the said commission was adjourned to Shepton Mallett.—B. 1713, fol. 97.

The counsel for the Defendants said that the objection on which they relied was an objection to the very essence of the commission; but the matters in which the commissions in the precedents produced were allowed to be amended were unimportant; that the latest of those precedents was dated so long ago as 1713; and they referred to *Campbell v. Dickens* (3 You. & Coll. 720).

THE VICE-CHANCELLOR [Sir L. Shadwell] said that in *Mackellar v. Mackellar* the motion was to suppress the depositions, and that no application was made, in that case, for leave to amend the return to the commission; that it did not follow that the cases which had been extracted from Reg. Lib. were the only instances in which the Court had allowed the return to a commission for examining witnesses to be amended; but that those cases seemed to him to be a sufficient authority for granting what was asked in the present case; that it would be extremely harsh not to allow a proceeding to be made right in appearance, which the Court knew, from indisputable evidence, to be right in fact and in substance; and, therefore, he should allow the return to be amended; but the Plaintiffs must pay the costs of the application.

[351] GLOVER v. WEBBER. Feb. 26, 1844.

Practice. Next Friend. Infant.

Where the next friend of an infant Plaintiff dies, the proper order for the Defendant to obtain is not that the infant may appoint a new next friend within a given time or that the bill may be dismissed; but that the Master may approve of a new next friend; and four days' notice of the order must be given to the Plaintiff's solicitor.

The next friend of the infant Plaintiffs in this cause having died before decree, Mr. Randell obtained an order, on behalf of the Defendant, that the infants might appoint a new next friend within a given time, or *that the bill might be dismissed*. But the registrar, Mr. Bedwell, conceiving that the order, so far as it directed the bill to be dismissed, was not warranted by the practice of the Court, the

motion was again mentioned on this day; and Mr. Randell then produced the following extracts from Reg. Lib., with which Mr. Bedwell had furnished him:—

Between Susanna Ludolph, an Infant, by Jacob Conen, her Next Friend, deceased, *Plaintiff*; William Saxby and Sarah, his Wife, and Anne Ludolph, *Defendants*. Friday, 26th March 1742.

Upon the Defendants, William Saxby and Sarah, his wife, their humble petition, this day preferred unto the Right Honourable the Lord High Chancellor, &c., shewing, among other things, that the said Jacob Conen, the Plaintiff's next friend, is dead, as by affidavit therein mentioned appears: It is ordered that it be referred to Mr. Edwards, the Master to whom this cause stands referred, within four days after notice hereof to the Plaintiff's Clerk in Court, to consider of a proper person to be *prochein ami* for the Plaintiff in the room of the [352] said Jacob Conen, deceased; and that such person as the said Master shall approve of be the Plaintiff's *prochein ami*.—B. 1741, fol. 279.

Between the Right Honourable Mary Countess Dowager of Shelburne, and John Hamilton Fitzmaurice, an Infant, by the said Countess, his Grandmother and Next Friend, *Plaintiffs*; Morough Earl of Inchiquin and Others, *Defendants*. Thursday, 22d March 1781.

Upon the humble petition of the Defendant, the Earl of Inchiquin, this day preferred to the Right Honourable the Master of the Rolls, setting forth (among other things) that the Plaintiffs exhibited their bill in this Court against the Petitioner and others, to which bill the Petitioner hath put in his answer, and obtained an order to examine a witness *de bene esse*: That the said Plaintiff, the Countess Dowager of Shelburne, the *prochein ami* of the Plaintiff, the infant being dead, the Petitioner is advised that objection may be taken to the regularity of such examination: That the Petitioner hath applied to the Plaintiff's Clerk in Court, requesting that a new *prochein ami* may be appointed in the room of the said Countess Dowager of Shelburne, but says he has no instructions, although he has applied to the said infant's solicitor for that purpose: It is thereupon ordered that it be referred to Mr. Eames, one of the Masters of this Court, within four days after notice hereof to the Plaintiff's Clerk in Court, to approve of a proper person to be *prochein ami* for the Plaintiff, the infant, in this cause, in the room of the said Countess Dowager of Shelburne; and that such person as the [353] said Master shall so approve of be the Plaintiff's *prochein ami*; and that the Plaintiff's bill be amended by inserting the name of the person who shall be so approved of by the said Master as the Plaintiff's *prochein ami*, instead of the name of the Plaintiff's said late *prochein ami*, now dead; and hereof notice is to be given forthwith.(1)—A. 1780, fol. 157.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The order ought to be made according to what has been done before. I shall follow the case of *Ludolph v. Saxby* as nearly as may be.

Refer it to the Master to approve of a new next friend, and give the Plaintiffs' solicitor four days' notice of the order now made.(2)

(1) See also *Lancaster v. Thornton*, Amb. 398, in which *Ludolph v. Saxby* and *Lady Shelburne v. Lord Inchiquin* are referred to.

(2) See *Bracey v. Sandiford*, 3 Madd. 468.

If the next friend of a married woman dies, the Court will order her to appoint a new next friend within a certain time, or the bill to be dismissed. *Barlee v. Barlee*, 1 Sim. & Stu. 100.

[354] GRIFFITHS v. GALE. *Ex parte* JAMES JONES, the Administrator of Stephen Jones. March 11, 1844.

[S. C. 12 Sim. 327; 13 L. J. Ch. 286; 8 Jur. 235. Followed, *Freeland v. Pearson*, 1867, L. R. 3 Eq. 663. Discussed, *Holyland v. Lewin*, 1884, 26 Ch. D. 268; Cf. *In re Will's Trusts*, 1889, 42 Ch. D. 646.]

Appointment. Lapse. Construction. New Will Act, 7 W. 4 and 1 Vict. c. 26.

The enactment in the New Will Act, that a bequest to a child of the testator who dies in the testator's lifetime leaving issue living at the testator's death shall not lapse, does not apply to a testamentary appointment.

A short report of this case, as it came on to be heard on the 23d of February last, is given *ante*, p. 327. In pursuance of the permission then given, the case was again argued on this day; and, as it raised a question of considerable importance, it has been deemed advisable to give a fuller statement of the facts than the former report contains.

By an indenture, dated the 26th of July 1794, being the settlement made in consideration of the marriage which had been solemnized between Mary Moffatt Walbancke and John Jones, the sum of £2000 stock, the lady's property was assigned to trustees, in trust for her separate use for her life; and, after her decease, in trust for John Jones for his life; and, after the decease of the survivor of them, in case there should be only one child or two or more children of the body of Mary Moffatt Jones, in trust to transfer the stock to the same one only child, or unto and amongst all and every or such one or more of the same children, at such age or ages, and in such parts, manner and form as John Jones and Mary Moffatt, his wife, at any time or times during their joint lives, by any deed or deeds, to be by both of them sealed and delivered in the presence of two or more credible witnesses, should direct or appoint; and, in default of such joint direction or appointment, then as Mary Moffatt Jones, in case she should survive John Jones, should at any time or times after his death, [355] notwithstanding any future coverture by any deed or deeds, writing or writings with or without power of revocation, to be by her executed as aforesaid, or by her last will and testament in writing, or by any writing purporting to be or in the nature of her last will and testament or a codicil or codicils, to be by her signed and published in the presence of the like number of witnesses, should direct or appoint; and, in default of and subject to such direction and appointment, unto all and every the child and children of Mary Moffatt Jones lawfully begotten or to be begotten, to be equally divided between or amongst them, if more than one, and, if there should be but one such child, then the whole to such one child, to be a vested interest in a son or sons on attaining 21, and in a daughter or daughters on attaining that age or previous marriage, with benefit of survivorship between such children if any or either of them should die without attaining a vested interest.

There was issue of the marriage four children, William, Stephen, James and John. William died intestate in July 1833, and his brother John took out administration to him. John Jones, the father, died in January 1839.

By a deed-poll, dated the 5th of August 1839, Mary Moffatt Jones, in exercise of the power reserved to her by the settlement, directed one-third of the £2000 stock to be transferred immediately after her decease to James Jones.

She made her will on the same day, and thereby, after appointing her sons, John, Stephen and James her executors, and after reciting the settlement and the appointment which she had made of one-third of the [356] stock in favour of James, she, in exercise of the power reserved to her by the settlement, appointed the remainder of the stock to John and Stephen, in equal shares, as tenants in common, their executors, &c., and, subject to the payment of her debts and funeral and testamentary expenses, she gave all the real estate which she then was or at the time of her death might be seised of or entitled to for any estate or interest whatsoever, and also all her

personal estate and effects whatsoever and wheresoever, to John, Stephen and James in equal shares as tenants in common, and to their respective heirs, executors, &c.

Stephen Jones died in October 1843 intestate and a widower, leaving six infant children, all of whom were still living; and administration to his estate during their minorities was granted to James Jones. Mary Moffatt Jones survived Stephen, and died on the 14th of October 1843.

Mr. Bethell, in support of the petition, which was presented by James Jones, who claimed to be entitled as administrator to his brother Stephen to the one-third of the £2000 stock appointed to Stephen, said that the will was made by Mary Moffatt Jones when she was discoverte, and that it contained not only an appointment of the property over which she had a power of appointment under the settlement, but also a disposition of property of which she was the owner; and, therefore, it was a will in the proper sense of the word, and not a testamentary writing in the nature of a will. He then referred to the 1st, 8th, 10th, 18th, 25th, 27th and 28th sections of the late Will Act, and to the observation on the last-mentioned section, in page 89 of H. Sugden's Essay on the Law of Wills as altered by that [357] Act, namely, that that section applied to gifts by will under powers. He added that it appeared from all the sections to which he had referred, and more especially from the 27th and 28th, that the words "devised or bequeathed," in the 33d section, were intended to apply to devises or bequests made in exercise of powers of appointment, as well as to devises or bequests properly so called.

Mr. Simons, for John Jones, the son, said that it was apparent from the words "devise, bequest and lapse," which was used in the 33d section of the Act, and from the Report of the Real Property and Ecclesiastical Commissioners,⁽¹⁾ that that section applied only to devises or bequests of property of which the testator or testatrix was the owner, and not to devises or bequests of property over which he or she had only a power of appointment. He referred also to the observations made on the 32d and 33d sections of the Act, in H. Sugden's Essay, pages 111, *et seq.*, and added that as Stephen Jones had died in his mother's lifetime, the appointment which she had made by her will in his favour had become ineffectual; and, consequently, the share of the stock which he would have been entitled to if he had survived his mother had become divisible under the trust declared by the settlement, in default of appointment, between John and James Jones in their own rights and as the personal representatives of their deceased brothers, William and Stephen respectively.

THE VICE-CHANCELLOR [Sir L. Shadwell]. My opinion is against the proposition which Mr. Bethell has contended for.

[358] The Legislature, when it passed the Act in question, meant to interfere in the case of a person disposing of his own property, and also in the case of a person disposing of property over which he had a power of appointment: but, in the latter case, so far only as the form of executing the power was concerned. It might be very reasonable to say that when a testator devised or bequeathed property to a child absolutely, and that child died in the lifetime of the testator, the devise or bequest should not lapse. But it is a totally different case, where a power of appointment is given, and, in default of appointment, the property is limited to specified objects. In that case the donee of the power has no estate to give, and has no control or dominion over the property except in the way directed by the donor of the power.

There are no words in the statute which shew that wills made in execution of powers of appointment are to be put on the same footing as the wills of those who have complete control and dominion over the property which is the subject of their disposition. If the section of the Act which has been particularly relied on is looked at, it will be found to contain words which are sufficient to shew that the operation of that section was meant to be restricted to the property of persons who, in the character of testators, had the property to give. That section enacts that, where any person being a child or other issue of the testator, to whom any real or personal estate shall be *devised or bequeathed* for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator,

(1) See H. Sugden's Essay, Appendix, pp. 188, 220, 221, 222, 223 and 229.

such *devise or bequest* shall not *lapse*, but shall take effect as if the death of such person had happened immediately [359] after the death of the testator, unless a contrary intention shall appear by the will. The first section of the Act, which also has been much relied on, enacts that, in construing the Act, the word "will" shall extend to a testament and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power. There the meaning of the word "will," not of the words "devise or bequeath," is expounded. Those words and the word "lapse," which also is used in the 33d section, are totally inapplicable to an appointment by deed or will; for where property is disposed of by virtue of a power, there is no lapse; the property goes over to specified objects, not by virtue of the intention of the donee of the power who has no control over the property, but by virtue of the previous directions of the donor. The term "lapse" shews that the Legislature was speaking of a thing that might lapse: it shews that the Legislature was speaking of devises and bequests properly so called; that is, of dispositions of property of which the testator was owner.

It is much too strong to say that the Legislature intended to control the disposition of property made by persons long since deceased, when the Act itself contains an express provision that it shall not extend to any will made before the 1st day of January 1838, unless the will shall have been re-executed, republished or revived after that day. (Sect. 34.) If I were to put that interpretation on the Act which Mr. Bethell has contended for, I should not only violate that express provision, but also, as I before observed, disappoint the dispositions made of their property by persons long since deceased.

[360] On these grounds, my opinion is that the Legislature, when it passed the Act in question, did not intend to interfere with powers of appointment further than by saying that the execution of them in a given form should be deemed a sufficient execution.

Before the Act was passed it was sent to me in draft, and I made certain alterations in it; but I have not the slightest impression that what is now contended for was meant to be comprehended in the 33d section; and I am morally sure that if it had been I should have recollected it and have altered the language of the 33d section.

At the same time, if the Petitioner wishes to take a case for the opinion of a Court of law, I will permit him to do so.(1)

[361] WILSON v. JONES. Dec. 8, 1843.

Construction. New Orders of August 1841. Defendant. Answer.

Although a Defendant's name is omitted in the note at the foot of the bill, he must put in an answer, though it be a mere formal one.

Motion to discharge an attachment which had issued against one of the Defendants for want of answer, on the ground that his name was omitted in the note at the foot of the bill.(2) His name, however, was inserted in the clause commencing, "To the end therefore," and also in the prayer of process; and he had been served with a *subpoena* to appear and answer.

Mr. Terrell, in support of the motion, relied on the 16th Order of August 1841, which provides that a Defendant shall not be bound to answer any statement or charge in the bill, unless specially and particularly interrogated thereto; and that a Defendant shall not be bound to answer any interrogatory in the bill, except those interrogatories which such Defendant is required to answer. He also contended that the Plaintiff ought to have served the Defendant with a copy of the bill under the 23d Order of August 1841.

Mr. Mylne, for the Plaintiff.

(1) The case was not taken.

(2) See 17th Order of 26th August 1841.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 23d Order affords an inference which is against, rather than in favour of, the motion; for it gives the Plaintiff an option whether he will or will not require an answer from a Defendant against whom no direct relief is prayed. Now, here the Plaintiff has exercised that option by requiring the Defendant, on whose behalf the motion is made, to answer the bill.

[362] The 16th Order says that a Defendant shall not be bound to answer any of the interrogatories in the bill, except those which he is specially required to answer: but it does not exempt him from the necessity of putting in an answer. If the Plaintiff does not choose to ask him to answer anything specially, he may put in an answer without answering specially. He must, however, put on the record that which, in form at least, is an answer.

[362] MAWHOOD v. LABOUCHERE. *March 18, 1844.*

New Orders of August 1841. Practice.

Under the 24th Order of August 1841, the Court will allow the Plaintiff to enter a memorandum of service of a copy of the bill without an affidavit, stating the nature of the suit, and that no direct relief is sought against the Defendant who has been served.

Mr. E. Montagu, for the Plaintiff, moved, under the 24th General Order of August 1841, for leave to enter a memorandum of service of a copy of the bill on one of the Defendants. He stated that he was not furnished with an affidavit disclosing the nature of the suit, or shewing that no account, payment, conveyance or other direct relief was sought against the Defendants: and he called the attention of the Court to *Haigh v. Dixon*.(1)

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am of opinion that there is no necessity for such an affidavit. Every Court is presumed to know the contents of its own records; and an affidavit on the subject is not evidence.

Order made.

[363] EVERETT v. PRYTHERGCH. *Nov. 11, Dec. 18, 1841.*

Contempt. Scandal. Defendant. Practice. Impertinence.

A Defendant, though he is in contempt for want of answer, may except to the bill for scandal, but not for impertinence.

A creditor filed a bill against the debtor's executor, stating, first, that the Defendant was a person of bad character, of drunken habits and violent behaviour, and then adducing instances in support of that statement; and praying that the assets might be administered under the direction of the Court, and for an injunction and receiver. Held, that the general statement and the instances were relevant to the relief asked, and therefore were not scandalous.

The Defendant after an attachment had issued against him for want of answer, filed exceptions to the bill for scandal and impertinence; and afterwards obtained an order, as of course, referring the bill and exceptions to the Master. All the exceptions, except the ninth, were for scandal and impertinence: the ninth was for impertinence only.(2)

Mr. Girdlestone and Mr. Barber, for the Plaintiff, now moved that the exceptions might be taken off the file and the order be discharged for irregularity, on the ground that the Defendant, when he filed the exceptions and obtained the order, was in

(1) 1 Youn. & Coll. N. C. 180; see also *Davis v. Prout*, 5 Beav. 102.

(2) It is scarcely necessary to mention that the Court considers matter that is scandalous to be impertinent also.

contempt, and, therefore, could not be an acting party in the cause, except for the purpose of clearing his contempt. *Howard v. Newman* (1 Molloy, 221); *Beavan v. Waterhouse* (2 Beav. 58).

Mr. Romilly, for the Defendant, said that there were many exceptions to the rule that a party in contempt could not be heard except for the purpose of clearing his contempt: *King v. Bryant* (3 Myl. & Craig, 191); *Wilson v. Bates* (*Ibid.* 197): that a bill, answer, or other proceeding in a cause might be referred for scandal at any time: *Fenhoulet* [364] v. *Passavant* (2 Vez. 23); *Anon.* (*Ibid.* 631); *Ex parte Simpson* (15 Ves. 476); *Nedby v. Nedby* (*ante*, vol. viii. p. 334); *Anon.* (5 Ves. 656).

THE LORD CHANCELLOR [Sir L. Shadwell]. The *Anon.* case in 5 Ves. is a direct authority that a Defendant, although he has taken out an order for time to answer, may refer the bill for scandal: and the question is whether, so far as the present question is concerned, there is any substantial distinction between a party's having taken out an order for time to answer (whereby he submits to answer), and a party's being in contempt for want of answer.

Notwithstanding Lord Bacon's 48th Order says, "They that are in contempt, especially so far as a proclamation of rebellion, are not to be here (heard *qu.*) neither in that suit nor any other, except the Court, of special grace, suspend the contempt;" yet Lord Cottenham, C., in *Bates v. Wilson*, mentions cases in which a party, though in contempt, was entitled to be heard.

Until the reference for scandal is disposed of, the Defendant cannot tell what he ought to answer; and, in my opinion, although he is in contempt, he has a right to call upon the Court to tell him what it is that he is bound to answer.

I think, therefore, that, upon the principle of the *Anon.* case in 5th Ves., the Defendant in this case is entitled to proceed with the reference, so far as scandal is concerned; that is to say, he is entitled to go on with [365] all the exceptions except the ninth. That exception is for impertinence only: the other exceptions are for scandal and impertinence; whatever is scandalous being impertinent also. But, as there is some degree of authority for the application, I cannot give the Defendant the costs of it.

The bill was filed by creditors of a testator against the Defendant Prythergeh and his wife (the latter being the executrix of the will), stating that the testator's personal estate was insufficient, or barely sufficient, to pay his funeral and testamentary expenses and debts; and that the Defendants were persons of bad character, of drunken habits, violent and disorderly in their conduct, and in a state of great poverty. The bill then proceeded to state various particulars in support of the above general allegation respecting the character, conduct and circumstances of the Defendants; such as that they were frequently drunk five times in a week; that they often quarrelled with each other; that they had surreptitiously left a house which they rented at a small weekly sum, leaving 15s. of the rent unpaid; that the husband went about very shabbily dressed, with his clothes torn, and with holes in his shoes; that he frequently pawned his own and his wife's clothes; and that he had expressed himself willing to perjure himself if he could get anything by it, &c., &c. The bill prayed for an account and for the administration of the testator's estate, and for an injunction to restrain the Defendants from collecting the assets, and for a receiver.

The bill, as is stated in the preceding part of this report, was excepted to for scandal and impertinence: and, the Master having allowed all the exceptions, [366] except those which related to the above general allegation, the Plaintiffs excepted to his report.

Mr. Girdlestone and Mr. Barber, in support of the exceptions to the report, contended that all the allegations in the bill respecting the character, conduct and circumstances of the Defendants were relevant to the relief prayed; as they tended to shew that the Defendants were not fit to be trusted with the testator's property: that the case of a creditor was different from that of a legatee; for the latter was a mere volunteer, and, therefore, there was some reason for saying that he was not entitled to complain of the person to whom the testator had thought proper to entrust his property: that, as the Master had considered the general allegation not to be scandalous, he ought to have come to the same conclusion with regard to the particular

allegations respecting the character, conduct and habits of the Defendants; for the principle that was applicable to the former was equally applicable to the latter.

Mr. G. Richards and Mr. Romilly said that no one had ever heard of notoriety of bad character (that is, what the neighbours thought of an individual) being proved either at law or in equity; that, when an executor applied for probate of a will, the Ecclesiastical Court never inquired into the moral character of the party making the application: that it was sufficient that the testator had thought proper to entrust that individual with the administration of his property; and that a person might be honest, though he was poor and shabbily dressed.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am under the necessity of differing from the Master.

[367] I think that it is a most delicate part of the jurisdiction of this Court to determine how strong a Plaintiff is at liberty to make his case. He frames it as he pleases, and states a number of circumstances in support of it: but I am not aware that the Court has ever abridged him of his right to state as much as he thinks fit, merely because some of those circumstances might have been sufficient.

In the case of *Morrice v. Salisbury*, which occupied the Court the greater part of a fortnight during the last term, a party was sought to be charged with certain sums of money which it was alleged that, but for his wilful default, he might have received: and, in order to get a decree under which the Defendant might be so charged, the Plaintiff entered into a great number of instances of default, where one or two instances would have been sufficient for the purpose. But I considered that it was not the duty of a Judge to limit the number of instances which a Plaintiff may think proper to adduce for the purpose of supporting his case: and therefore I heard the whole throughout.

Now, here the bill is filed to have such a proper administration of the testator's estate as will enable the Plaintiffs and the other creditors to obtain payment of their debts. And in order to shew that this is a proper case for the Court to grant an injunction and a receiver, the Plaintiffs, first of all, state in a general way that the executrix and her husband are persons of bad character, drunken habits and great poverty: and then, in order to support that general charge, a great number of particulars are detailed which tend to shew their poverty, drunkenness and outrageous conduct. A Plaintiff, as I said before, has a right to make his case as [368] strong as he can: and, when there is a question about the administration of assets, it is surely of importance to make out that the person who has the power over and the sole management of them is a person of violent conduct and drunken habits. His duty is to collect the assets and to pay the debts; and, where peaceful conduct is so indispensable, it is material for a Plaintiff who is seeking for an injunction and a receiver to enter into instances of violent conduct: and it is obvious that the assets cannot be safe in the hands of a person who is in the habit of being drunk. The Plaintiffs have obtained an injunction on affidavits verifying the allegations in the bill; and when the cause comes on to be heard, the Court must determine whether that injunction ought to be continued or not; and if those charges which have been deposed to on an interlocutory proceeding are proved at the hearing, the Court will continue the injunction and the receiver. Therefore it is necessary, with a view to the decree, that the matters objected to should be stated. So that, on the whole, I am of opinion that the Master has erred in allowing any of the exceptions for scandal and impertinence.

It is singular that the Master should have overruled the exceptions so far as they relate to the general charge, and yet have allowed them so far as they relate to the particular instances which are adduced in support of that general charge. The general charge of bad character is not a charge of general bad character, but of bad character in respect of drunkenness and violent behaviour.

[369] BRYDGES AND ANOTHER v. BRANFILL AND OTHERS. BRYDGES AND ANOTHER v. BRYDGES AND OTHERS. *Feb., March, April 16, 1842.*

[S. C. 11 L. J. Ch. 249; 6 Jur. 310. See *Phosphate Sewage Company v. Hartmont*, 1877; 5 Ch. D. 443; *Marsh v. Joseph* [1897], 1 Ch. 249.]

Fraud. Partners (Liability of). Solicitors.

A tenant for life of settled estates obtained an Act of Parliament for selling the estates and investing the proceeds, under the direction of the Court, in the purchase of other lands to be settled to the same uses. After the estates had been sold and the money paid into Court, the tenant for life fraudulently obtained an order, under which part of the money was paid out to him. Messrs. B., G. and C., solicitors and co-partners, acted as the solicitors of the tenant for life, in obtaining the orders and in every other proceeding under the Act. B. was aware of the fraud; but G. and C. were wholly ignorant of it. Held, nevertheless, in a suit instituted by the remainder-man after the death of the tenant for life, that G. and C. as well as B., and the estate of the tenant for life, and all the other parties to the transaction, were jointly and severally liable to make good the money.

A motion in the above causes is reported, *ante*, p. 334.

The causes now came on to be heard. The pleadings and depositions were very voluminous, and the arguments of counsel occupied several days; but, as the only important question of law that arose was as to the liability of the Defendants, Grane and Cooper, the following report is confined to that question.

Thomas Barrett, Esq., died in 1803, having devised his estates in Kent, upon trusts under which Colonel Brydges Barrett, and the Plaintiff, John W. E. Brydges, the first and second sons of Sir Samuel Egerton Brydges, Bart., became successively tenants for life, and the Defendant, Mrs. Holmes, the widow of Colonel Holmes, the late Mrs. Quillinan, the wife of the Defendant, Edward Quillinan, and the Defendant, Mrs. Swann, the wife of the Plaintiff, F. D. Swann, three of Sir S. E. Brydges's daughters became tenants in common in tail in remainder of the estates. In June 1822 Colonel [370] Barrett obtained an Act of Parliament for selling the devised estates and investing the proceeds in the purchase of other estates, to be settled upon the trusts of the will; it being the colonel's intention that certain estates in Kent, of which his father was tenant for life and he himself was the remainder-man in fee, should be purchased out of the monies to arise from the sale of the devised estates, at a price much above their real value. Colonel Barrett, in order to facilitate the attainment of his object, procured the trustees of Mr. Barrett's will to be removed before he applied for the Act, and his relative, the Defendant Branfill, and his half-brother, the Defendant A. E. Brydges, to be appointed in their place. In July 1822 Colonel Barrett communicated to his father the plan which he had formed, in a letter containing the following passage:—"The plan is to sell; and when the money is in the Accountant-General's hands, for you to take it, if you choose, for the smallest portion of land to be settled in lieu: which can be done with the approbation of a Master; which will be managed by having as high a valuation as possible put upon any lands which you may choose to be so disposed of."

In July 1829 Sir S. E. Brydges and Colonel Barrett, in pursuance of that plan, agreed, colourably, to sell part of the estates of which they were seised, as before mentioned, to the Defendant, Quillinan, for £3000, and another part of the same estates to the same gentleman for £4596.(1) A conveyance was afterwards executed in pursuance of that agreement, in which Mrs. [371] Whitby (who was a mortgagee of the first portion of the lands sold to Quillinan), and Messrs. Shepherd and Crozier (who were mortgagees of the other portion) joined; and in February

(1) The Act, as is usual in like cases, directed the monies to arise from the sale of the devised estates to be paid into Court, and to be laid out in the purchase of other estates, under the direction of the Court.

1830 sums amounting to £3000 and £4596 were paid to them respectively ; but those sums were not sufficient to cover the whole of what was due to them. By means of that fictitious sale, a fraud was practised on the mortgagees ; for the lands sold were in fact worth more than the two sums, amounting together to £7596, at which Quillinan was represented to have purchased them.

In December 1829 a state of facts and a proposal to purchase the two last-mentioned properties from Quillinan for £22,600 (which was proved by evidence in the suit to be more than their value), was submitted to the Master (Dowdeswell) on behalf of the trustees, Branfill and A. E. Brydges, together with a valuation made by Mr. Westwood, a land surveyor, and duly verified, stating the properties to be worth that sum. The Master having approved of the proposal, three abstracts purporting to be abstracts of Quillinan's title were laid before the Master. The Master approved of the title ; and by indentures of lease and release, dated the 20th and 21st of January 1830, Quillinan conveyed the properties to the trustees upon the trusts of Mr. Barrett's will. The Defendant, Grane, was one of the parties to the release. On the 25th of the same month an order was made, on a petition presented in the names of the trustees, for payment of the £22,600 to Quillinan, out of the monies arisen from the sale of the devised estates. The Defendant, Brooks, received that sum from the Accountant-General under a power of attorney from Quillinan.

The Defendant Brooks and the Defendant Grane, [372] his partner, were the solicitors employed to obtain the Act of Parliament ; and they, until the year 1825, and, from that year, they and the Defendant, Cooper, who then entered into partnership with them, were the solicitors of Colonel Barrett and the trustees in the transactions before mentioned. Brooks was privy to *all* the circumstances of those transactions ; but neither of his partners was aware that there was any fraud or irregularity in them.

In May 1830 an account was delivered by Brooks, Grane & Cooper to Sir S. E. Brydges and Colonel Barrett, in which Sir S. E. Brydges and Colonel Barrett were credited with the £22,600, and debited with various sums amounting in the whole to more than that sum for costs, monies lent, &c. The following was one of the items on the debit side of the account : "To costs of *recent arrangements*, as *per* Colonel Barrett's letter of the 14th of January . . . £1050."

In June 1834 Colonel Barrett died abroad in very distressed circumstances. His half-brothers, Anthony Rokeby Brydges, and the Defendant, Anthony Egerton Brydges, were his executors, and Anthony Rokeby Brydges proved his will.

In 1836 the original bill was filed by John W. E. Brydges (who was a lunatic) by Swann as his committee and by Swann in his own right, against Branfill, Brooks, Grane, Cooper, Anthony E. Brydges, Quillinan, Mrs. Holmes, Quillinan's children, Mrs. Swann and A. Rokeby Brydges, praying, amongst other things, that it might be declared that the pretended sale by Quillinan to the trustees was a fraud upon the Plaintiff, J. W. E. Brydges, and the other parties interested under Mr. Barrett's will who were not privy to such [373] fraud ; and that it might be declared that the Defendants, A. E. Brydges, Sir S. E. Brydges, Quillinan, Brooks, Grane & Cooper, and the personal estate of Colonel Barrett, were jointly and severally liable in respect of such fraud to make good the £22,600 : the Plaintiffs being ready and willing, upon that sum being made good, to deal with the hereditaments and premises fraudulently purchased from Quillinan in such manner as the Court should think just ; and to deliver up the hereditaments and premises if the Court should think the Plaintiffs bound so to do to Quillinan : but if the Court should be of opinion that the Plaintiffs were not entitled to have the whole of the £22,600 made good, then that it might be declared that the Plaintiffs were entitled to have the difference between the £7596 or such other sum as was the real value of the hereditaments and premises at the time they were conveyed to the trustees by Quillinan, and the £22,600 made good.

Sir Samuel Egerton Brydges died in September 1837 : Lady Brydges, his widow, was his personal representative. Anthony Rokeby Brydges died in December following without having answered the bill. After his death Anthony Egerton Brydges proved Colonel Barrett's will. In September 1839 the Plaintiffs filed a bill of revivor and supplement against Lady Brydges, Anthony Egerton Brydges and

other parties. Anthony E. Brydges was made a party to that bill on account of his having proved Colonel Barratt's will.(1)

[374] Mr. Bethell, Mr. Chandless and Mr. Hubback, for the Plaintiffs, said, with respect to Mr. Grane, that he [375] was as well aware as Mr. Brooks was of the fraudulent nature of the transactions to which the bill related, and that he actively co-operated with Brooks in the management of them. With respect to Mr. Cooper, they said that though he might have no personal knowledge of the blacker parts of the transaction, yet he must have known that the sale to Quillinan was a mere pretence, and that the sale by him to the trustees was an imposition, and that the purchase-money was not paid to Quillinan as it would have been if he had been the real owner of the lands sold, but was applied, in part at least, in paying the firm in which he was a partner a *bonus* of one thousand guineas (in which he participated) for their concurrence in and management of the transaction : so that there was quite sufficient to fix him with legal notice of the fraud, though there might not be enough to affect his moral character or his honour. *Cholmondeley v. Clinton* (19 Ves. 272); *Willet v. Chambers* (Cowp. 814); *Rapp v. Latham* (2 Barn. & Ald. 795); *Stone v. Marsh* (6 Barn. & Cress. 551); *Moreton v. Hardern* (4 Barn. & Cress. 223).

[376] Mr. James Russell and Mr. Craig, for the Defendant Branfill.

(1) After the pleadings had been opened, it was objected, by the counsel for some of the Defendants, that the supplemental bill ought to have prayed that Anthony Egerton Brydges might answer the original as well as the supplemental bill : for that he had answered the former in the character of one of the trustees of the devised estates ; but that he had since proved Colonel Barrett's will, and thereby had acquired a new character, namely, that of Colonel Barrett's personal representative ; and that he ought to have answered the original bill in his new character, for otherwise the Court could not make a decree against Colonel Barrett's estate.

The Vice-Chancellor. A Defendant is a Defendant in every character which the statements of the bill shew that he bears. The original bill stated the death of Colonel Barrett, and that he appointed A. R. Brydges and A. E. Brydges his executors ; and that A. R. Brydges alone proved the will, and thereby became the sole legal personal representative of Colonel Barrett. But that is not true in point of law : for where there are two or more executors, probate by any one of them makes them all personal representatives, unless they renounce. So that A. E. Brydges was as much the personal representative of Colonel Barrett as Anthony Rokeby Brydges was.

Besides, A. E. Brydges, in his answer to the original bill, states that A. R. Brydges was dead, and that he himself was the sole surviving executor of Colonel Barrett, but had not proved the Colonel's will. So that A. E. Brydges has, in fact, answered the original bill in the character of Colonel Barrett's personal representative.

Another preliminary objection was that the personal representative of A. R. Brydges was a necessary party ; as the original bill alleged that he had possessed assets of Colonel Barrett.

The Plaintiff's counsel said that the supplemental bill stated that A. R. Brydges did not possess assets of Colonel Barrett ; and that, even if he did possess assets, his personal representative was merely a debtor to the estate, and that it was not necessary that a mere debtor should be a party.

The Vice-Chancellor. The original bill avers, positively, that A. R. Brydges did possess assets ; but the statement as to that fact in the supplemental bill is made only according to the Plaintiffs' information and belief : therefore I must take the averment in the original bill to be correct ; especially as the objection is made on behalf of Defendants who are sought to be charged, and, therefore, have a right to elect which of the two statements shall be taken as true. I think, therefore, that the Defendants have a right to have the personal representative of A. R. Brydges brought before the Court.

The cause stood over in order that A. R. Brydges's personal representative might be made a party : and, that having been done, the hearing of the cause was proceeded with.

Mr. Walker and Mr. Parry, for the Defendant Brooks.

Mr. G. Richards and Mr. Stinton, for the Defendant Grane, cited *Sainsbury v. Jones* (2 Beav. 462); *Bowles v. Stewart* (1 Scho. & Lef. 209); and *Arnot v. Biscoe* (1 Vez. 95).

THE SOLICITOR-GENERAL [Sir Wm. Follett] and Mr. Romilly, for the Defendant Cooper, said that Mr. Cooper denied, by his answer, that he had any participation in or even knowledge of the alleged fraud, and there was not the slightest evidence to shew that he was aware that there was any fraud or even irregularity in the transaction: that, with respect to him, the case must be considered as if he were on his trial for a conspiracy; and then there could be no doubt that he would be acquitted, as there would be nothing to shew that he had been guilty of penal misconduct: that the rule of law with respect to the liability of one partner for the acts of his co-partner was that, if a partner pledged the credit of the firm, if he entered into a contract in the name of the firm, the firm would be liable, although he intended to commit a fraud in the name of the firm: but that rule was founded on the principle that the party with whom the contract was made had trusted the firm, in consequence of the authority which one member of a firm has to pledge the character and credit of the other members; and that all the cases which had been cited for the Plaintiffs were decided on that principle (see Collyer on Partnership, 241): that, in [377] *Moreton v. Hardern*, the action was held to be sustainable against the firm, because the injury done to the Plaintiff arose from the *negligence* of one of the partners; but that if it had arisen from the wilful act of one of the partners, that partner alone would have been liable: that the Plaintiffs in the present case never had any dealings or transactions with the firm of Brooks, Grane & Cooper; to them the credit of the firm was never pledged: that the trustees were the parties who trusted the firm; but there was no privity of contract whatever between the Plaintiffs and the firm: that there was no case in which an innocent partner had been held liable for the fraud or wilful misconduct of another partner, where there was no privity of contract and no partnership transaction, but a wrongful act was done, which eventually proved injurious to a person who never had any dealings or transactions with the partnership. *Rez v. Manning* (Comyns' Rep. 616); *Longman v. Pole* (Dans. & Lloyd, 126).

Mr. Nevinson appeared for the Defendant Anthony Egerton Brydges.

Mr. Piggott appeared for the Defendant Quillinan.

Mr. Stuart and Mr. Elmsley appeared for the Defendant Mr. Holmes: and

Mr. Wakefield, Mr. Cooper, Mr. Hansard and Mr. Austen appeared for the other Defendants.

Mr. Bethell, in his reply, commented on several letters which had been written by Mr. Grane relating to the matters mentioned in the bill, and which, he contended, [378] proved that Mr. Grane was cognizant of the fraud from the beginning to the end.

In order to shew that Mr. Cooper had, at the least, legal knowledge of the fraud, he observed upon certain letters, and particularly on one dated in October 1829, which had been signed by Mr. Cooper during Mr. Brooks's absence from town, and also on entries in the books and accounts of the partnership relative to the transactions, and, especially on the item in the account mentioned in the statement of this case. He then referred to the case of *Marsh v. Keating* (2 Cl. & Finn. 250), when it was before the House of Lords; and said: In that case a forgery had been committed by Fauntleroy, one of the partners in the house of Marsh & Co.; and his co-partners were held to be liable, notwithstanding they had no knowledge of the transaction: because they had the means of knowledge, and there was no principle of law upon which they could succeed in protecting themselves from responsibility in a case wherein, if actual knowledge were necessary, they might have acquired it by using the ordinary diligence which their calling required. Now, in the present case, we have conclusive evidence, as against Mr. Cooper, that there were in his power the means of becoming acquainted with the whole of the transactions to which the bill relates.

In *Longman v. Pole* a fraudulent act was committed by one of the partners in a firm, and his innocent co-partners were held to be liable, notwithstanding (as was the case also in *Marsh v. Keating*) not a shilling of the money acquired by the fraud ever came into their hands. [379] Those cases therefore are stronger than the present: for Mr. Cooper participated in the benefit derived from the fraud.

In *Hern v. Nichols* (1 Salk. 289) Lord Holt held that a merchant was responsible (civilly, though not criminally), for a deceit practised by his factor on a third person. The principle of that case applies to the present; for one partner is the agent of another; and, if he commits a fraud in the course of employment by the partnership, the innocent partners are answerable for the consequences of that fraud. So in *Doe v. Martin* (4 T. R. 39) a principal was held to be responsible for the fraud of his agent, although he did not personally take any part in the fraud. *Lovell v. Hicks* (2 You. & Coll. 472) is another remarkable instance in which an innocent partner was held responsible for the fraud or misrepresentation of his co-partner, notwithstanding he did not participate in the money acquired by the fraud.

It was said by the Solicitor-General that Messrs. Brooks, Grane & Cooper were not responsible to the Plaintiffs; because they were employed, not by the Plaintiffs, that is, the *cestuis que trust*, but by their trustees: but it would be most extraordinary if a solicitor who had dealt fraudulently with trust money could escape from the consequences of the fraud in a Court of Equity by saying that the trustee and not the *cestui que trust* was his client. Messrs. Brooks, Grane & Cooper represented the trustees; and it was as much their duty as it was the duty of the trustees to protect the interest of the *cestuis que trust*: and, as they [380] have violated that duty, they, as well as the trustees, are responsible to the injured parties.

THE VICE-CHANCELLOR [Sir L. Shadwell].(1) The substantial question in this case is what ought to be done with respect to the £22,600 obtained out of Court in 1830.

The Act of Parliament passed on the 24th of June 1822 vested part of the devised estates of Mr. Barrett in the Defendants Branfill and Anthony Egerton Brydges, in trust to sell, and directed the purchase-mones to be paid into this Court, and that, after payment of expenses, the surplus should be laid out, under the direction of the Court, in the purchase of tenements of freehold and inheritance in the county of Kent, to be vested in Branfill and Brydges, or the trustees for the time being of Mr. Barrett's will, to the uses thereby declared. The Defendants Brooks and Grane were the solicitors who obtained the Act; and, from the time of its passing till the year 1825, they, and from the year 1825 they and their partner, the Defendant Cooper, acted as the solicitors of Colonel Barrett and the trustees, in all the numerous transactions that took place under the Act, of which the trustees must, in some degree at least, have been aware.

It appears that estates subject to mortgages were vested in Sir Samuel E. Bridges for life, with remainder in fee to Colonel Barrett. It is plain what the colonel's views were when the Act had passed. In his letter to Sir Samuel of the 26th July 1822, he says: "The plan is to sell, and, when the money is in the Accountant-General's hands, for you to take it, if you choose, for the smallest portion of land to be settled in lieu: which [381] can be done with the approbation of a Master; which will be managed by having as high a valuation as possible put upon any lands which you may choose to be so disposed of."

The substantial case stated in the bill appears to be this: A formal agreement was drawn up, dated the 28th of July 1829, between Sir Samuel and the colonel of the one part, and the Defendant Quillinan of the other part, whereby Sir Samuel and the colonel agreed to sell to Quillinan several parcels of land for several sums amounting together to £4596, and certain other lands for £3000; making together £7596. All these subjects of the agreement were, in July 1829, in mortgage. Of those to be sold for £4596, Messrs. Shepherd and Crozier were the first mortgagees; and, of those to be sold for £3000, Mrs. Whitby was the first mortgagee. On the 30th of July 1829 Westwood made an affidavit that the lands and tenements therein mentioned, being those agreed to be sold for £4596, were worth £13,885; and on the same day he made another affidavit that the lands therein mentioned, being those agreed to be sold for £3000, were worth £8715; the two sums of £13,885 and £8715 making together £22,600.

On the 8th of December 1829 a state of facts and proposal was carried in before Master Dowdeswell by the partnership of Brooks, Grane & Cooper, whereby the

(1) The above is taken from His Honor's written judgment.

trustees proposed to lay out £22,600, part of the trust monies arising under the Act, in the purchase from Quillinan of the lands and tenements mentioned in the schedule to the state of facts, being the same as were mentioned in the agreement and Westwood's affidavits; and, on the 19th of December, those affidavits [382] and also an affidavit sworn by Colonel Barrett, on the 17th of December, as to Westwood's competency to survey and value lands, were carried in before the Master, together also with three abstracts professing to be abstracts of Quillinan's title; and an affidavit sworn by Mr. Josiah Wathen, Messrs. Brooks & Co.'s clerk, on the same 19th of December. The abstracts were marked respectively A., B. and C. A. and C. related to those tenements of which Shepherd and Crozier were first mortgagees, and B. to those of which Mrs. Whitby was first mortgagee. Six of the deeds mentioned in abstract B. are the same as six mentioned in abstract A.; and seven deeds and a will mentioned in C. are the same as those mentioned in A.; and four of them are to be found in all the three abstracts; the conveyance to Quillinan being mentioned in all three, but not abstracted in the same way in all three.

What struck me upon reading these abstracts was this; that no one can with certainty infer, from what appears on the three abstracts of the conveyance to Quillinan, what the whole consideration was. In abstract B. the agreement of the 28th of July is recited as an agreement to purchase the inheritance of, *inter alia*, the lands and hereditaments thereafter secondly granted for £7596; and it then represents the conveyance as a conveyance whereby, *inter alia*, in consideration of £3000 certain lands were granted; but what the *alia* were, or what consideration affected them, or what lands were first granted, is not stated in abstract B. Abstract A. is in a different form from B., but in the same as C.; that is, both A. and C. recite the agreement as an agreement to purchase the lands and hereditaments thereafter first granted without stating the consideration; and both state the conveyance as a conveyance, *inter alia*, of certain lands for the considerations therein mentioned; but do not state what the considerations were.

It is quite consistent with what appears on the abstracts that there might have been some other consideration besides the £7596. If the deliberate purpose had been to conceal from the Master what the real consideration was, it is difficult to imagine what more effectual scheme, short of direct falsehood, could have been adopted than the making of the abstracts in the way in which we find them. The reasonable inference from what actually did take place is that the Master was not aware what was the whole consideration for the conveyance to Quillinan; whereas, if the conveyance to Quillinan had been but once fully abstracted, the Master would have had his attention plainly directed to the whole consideration apparent on the deed, and would, in all probability, have required an explanation. The simple truth, as far as the conveyance went, ought to have been stated clearly at least once. If it had been, then there would have been exemplified the force of what Mr. Brooks states in his letter to the colonel of the 24th July 1829: "The disproportion of prices between the buying and the selling being so very great as to attract attention when the title is examined, both now and on future occasions."

For the purpose of stating the whole conveyance to Quillinan fully and but once, either there should have been but one abstract comprising the three titles throughout; or if, as to their earlier part, they had been deduced in three abstracts, when they became blended, they should have been shewn in one abstract. I observe that Mr. Brooks, in his letter to the colonel, of [384] the 1st of January 1830, says: "I could not spare Mr. Wathen (meaning, I presume, Mr. Josiah Wathen), and no other person understands the thing, and 'tis better they should not;" and I can conceive that Mr. Josiah Wathen was employed as being the most able conveyancing clerk in the office; and he may have sincerely thought that to deduce the title by three abstracts was better than by one; and, that, in perusing the abstracts, he acted on his own judgment and without special directions from any one, which seems to be the result of his answer in chief to the 74th interrogatory, and his answer on cross-examination by Brooks. And I observe some slight inaccuracies in the abstracts; and it appears, on the depositions, that, at the time when Mr. Josiah Wathen made these abstracts, he was a very young man; and these circumstances do countenance the supposition that the abstracts were made without sufficient care, and without a design to mislead. And

it certainly is possible and probable that they were made without a design to mislead; but if, in fact, they tended to mislead, and did mislead, by a suppression of truth, though without design, this Court will consider them as fraudulently made, and deal accordingly with the transaction of which they form a part. The abstracts being marked A., B. and C., the probability is that the Master would first read abstract A. Why should it have been marked A. unless it was intended that it should be read first? The earliest and most numerous title-deeds are not in abstract A., but in abstract B. Therefore such priority as the letter A. indicates could not have been suggested by the deeds abstracted. But, as neither abstract A. nor abstract C. at all states the consideration of the conveyance to Quillinan, and abstract B. does in a certain manner state it, but not plainly or unequivocally, it seems to me that the read-[385]-ing of abstract A. first would tend to lull the Master's vigilance, and turn his attention from the whole consideration said to be given by Quillinan. This also may have been undesigned. But, if so, it is remarkable that the abstracts should not only be made but be marked in the manner they are; especially when the schedule of deeds annexed to the affidavit of the 19th December 1829 commences with the deeds in abstract B.; so that, with more propriety, abstract B. should have been marked A. and *vice versa*.

Then, by the affidavit sworn on the 19th of December 1829, it was stated that the abstracts contain "true and faithful abstracts of the deeds, muniments, and evidences of title mentioned in the schedule to the affidavit, so far as the same respectively relate to the lands comprised in the abstracts, and to which a title is hereby professed to be shewn." The indentures of lease and release, of the 29th and 30th of December 1829, being the conveyance to Quillinan, had been executed by Sir Samuel and the colonel, and they are introduced into the abstract in this way. In the margin is written 1829 without day or month, "originals produced and examined;" and at the end in each abstract the statement is, "duly executed and attested, and receipts for consideration money indorsed and witnessed." Mrs. Whitby is a most important party to those indentures: and Colonel D'Arcy, one of the attesting witnesses to her execution, has proved most distinctly with respect to the month and the day, though he made an obvious error as to the year, that she did not execute before the 29th of January 1830; and there is nothing to impugn his testimony. In that respect, therefore, the affidavit of the 19th December is untrue. It also appears from the copy of the [386] release that there was no receipt for any consideration indorsed. In that respect also the affidavit is untrue.

It is a fact that, on the 18th January 1830, the Master signed on each abstract a memorandum that he approved of the title; yet, on the 8th January 1830, a report approving of the proposed sale to the trustees and of Quillinan's title was procured from the Master. That could hardly be accurate, and it remains unexplained. I observe that Mr. Brooks, in his letter to Master Dowdeswell of the 5th of January 1830, says, "The Vice-Chancellor sits on Friday next: on which day or the next I hope, with your obliging assistance, to mention the matter." According to Colonel D'Arcy's evidence and the calendar, Friday was the 8th of January; and, in his letter of the 6th, Brooks says, "Under these circumstances, probably I may not be premature (as the times presses) in stating your opinion as in favour of the whole title." I conjecture that Mr. Brooks did allow himself to anticipate what had not happened, but did afterwards happen; and acting upon that anticipation did, somehow or other, procure the report of the 8th of January. On the same day he caused a petition to be presented in the names of Branfill and Brydges, the trustees of the Act; and on the 12th of January an order was made on that petition, confirming the report of the 8th, and directing that the Master should settle a conveyance, and that certain Exchequer bills should be sold, and that certain costs should be paid, and that, upon the Master's certifying the due execution of the conveyance, payment should be made to Quillinan. On the 15th of January 1830 a report was procured that the Master had approved of the conveyance. It is remarkable that the draft conveyance from Quilli-[387]-nan was approved of by counsel on the 15th January; and, in the spirit of anticipation which seems to have pervaded the whole of this part of the transaction, it probably was assumed that the Master would approve of what counsel had approved of, and that therefore the report might properly be obtained, as, in fact, it was on the 15th; though it appears by the Master's signature on the fair copy of the draft that

he approved of it on the 21st January : so that the report of the Master's approval of the conveyance was dated three days before his approval of the title, and six days before his approval of the draft of the conveyance.

On the 21st of January a petition was presented in the names of the trustees of the Act, stating with glaring inaccuracy, as appears by the office copy of the order, that the Master, by his report of the 23d of January, that is, two days after the petition was presented, had certified that the conveyances had been duly executed, and praying an order for payment to Quillinan. This is remarkable ; because, on the 23d of January, Brooks wrote to the colonel as follows :—"We can bespeak nothing at the Accountant-General's till he (meaning the Master) has certified." This shews that Brooks on the 23d clearly knew that the Master had not certified. However, upon that last petition on the 25th of January, counsel attending for the Petitioners and Colonel Barrett, an order was made as prayed. On the 26th of January the Master reported that the deeds of conveyance had been duly executed by all proper parties : which report was founded upon an affidavit sworn the same day.

The release was dated the 21st of January, and was executed by Quillinan, Colonel Barrett, and both the [388] trustees of the Act : all of whom by executing the conveyance adopted the transaction. Under a power of attorney from Quillinan to Brooks, dated the 28th of January 1830, Brooks received from the Accountant-General on the 28th of January £18,564, 1s. 10d., and on the 4th of February £4035, 18s. 2d., making together £22,600.

All this machinery of agreement, affidavits, abstracts and petitions, as well as the conveyances to Quillinan, and from him to the trustees of the Act, emanated from the office of Brooks, Grane & Cooper, with more or less of privity on the part of Sir Samuel Brydges, Colonel Barrett, Quillinan and the two trustees. The release from Quillinan to the trustees states the reports of the 8th and 15th January and the order of the 12th, and professes to be made in pursuance of that order, and of the report dated the 15th.

Now, upon this state of things, putting out of view all mere inaccuracies and irregularities, and all suspicion of design where none may in fact have existed, is it not plain that the Master and the Court were deceived by positive misrepresentation ? Unless the Master had been induced to believe that Mrs. Whithy had executed the indenture of 30th December 1829 he could not have approved of the title.

Now, considering the vast quantity of property confided to the care of the Court, it is the bounden duty of the Court to require that the statements upon which it acts shall be strictly true. I do not here enter into the question how far the misrepresentation was wilful. I am willing to suppose that Mr. Josiah Wathen, being then a very young man, and believing that all was right or [389] would be right, and that it was his duty to expedite the matter in hand, prepared the abstracts and made his affidavit in the manner I have stated without sufficient reflection. But the Court was deceived by false representation : and, on that ground, it is my clear opinion that all the parties to the transaction, Sir Samuel Brydges, Colonel Barrett, Quillinan, the two trustees and Messrs. Brooks, Grane & Cooper, became answerable to the Court for at least so much of the £22,600 as was not applied to lawful purposes.

Upon general principles with respect to liability, I cannot distinguish Mr. Cooper or Mr. Grane from Mr. Brooks. They were all of them solicitors and officers of the Court ; and the Court cannot regard any division of labour as among themselves, but must look upon the act of the partnership towards the Court as the act of all and every of them. The safety of the public requires this. Of the £22,600, £7596 was paid to or for the benefit of the mortgagees ; which was right at all events. The remainder was applied to several purposes for the benefit of the parties to the transaction.

Then the great question in the cause arises : whether the £22,600 was fairly obtained from the Court, or, in other words, whether the tenements sold to the trustees were really worth £22,600. The Plaintiffs allege that the real value did not amount to £7596, Brooks, by his answer, says they greatly exceeded £7596. Branfill, by his answer, leaves it to be inferred that they were worth £10,514, 10s. [His Honor here stated the valuations of the surveyors who had been examined in the cause. They differed, materially, in their estimates.] This is not very satisfactory

evidence ; but it induces [390] me to think that £22,600 was by no means the fair value of the lands conveyed to the trustees of the Act ; and I have not the slightest doubt, if it shall turn out that the purchase was not worth £22,600, that a fraud was practised upon the Court, and that Sir Samuel Brydges, the colonel, and Brooks contrived it, and that they became responsible for it ; that is, so far as the value shall turn out to be less than £22,600.

Mr. Quillinan took an active part in the transaction. It seems, from what he states in his answer, that he must have known that he was taking on himself a false character. I do not impute to him any knowledge of the fraud, or any wish to defraud ; he acted thoughtlessly out of kindness to his brother-in-law. But without his concurrence the transaction could not have been managed as it was ; therefore he is responsible.

The trustees of the Act, though innocent of fraud, are responsible ; for it was their duty to have ascertained what was going on under their names by their permission. Instead of which, it does not appear that they ever made any inquiry or exercised any caution, but took for granted that all was right, when the least inquiry would have shewn that all was wrong.

For the reasons before assigned, I think Mr. Grane and Mr. Cooper are personally responsible. But, upon reading the whole of the correspondence, and attending to what is stated in the answers and in the evidence as to the course of business pursued in their office, I do not think that it is at all established that Mr. Grane or Mr. Cooper (though they must have had some knowledge that a transaction was going on) had the least knowledge or suspicion that it was a fraudulent trans-[391]-action of the circumstances that constituted the fraud until long after it was completed. So that I consider the moral characters of those two gentlemen to be unaffected by the transaction.

With respect to Mr. Brooks, the correspondence shews that he entered unwillingly into the transaction. He seems to have allowed himself to be overborne against his better judgment by the importunity of his client, Colonel Barrett, and the view of his distressed circumstances. His letters are full of affectionate regard towards Colonel Barrett, and shew that he preferred the Colonel's views to his own.

The substantial ground for relief is the fraud in the excessive price. The bill asks, alternatively, to set aside the transaction altogether, or to have relief by restitution of the excess of the price above the value. It seems to me considerable difficulty would arise from setting aside the whole transaction ; but the relief should rather be to have that money made good to the trust estate which was improperly taken out of Court. To a certain extent, the decree must be in the nature of an inquiry and hypothetical ; because I have not sufficient evidence to shew what was the proper price to have been paid for the lands purchased. I think, therefore, that all I can do at present is to refer it to Master Dowdeswell to inquire what, on the 8th day of January 1830, was a fit and proper price to have been given by the Defendants, Branfill and Anthony Egerton Brydges, for the purchase of the lands sold and conveyed to them for the sum of £22,600 ; and in case it shall appear that a less sum than £22,600 was a fit and proper price to have been given, then I declare that the Defendants, Branfill, Anthony Egerton Brydges, [392] Quillinan, Brooks, Grane & Cooper, and the personal assets of Sir Samuel Bridges and Colonel Barrett, are jointly and severally liable to make good the loss to the trust estate occasioned by paying the sum of £22,600 instead of the proper price.

[392] *In re THOMSON.* Nov. 12, 1841.

Mortgagor and Mortgagee. *Heir. Construction.* *Stat. 11 Geo. 4 and 1 Will. 4, s. 8, and 4 & 5 Will. 4, c. 23, s. 2.*

The 8th sect. of 11 Geo. 4 and 1 Will. 4, as expounded by the 2d sect. of 4 & 5 Will. 4, c. 23, applies to the case of the heir of a mortgagee being out of the jurisdiction of the Court.

This was a petition praying that some person might be appointed by the Court to

convey a mortgaged estate, in the place of the heir of the mortgagee, who was out of the jurisdiction of the Court. (See 11 Geo. 4 and 1 Will. 4, c. 60, s. 8.)

Mr. Younge appeared in support of the petition, and said that the heir was known, but was out of the jurisdiction; and that the question was whether the case was within 11th Geo. 4 and 1 Will. 4, c. 60, s. 8. He referred to *Ex parte Whitton* (1 Keen, 278), and to 4th & 5th Will. 4, c. 23, s. 2, which enacts that: "Where any person seised of any land upon any trust or by way of mortgage dies without an heir, it shall be lawful for the Court of Chancery to appoint a person to convey such land, in like manner as is provided by the Act of the 11th year of King George the 4th and the 1st year of His present Majesty, intituled an Act for amending the laws respecting conveyances and transfers of estates and funds vested in trustees and mortgagees, and for enabling Courts of Equity to give effect to their decrees and [393] orders in certain cases, in case such trustee or mortgagee had left an heir, and it was not known who was such heir; and such conveyance shall be as effectual as if there was such heir."

THE VICE-CHANCELLOR [Sir L. Shadwell]. The 8th section of 11 Geo. 4 and 1 Will. 4 applies to a case where a person seised of land is out of the jurisdiction of the Court; and, according to Lord Langdale's decision in *Ex parte Whitton*, that section does, by the operation of 4th & 5th Will. 4, c. 23, s. 2, apply to the case of a mortgagee. Now here we have a mortgagee who is out of the jurisdiction; and according to the statutory construction which the 4th & 5th Will. 4, c. 23, has put upon the 8th section of 11 Geo. 4 and 1 Will. 4, c. 60, the case is within that section; and, therefore, you may take your order.(1)

[394] PYM v. LOCKYER. Nov. 12, 1841.

[S. C. 11 L. J. Ch. 8. See *In re Carew* [1896], 1 Ch. 533; [1896], 2 Ch. 311.]

Alienation (Restraint of). Forfeiture. Vesting Order. Insolvent.

The dividends of a fund were directed to be paid to A. for life; but if he assigned or otherwise disposed of them, they were to go over. A. being in prison, and charged in execution for debt, the creditor obtained an order under 1 & 2 Vict. c. 110, s. 36, vesting all his property in the provisional assignee of the Insolvent Debtors Court. Held, that the dividends of the fund did not go over, but vested in the assignee.

The testator in this cause, by his will, dated the 11th of July 1823, directed the trustees to invest £5000 in the funds, and after his grandson, Edmund Lockyer Pym, should have attained 21, to pay the dividends: "Into the hands only of the said E. L. Pym during his life, or until such forfeiture by him as hereinafter mentioned, and whose receipts alone shall be required as good and necessary discharges for the same: hereby willing that the said dividends and interest or any part thereof, shall not be assignable or assigned by him or otherwise disposed of by him in any manner by anticipation, on pain of forfeiture to go as hereinafter mentioned; meaning the said dividends and interest to be for his sole and personal use and benefit only: and from and after the death of the said E. L. Pym, or such forfeiture by him as aforesaid, and subject to the trusts aforesaid, then upon trust that my said trustees shall stand possessed of the said stocks, funds and securities, and the interest and dividends thereof, in trust for the use and benefit of all and every the children of the said E. L. Pym."

In September 1839, E. L. Pym being in prison and charged in execution for debt, the creditor at whose suit he had been committed obtained an order under the 36th sect. of 1 & 2 Vict. c. 110 (for abolishing arrest on mesne process, &c.), vesting his real and personal estate and effects in the provisional assignee of the Insolvent Debtors Court.

(1) See *In re Stanley*, ante, vol. vii. p. 170; and *In re Williams*, ante, vol. ix. p. 642.

[395] The question was whether Pym's interest under the will was forfeited, or whether it was vested in the assignee.

Mr. Bethell and Mr. West appeared for the trustees of the will.

Mr. Wakefield and Mr. Bacon, for the assignee, said that the language of the will applied, not to a hostile and compulsory process by means of which E. L. Pym might be deprived of the provision thereby made for him, but to an assignment or disposition of it by his own voluntary act: that, as the law stood at the time of the testator's death, the taking of the benefit of the Insolvent Debtors Act must be the voluntary act of the prisoner; but, under the 36th sect. of the late Act, the creditor, at whose suit he was in custody, might *compel* him, after he had been in gaol for 21 days, to take the benefit of the Act: consequently, the vesting order, although it had deprived Pym of the personal use and benefit of the provision, had not caused a forfeiture of it. They cited *Lear v. Leggett* (*ante*, vol. ii. p. 479) as applying in principal to the present case; because the obtaining of the vesting order in the present case was as much an act done *in invitum* as the taking out of the commission of bankruptcy was in the case cited.

Mr. G. Richards and Mr. Chandless, for the children of E. L. Pym, relied on the language of the will, and said that the Court would disappoint the clear intention of the testator if it held that the dividends of the stock were payable to the assignee; for then the assignee's, and not Pym's, receipts would be required as [396] good and necessary discharges for the same: that it was impossible for anyone to express, more strongly than the testator had done, that the dividends should be paid to his grandson, for the sole and personal benefit of his grandson; and that if, from any cause whatever, they could not be so paid any longer, then that they should go over to the children of his grandson: that, in *Lear v. Leggett*, the words of the proviso were not nearly so strong as those used by the testator in this case; for there was no direction that the receipts of the legatee alone should be required as good and necessary discharges, nor was it declared that the provision should be for the sole and personal use and benefit only of the legatee.

In *Shee v. Hale* (13 Ves. 404) the annuitant, who was restrained from alienation, took the benefit of the Insolvent Debtors Act, which was then in force, and it was held that the annuity did not vest in his assignee, but fell into the residue. The language of the Master of the Rolls, in giving judgment in that case, is material to shew that it is the intention of the testator that is to govern in cases like the present. The case of *Cooper v. Wyatt* (5 Madd. 482), which your Honor followed when you decided *Lear v. Leggett*, is very strong in favour of our clients. The words of the will in that case corresponded very nearly with the words of the will in this case. There the legatee became bankrupt, and it was held that his interest did not vest in his assignees, but ceased for the benefit of his children.

At the time when the will was made and at the testator's death, the old Insolvent Debtors Act was in force; [397] and the will must be construed with reference to the law as it then existed: and as, if Pym had taken the benefit of the former Act, the trust for him would have ceased, and the trust for his children have taken effect, the Court must hold the same consequence to follow from his taking the benefit of the present Act; otherwise, it would construe the will according to an *ex post facto* law.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am clearly of opinion that the assignee of Pym is entitled to the interest of the fund.

This case is quite unlike that of *Cooper v. Wyatt*; for there the trustees were directed to pay the overplus of the rents, issues and profits into the hands of the testator's nephew, *but not to his assignees*. Here there is no such direction, but the trust is to pay the dividends "into the hands only of E. L. Pym during his life, or until such forfeiture by him as hereinafter mentioned, and whose receipts alone shall be required as good and necessary discharges for the same: hereby willing that the said dividends and interest, or any part thereof, shall not be assignable or assigned by him, the said E. L. Pym, or otherwise disposed of by him in any manner by anticipation, on pain of forfeiture to go as hereinafter mentioned; meaning the said dividends and interest to be for his sole and personal use and benefit only."

Then what are the facts of this case? No voluntary act has been done by E. L. Pym by which his interest in the fund has become forfeited; but, under the provisions of a recent Act of Parliament (which I admit the testator could not foresee, and, therefore, could not pro-[398]-vide against), Pym's property has been taken from him by operation of law and without his concurrence, and his assignee has become entitled to it.

[398] JOLLIFFE v. HECTOR. Nov. 15, 1841.

Principal and Agent. Account. Just Allowances. Solicitor and Client.

In a suit by a principal against his steward and agent, the decree, in conformity to the prayer of the bill, directed an account to be taken of rents, profits and timber-money received by the Defendant on the Plaintiff's account; and also directed the Master, in taking the accounts, to make to the parties all just allowances. The Defendant was a solicitor, and had acted as such for the Plaintiff during his stewardship; and bills of costs were due to him from the Plaintiff. The Master, at the Plaintiff's request, taxed the bills, and, in taking the accounts under the decree, included the reduced amounts of them amongst the just allowances to which the Defendant was entitled. The Plaintiff excepted to the report on that account: and the Court allowed the exceptions.

The Plaintiff, a gentleman of landed property, had employed the Defendant to act as his agent in the management of his estates. The bill prayed that an account might be taken of the sums which the Defendant had received as such agent, and that the Defendant might be decreed to deliver up to the Plaintiff all deeds, documents papers and writings in his possession or power, which belonged to the Plaintiff. The decree directed the accounts to be taken, and the Master to make to the parties all *just allowances*.

The Defendant was a solicitor, and had been employed by the Plaintiff in that capacity during the period that he had acted as the Plaintiff's agent: and, several bills of costs having become due to him from the Plaintiff, the Master, on the application of the Plaintiff's solicitor, referred those bills to a Clerk in Court for taxation; and, in taking the accounts directed by the decree, he included the reduced amounts of the [399] bills amongst the just allowances to be made to the Defendant. The Plaintiff excepted to the report, because the Master had allowed the Defendant the reduced amounts of his bills.

Mr. G. Richards and Mr. Parry, in support of the exceptions.

Mr. Bethell and Mr. Briggs, in support of the report, said that if a client applied to have his solicitor's bills taxed he undertook to pay them; and that the Plaintiff could not get his deeds, &c., out of the hands of the Defendant until he had paid his bills.

THE VICE-CHANCELLOR [Sir L. Shadwell], after referring to the pleadings and decree, said: The bill states that the Defendant did act as the Plaintiff's solicitor; but I do not see either in the bill or in the answer any statement that any bills of costs were due from the Plaintiff to the Defendant. The bill is framed for an account of the rents and profits of the Plaintiff's estates, and of the monies produced by the sale of timber on those estates which had been received by the Defendant: and the Defendant does not, by his answer, make any claim in respect of bills of costs: there is no passage in the answer to that effect. The decree directs the Master to take an account of the rents, profits and timber-money received by the Defendant: but it does not order the Master to tax any bills of costs. Therefore, under the direction to make the Defendant just allowances, it was not competent to the Master to tax the Defendant's bills, and to allow him the amounts.

Consequently I cannot allow the report to stand.

[400] In the Matter of 3 & 4 VICT. c. 55 (To Enable the Owners of Settled Estates to Defray the Expense of Draining the Same by Way of Mortgage). *Ex parte* DERING. Nov. 19, 1841.

Petition, Service of. Stat. 3 & 4 Vict. c. 55.

A petition presented under 3 & 4 Vict. c. 55, by a tenant for life of settled estates for leave to drain the estates, ordered to be served on the trustees to preserve contingent remainders, the person beneficially entitled to the first vested estate of inheritance being an infant.

The Act of Parliament above mentioned empowers any tenant for life or for a term determinable upon his or her life under any will, settlement or other like disposition, entitled in possession, at law or in equity, to any lands in England or Ireland, or the guardian or guardians of any infant, on the behalf of such infant so entitled as aforesaid, to apply by petition to the Court of Chancery or Exchequer in England or Ireland for leave to make any permanent improvements in the lands to which he or she shall be so entitled, by draining the same in a permanent manner; sect. 1: Provided that a copy of every such petition shall be served, 21 days at the least before the hearing thereof, upon the person or persons beneficially entitled at law or in equity to the first vested estate of freehold of inheritance in remainder after the estate of the tenant for life; but, if any such persons shall be of unsound mind or under the age of 21 years, or under any other legal disability, or beyond the limits of the United Kingdom, then a copy of such petition shall be served on his, her or their behalf, upon such person or persons respectively as the Court of Chancery or Exchequer to which the petition shall be preferred shall appoint for that purpose; sect. 2: And when the improvements have been made and sanctioned by the Court, the Master may authorize the tenant for life, &c., to charge the estates [401] with the payment, to any person willing to advance the same, of the amount of the sums expended, together with interest at five per cent.: sect. 4.

Sir Edward Dering, the tenant for life of certain settled estates, in which his eldest son, an infant, was entitled to the first vested estate of freehold of inheritance in remainder, having presented a petition under the Act,

Mr. Bloxam, on his behalf, applied to the Court to appoint a person on whom the petition might be served on the infant's behalf.

THE VICE-CHANCELLOR [Sir L Shadwell] directed the petition to be served on the trustees of the estates to preserve contingent remainders.

[402] HANNAH MARIA TRULOCK *v.* JOHN ROBEY. Nov. 19, 1841.

[See *Richardson v. Younge*, 1870, L. R. 10 Eq. 278. S. C. on Bill of Review, 15 Sim. 265, 2 Ph. 395; 41 E. R. 995, which decision was questioned in *Green v. Jenkins*, 1860, 6 Jur. (N. S.) 515.]

Statute of Limitations, 3 & 4 Will. 4, c. 27. Acknowledgment. Mortgagor and Mortgagee. Equity of Redemption. Agent.

A mortgagee in possession of lands at Hendred having received from the grandfather of the infant heir of the mortgagee a letter, the contents of which did not appear, wrote in answer as follows:—"Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you; which I am very willing to settle if your granddaughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. The difference is not worth much. I shall hear from your granddaughter about the business." Held, that the last-mentioned letter was an acknowledgment of the heir's right to redeem the mortgage, and that, when she came of age, she was

entitled to consider her grandfather as having acted as her agent, and, consequently, that she was entitled to redeem the mortgage at any time within 20 years after the letter was written.

In December 1767 Richard Hutchins, the Plaintiff's great-grandfather, made a mortgage in fee of a copyhold estate, held of the manor of East Hendred in Berkshire. In October 1774 the mortgage was transferred to John Robey the elder; and, soon afterwards, he was admitted to and entered into possession of the mortgaged premises, and continued in possession of them until his death.

Hutchins, the mortgagor, died in 1776; and the equity of redemption of the mortgaged premises descended to his three daughters, Ellen, Hannah and Mary. Ellen afterwards died intestate and without issue, leaving her sisters, Mary and Hannah, her customary co-heirs. In October 1804 Hannah sold and surrendered her moiety of the equity of redemption to John Robey the elder, in fee. Mary married John Trulock the elder, and died in 1778, leaving her son, John Trulock the younger, her customary heir. John Trulock the younger died in 1811, leaving the Plaintiff, who was then about four years old, his only child and customary heir. In December 1837 John Trulock the elder died.

[403] John Robey the elder died some time before the 31st of October 1817; and, on or about that day, the Defendant was admitted to the mortgaged premises either as the devisee or heir of his father; and he then entered into and had ever since continued in the possession of the mortgaged premises.

The bill was filed on the 9th of May 1838, praying, amongst other things, that the Plaintiff might be declared to be entitled to redeem one moiety of the mortgaged premises. It charged that the Defendant, in a letter written by him to the Plaintiff's grandfather, in or about the month of November 1821, in reply to a letter from the Plaintiff's grandfather, admitted the Plaintiff's title to the equity of redemption in a moiety of the mortgaged premises, and stated that he was willing to settle accounts as to the mortgaged premises when the Plaintiff should attain her full age. The letter alluded to in the above charge, as containing an admission of the Plaintiff's title, was dated, "Hendred, 30th of November 1821," and was as follows:—"Sir,—Having received a letter dated the 17th of November, after a week's turn round the country on expense, I think you might send letter with less expense. Concerning the business at Hendred, which you know nearly as well as myself, as there has been nothing kept from you: which I am very willing to settle if your granddaughter is of age. I never told you any otherways; as I have been informed she is the heiress of what there is. As for Chancery, I think there is no good there. The difference is not worth much. I shall hear from your granddaughter about the business.—J. Robey."

The question at the hearing of the cause was whether that letter prevented the Plaintiff's right to redeem [404] from being barred by the Statute of Limitations, 3 & 4 Will. 4, c. 27; that is, whether it was "an acknowledgment of the title of the mortgagor or of his right of redemption, given to the *agent* of the *mortgagor* or some person claiming his estate, in writing, signed by the mortgagee or the person claiming through him:" sect. 28.

The direction and contents of the letter and the signature to it were proved to be in the handwriting of the Defendant; and J. Trulock's daughter deposed that she received it from the East Hendred carrier, for her father, who was then confined for debt in Reading gaol.

Mr. Stuart and Mr. Koe, for the Plaintiff, contended that the letter contained a sufficient acknowledgment of the Plaintiff's right to redeem the mortgaged premises, and referred to the judgment in *Reeks v. Postlethwaite* (Cooper's C. C. 164).

Mr. Wakefield and Mr. Randell, for the Defendant, said, first, that the language of the letter was so vague that it did not distinctly appear to have any reference to the mortgaged premises; and, secondly, that there was no evidence, nor was it even alleged by the bill that John Trulock the elder was the agent of the Plaintiff, or even that he had assumed to act as such.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I think that the Plaintiff has a right to redeem the mortgaged property.

The question is what is the fair construction of the letter of the 30th of November 1821, and what effect [405] ought to be given to it, having regard to the Statute of Limitations? Now the language of the statute is: "That when a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, but within 20 years next after the time at which the mortgagee obtained such possession or receipt, unless, in the meantime, an acknowledgment of the title of the mortgagor, or of his right of redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person, in writing signed by the mortgagee or the person claiming through him; and, in such case, no such suit shall be brought but within 20 years next after the time at which such acknowledgment or the last of such acknowledgments, if more than one, was given." Now, John Robey the elder was in possession of the estate, and had been in possession of it ever since 1774. In 1804 he purchased one moiety of the equity of redemption. Then, with respect to the other moiety, the case was this. Mary, who was the owner of the other moiety of the equity of redemption when it first became divided into moieties died in 1778, leaving a son. He died in 1811 and left the Plaintiff his heir. The Plaintiff was born in 1807, and, consequently, she was only four years old when her father died. John Trulock, the husband of Mary and the grandfather of the Plaintiff, survived his wife, and became entitled to her moiety of the estate, subject to the mortgage, as tenant by the curtesy. He died in December 1837. The grandfather, being entitled as tenant by the curtesy, and the Plaintiff being the owner of one moiety of the equity of redemption, the grandfather wrote some letter to the Defendant which does not appear. The Defendant [406] wrote in answer the letter of the 30th of November 1821. But, first, I must observe that the mortgaged estate was situate in the parish of Hendred. In that letter he says: "Concerning the business at Hendred, which you know nearly as well as myself." So that the writer assumes that the person whom he was addressing knew nearly as much of the matter as he did himself. Then he says, "which I am very willing to settle if your granddaughter is of age." Now what was the matter which he was willing to settle? There could be but one matter to settle, namely, that which might arise in consequence of the granddaughter being entitled to a moiety of the equity of redemption. He then says, "I never told you any otherways; as I have been informed she is the heiress of what there is." That is an admission that the granddaughter was the heiress of what there was, that is, of that portion of the equity of redemption which had not been purchased by John Robey the elder.

It appears to me that the Court, being in possession of the circumstances of the case, must construe the letter in the way in which the writer intended it to be construed by the person to whom it was addressed; and I think that it is an acknowledgment by the Defendant that the Plaintiff, Hannah Maria Trulock, was entitled to one moiety of the equity of redemption; it is not capable of any other construction.

Then it was objected that, as the letter was not written either to the granddaughter or to a person authorized to act as her agent, it was not such a written acknowledgment as the statute requires. The question, however, is whether the party who wrote the letter did not treat the party to whom it was written as the [407] agent of the child. She was at that time an infant, and the writer made the statements in his letter in answer to the grandfather's letter upon the infant's business; and when he said, "I am very willing to settle if your granddaughter is of age," can it be supposed that that was not meant to be a statement of which the granddaughter might avail herself when she came of age? It would be a forced construction to say that this was not an acknowledgment within the statute, or that it was not given to the agent of the person claiming the estate of the mortgagor. It is not necessary to make a person an agent, that he should have an actual authority to act. It is quite sufficient that the grandfather acted as the agent of his grandchild; and that she, when she came of age, adopted what he had done on her behalf. The letter, too, treats the grandfather as agent; it assumes that he had full knowledge of all the circumstances relating to the property, and, in my opinion, the expressions in it do, in

effect, admit the right in dispute. Consequently, I shall make a decree to redeem in the usual form where the Defendant is a mortgagee in possession.

[408] COLLEY v. CANDLER. Nov. 25, Dec. 9, 1841.

Contempt. Practice. Process. Construction of 11 Geo. 4 and 1 Will. 4, c. 36, rule 5.

The 5th rule of 11 Geo. 4 and 1 Will. 4, c. 36, directs that where a Defendant is in custody for a contempt in not answering, the Plaintiff shall bring him by *habeas corpus* to the Bar of the Court within a certain specified time, and that, in case he shall not be brought up within that time, he shall be discharged out of custody. A *habeas corpus* for bringing up a Defendant expired before he was brought up, but he was brought up within the time prescribed, and was then committed to the Fleet. Held, that the committal was regular.

The Defendant being in custody under an attachment for want of answer, a *habeas corpus*, returnable on the 2d of November 1841, was issued for bringing him to the Bar of the Court. On the 4th of November he was brought to the Bar of the Court, and was then turned over to the Fleet.

Mr. Fisher now moved to discharge the Defendant out of custody, on the ground that he had not been brought to the Bar of the Court until after the *habeas corpus* had expired, and consequently had not been brought there by *habeas corpus*, as required by 11th Geo. 4 and 1 Will. 4, c. 36, rule 5, which directs that, if the Defendant under process of contempt for not appearing or not answering be in actual custody, and shall not have been sooner brought to the Bar of the Court under process to answer his contempt, the Plaintiff, if the contempt be not sooner cleared, shall bring the Defendant by an *habeas corpus* to the Bar of the Court within 30 days from the time of his being actually in custody or detained (being already in custody) upon process of contempt; and if the last day of such 30 days shall happen out of term, then within the first four days of the ensuing term: and, in case any such Defendant shall not be brought to the Bar of the Court within the respective times aforesaid, the sheriff, gaoler, &c., [409] in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of the contempt. *Greening v. Greening* (1 Beav. 121).

Mr. Cooper, *contra*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The rule says that in case any Defendant shall not be brought to the Bar of the Court within the respective times aforesaid, he shall be discharged: it does not say that in case he shall not be brought up by *habeas corpus* he shall be discharged; but it merely prescribes the time within which he shall be brought up, which, in this case, was within the four first days of Michaelmas term; and, as he was brought up within that time, the order sought to be discharged was right.

Motion refused.

[410] HERRING v. CLOBERY. Dec. 4, 1841.

Contempt. Decree (staying proceedings under).

A Plaintiff, whose bill had been dismissed with costs at the hearing, appealed from the decree before any steps had been taken to compel him to pay the costs; the Court, however, refused an application made by him to stay the execution of the decree.

If a party who has appealed from a decree wishes to stay the execution of it, he ought to apply to the Court as speedily as possible.

A party against whom a decree had been made with costs appealed from it, and afterwards moved to stay the execution of it. The Court allowed the motion to proceed, notwithstanding the party was in contempt for non-payment of the costs.

The Court refused to discharge a Plaintiff who was in custody for a contempt in not

paying costs which he had been decreed to pay, notwithstanding he had appealed from the decree, and deposed that it was of the greatest importance to him, and to an infant Co-plaintiff (his daughter), that he should have his personal liberty to enable him to prosecute the appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct of it.

By the decree made at the hearing of this cause, on the 15th of December 1840, the bill was dismissed with costs. On the 13th of April 1841 the Plaintiff presented a petition of appeal from the decree. On the 25th of that month the Defendants' bills of costs were left with the Master for taxation, and on the 10th of May those bills were taxed at £846. On the 5th of June the Plaintiff was taken on an attachment for non-payment of the £846, and on the 12th he was brought to the Bar of the Court and turned over to the Fleet. A few days afterwards attachments were left with the Warden of the Fleet for costs due from the Plaintiff under orders in the cause.

On the 29th of November the Plaintiff served a notice of motion that he might be discharged out of the custody of the Warden of the Fleet, and that process of contempt upon the several attachments issued against him at the instance of the Defendants for non-payment of costs might be stayed until after his petition of appeal should have been heard.

[411] The motion was supported by an affidavit made by the Plaintiff, stating that it was of the utmost importance to him and to the interests of his daughter, the infant Co-plaintiff in the cause, that he should have his personal liberty to enable him to prosecute his appeal, and to instruct his counsel and solicitor, and otherwise to assist in the conduct thereof.

Mr. G. Richards and Mr. Wright, for the Defendants, said that, whatever might be the grounds on which the Plaintiff sought to be discharged without clearing his contempt in not paying the costs of the suit, he could not be heard at all until the prior costs had been paid.

Mr. Romilly and Mr. Loftus Wigram, for the Plaintiff, submitted to the objection; and the costs incurred prior to the decree were paid in Court by some person on the Plaintiff's behalf.

Mr. Romilly and Mr. L. Wigram then proceeded with their motion. They cited *King v. Bryant* (3 Myl. & Craig, 191), *Wilson v. Bates* (*Ibid.* 197), *Ricketts v. Mornington* (*ante*, vol. vii. p. 200), *Meade v. Norbury* (4 Price, 322), and *Gwynn v. Lethbridge* (14 Ves. 585). But they relied principally upon Lord Eldon's judgment in *Roberts v. Totty* (19 Ves. 446), where his Lordship says: "In a case that occurred yesterday, on a motion to discharge proceedings for irregularity, the appeal was lodged *before any proceeding for the costs had been commenced*; and the distinction taken by Mr. Newland, between appeals presented *before* and after a step taken for the costs, appeared to me to be very sensible. There would be danger in going to this extent, that an appeal lodged [412] *after* a party had begun to pursue his remedies for costs, perhaps with the very object of preventing the payment of those costs, should stay the proceeding for them." They added that the Plaintiff, in case the Court should think proper to discharge him, was ready to give security for surrendering himself, if his petition of appeal should be dismissed.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot grant this application; for, in the first place, it is not a rule of this Court to interfere, as a matter of course, to stay the proceedings under a decree, merely because it is appealed from; and, in the next place, it is by no means the practice of the Court to interpose in order to stay a proceeding the only object of which is to compel the payment of costs. Here the bill was dismissed with costs; so that all that the party who now asks for the interference of the Court has to do is to pay the costs.

The 46th General Order of 1828 directs that every application to stay proceedings upon any decree or order which is appealed from shall be made first to the Judge who pronounced the decree or order. I always considered the essence of that General Order to be that the Judge who pronounced the decree or order was the person best able to determine whether the party who was dissatisfied with it had a fair ground for appealing from it. If the Judge should see that the case involved important and

difficult questions, and that it was probable that, if the application were not granted, the thing which formed the subject of the decree would be placed in jeopardy and be irrecoverable in case the decree should be reversed, then it would be his duty to interfere in order to stay the execution of the decree. But [413] where a decree has been appealed from, and no ground is stated for staying the execution of it, except that it may be reversed, the Court will not interfere.

Now, with respect to this particular cause. It was argued at considerable length and with great ability; but there was no difficulty about the law of the case. It is true that I reserved my judgment upon it; but I did so because the parties, by what they had done amongst themselves, had involved the matter in great perplexity; and, therefore, it was necessary for me, before I could determine what ought to be done, to read, very deliberately, through the pleadings and evidence in the cause; and I exercised my best judgment in pronouncing the decree.

Then what was the course which was taken by Mr. Herring, against whom the decree was pronounced? He did not interfere, in the first instance, to stay the proceedings as to the payment of the costs directed by the decree. The Defendants' bills of costs were carried in before the Master to be taxed. The taxation was proceeded with, and was completed in May 1841. On the 5th of June Mr. Herring was taken on an attachment for non-payment of the costs; and it was not until the 29th of November that the present application was made.

If this case had really been one in which the Court ought to interfere, the application to stay the proceedings ought to have been made immediately. Instead of which the Plaintiff has allowed all these proceedings to take place and himself to be placed in contempt before he made the application. So that, if this case had been one in which the Court ought to interfere, he [414] has placed himself in an unfavourable position for the purpose of being heard; and, being in that position, he has made an application which rests only on the ground that, possibly, the decree may be reversed; and that, as I said before, is not a sufficient reason for staying the proceedings under the decree; and, consequently, the motion must be refused with costs.

[414] TURNER v. HIND. Dec. 10, 1841.

New Orders of August 1841. Parties. Construction.

The 30th Order of August 1841 does not apply to a case in which the equitable interest only is vested, by devise, in A. and B., in trust to sell, although they are empowered to give discharges for the proceeds.

Under the settlement on the marriage of John Turner and Mary Hind, an estate was vested in trustees in trust for the husband and wife for their lives successively, and, after the death of the survivor, in trust for such of their children or grandchildren as Mary Turner should appoint by deed or will, and, in default of appointment, in trust for all the children of the marriage who should be living at the death of their surviving parent, and for the issue of such of them as should be then dead.

Mary Turner survived her husband. By her will, made in execution of the power, she appointed the estate to two persons, one of whom was the Plaintiff, in trust to sell and divide the proceeds amongst certain of her children, and she declared that the receipts of the appointees should be sufficient discharges for the purchase-money. The object of the suit was to have the trusts of the will carried into execution under the direction of the Court.

At the hearing of the cause it was objected that the suit was defective in respect of parties; as some of the [415] persons interested, under the will, in the proceeds of the sale of the estate, and also some of the persons interested under the settlement, in default of appointment, (1) were not made parties.

Mr. Bethell, for the Plaintiff, relied on the 30th Order of August 1841, which

(1) One of the questions in the suit was whether the appointment was valid. It was clearly bad at law; as the appointees were not objects of the power.

directs: "That, in all suits concerning real estate which is vested in trustees by devise, and such trustees are competent to sell and give discharges for the proceeds of the sale and for the rents and profits of the estate, such trustees shall represent the persons beneficially interested in the estate or the proceeds, or the rents and profits, in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and, in such cases, it shall not be necessary to make the persons beneficially interested in such real estate or rents and profits, parties to the suit. But the Court may, upon consideration of the matter on the hearing, if it shall so think fit, order such persons to be made parties."

Mr. Wilbraham and Mr. Freeling also were counsel in the cause.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is quite evident that this case is not within the 30th Order of August 1841. That order, on the face of it, applies to those cases only in which a real estate is vested in trustees by devise, and such trustees are com-[416]-petent to sell and give discharges for the proceeds of the sale. Here, the persons who are empowered to give discharges for the proceeds of the sale are not persons in whom the legal estate is vested by devise. Consequently, neither they nor the trustees of the legal estate under the settlement will be able to make a good title, unless all the *cestuis que trust* are made parties to the suit.(1)

[416] HUDSON v. MADDISON. Dec. 21, 1841.

[S. C. 11 L. J. Ch. 55; 5 Jur. 1194.]

Nuisance. Pleading. Parties. Misjoinder. Injunction.

A bill was filed by five several occupiers of houses in a town, to restrain the erection of a steam-engine which would be a nuisance to each of them. Held, that each occupier had a distinct right of suit, and, therefore, that they could not sue as Co-plaintiffs.

On a motion to dissolve an injunction the Defendant may rely on an objection, although it would have been a ground for demurring to the bill.

The bill was filed by five persons occupying houses in the town of Louth in Lincolnshire, for an injunction to restrain the Defendant from proceeding to erect a steam-engine and chimney in the neighbourhood of the Plaintiffs' houses, on the ground that the steam-engine would prove a nuisance to the Plaintiffs.

An injunction having been obtained, *ex parte*,

Mr. Bethell and Mr. Anderdon, for the Defendant, now moved to dissolve it, on the ground that each of the Plaintiffs had a right of suit distinct from the other; and, consequently, a suit instituted by them as Co-plain-[417]-tiffs could not be maintained; but an information ought to have been filed by the Attorney-General at their relation. *Jones v. Del Rio* (Turn. & Russ. 297), *Cowley v. Cowley* (*ante*, vol. ix. p. 299), *Sampson v. Smith* (*ante*, vol. viii. p. 272), *The Attorney-General v. Forbes* (2 Myl. & Cr. 123).

Mr. G. Richards and Mr. Koe, for the Plaintiffs, said that the Plaintiffs had a common interest in restraining the nuisance: that the ground upon which creditors were allowed to sue on behalf of themselves and others was that they had a common interest; and that there was no doubt that the bill would have been sustainable if it had been filed by only one of the Plaintiffs. They referred to the following passage in the judgment in *Attorney-General v. Forbes*: "In informations and proceedings for the purpose of preventing public nuisances, the ordinary course is for the Attorney-General to take it on himself to sue, as representing the public: but it is equally certain that individuals who conceive themselves aggrieved may come forward and ask the assistance of the Court to prevent a public nuisance from which they have individually sustained damage." (2 My. & Cr. 129.) With respect to *Jones v. Del*

(1) See *Weatherby v. St. Giorgio*, 2 Hare, 624; and *Osborne v. Foreman*, *Ibid.* 656.

Rio, they said that the ground on which Lord Eldon dissolved the injunction in that case was that the Peruvian Government was not recognized by the Government of this country. They added that the objection on which the Defendant's counsel relied could not be taken at the hearing of a motion to dissolve the injunction; but the Defendant ought either to have demurred to the bill or to have waited until the hearing of the cause. *Spencer v. The London and Birmingham Railway Company* (*ante*, vol. viii. p. 193); Story on Eq. Plead. 341.

[418] THE VICE-CHANCELLOR [Sir L. Shadwell]. The only question is, whether the principle of Lord Eldon's decision in *Jones v. Del Rio* is applicable to the present case.

In the cases where the Attorney-General sues as representing the whole community, and certain individuals join with him as relators and Plaintiffs, representing themselves as suing on behalf of themselves and all other persons affected by a nuisance, their being so added as parties amounts only to that which the Attorney-General, as the informant on behalf of the public, had already done for them. But those cases are no authority for a case like the present, where several individuals having each an independent interest with respect to the matter complained of choose to file a bill to which they do not make the Attorney-General a party, praying a general decree as to that matter which separately affects the separate case of each of them. Whether a bill so constructed could be sustained is a question which formerly gave rise to some fluctuation of opinion.

When the case of *Cowley v. Cowley* was before me, I was furnished by the registrar with a note of a case before Lord Bathurst, in which his Lordship, at the hearing, dismissed those parties from the suit who had no interest, and gave relief as to those who had an interest. I also had a conversation with Lord Cottenham, relative to the question in *Cowley v. Cowley*; and his Lordship then expressed that opinion which appears in the report of the case.

In the present case the bill is filed by five persons, each having a separate tenement: and they represent that the erection of the steam-engine and chimney will [419] operate as a nuisance to all of them. They, therefore, have joined their cases together. It is obvious, however, that, as each of them has a separate nuisance to complain of, that which is an answer to one may not be an answer to the other: and if, upon such a bill, a decree were to be pronounced, it must be a decree which would provide for five different cases: and I do not think that such a decree could be made.

This bill asks for no relief, but only for an injunction; and if the Court sees that the injunction asked is one that could not be maintained at the hearing, why should it now continue the injunction? We have the express authority of Lord Eldon in *Jones v. Del Rio* that, on a motion to dissolve an injunction, a Defendant may rely on the same objections to the bill as would have formed a ground for demurring to it. In that case the Defendant had not demurred to the bill, but had put in his answer to it: so that he had given an apparent stability to it in this Court; but, nevertheless, Lord Eldon dissolved the injunction; and, what is very remarkable, the injunction was one which he himself had granted.

As the law of this Court now stands, the objection which the Defendant has taken is one which he has a right to take; and, as he has thought proper to exercise that right, the Court is now bound to entertain the objection: and, in my opinion, it is a valid one, and therefore the injunction must be dissolved.

[420] WALKER v. FLETCHER. Dec. 22, 23, 1841.

[Affirmed, 1 Ph. 115; 41 E. R. 574.]

Affidavit. Practice. Stat. 53 Geo. 3, c. 159. Shipowners (Liability of).

The Act of 53 Geo. 3, c. 159, for limiting the responsibility of shipowners in certain cases, requires an affidavit of certain facts to be annexed to bills filed under it. Held, that it was no objection to such an affidavit that it was sworn four days before the bill was filed, the deponents living at Sunderland.

The 7th sect. of 53 Geo. 3, c. 159 (to limit the responsibility of shipowners in certain cases), enacts that, if several persons shall suffer any loss or damage in or to their goods, wares, merchandizes, ships or otherwise, by any means for which the responsibility of any owner or owners is limited by this Act as aforesaid, and the value of the ship or vessel with all her appurtenances and the amount of the freight, estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damage, it shall and may be lawful to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them on behalf of himself, herself or themselves and the other owner or owners of the same ship or vessel, to exhibit a bill in any Court of Equity having competent jurisdiction, against all the persons who shall have brought any such action or actions, suit or suits as aforesaid, and all other persons who shall claim to be entitled to any recompence for any loss or damage arising or happening by the same separate and distinct accident, act, neglect or default or on the same occasion, to ascertain the amount or value of the ship or vessel, appurtenances and freight, and for payment or distribution thereof rateably amongst the several persons claiming recompence as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompence as aforesaid, according to the rules of equity and as the case may require: provided, always, that the [421] Plaintiff or Plaintiffs in such bill shall annex to such bill an affidavit that he, she, or they do not directly or indirectly collude with any of the Defendants thereto or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of this Act, and that the several persons named as Defendants to the said bill are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompence for loss or damage sustained by the same accident, act, neglect or default, or on the same occasion; and that all such Defendants do claim such recompence, and to be entitled to proportions of the value of such ship or vessel, appurtenances and freight; and that no other person claims to be entitled to any proportion thereof under the provisions of this Act, and that the amount of the value of such ship or vessel, appurtenances and freight, does not exceed a sum to be specified in such affidavit, and that the several claims made by the Defendants to such bill do exceed the amount of the value of such ship or vessel, appurtenances and freight: and the Plaintiff or Plaintiffs in such bill shall, on filing such bill, apply to the Court and obtain an order for liberty to pay into Court the *account* (*sic*) of the value of such ship or vessel, appurtenances and freight, as ascertained by such affidavit, and shall pay the same into Court according to such order.

The bill was filed under the before-mentioned Act, praying, amongst other things, for an injunction to restrain an action brought by the Defendants against the Plaintiffs for the loss of their ship; which had been run down by the Plaintiffs' ship. The injunction was granted on the sum specified in the affidavit annexed to [422] the bill being paid into Court. A motion was now made to dissolve it.

Mr. G. Richards, Mr. Bethell and Mr. Bacon, in support of the motion, objected that the affidavit, though intituled in the cause, was sworn four days before the bill was filed, and consequently no indictment for perjury could be maintained upon it, as the suit in which it was sworn was not then existing. They added that the practice which prevailed with respect to affidavits annexed to bills of interpleader was not applicable to cases like the present; for, by the Act in question, the affidavits to be annexed to bills filed under it were required, not only to deny collusion, but also to verify the material contents of the bill; and some of those facts might be true at the time when the affidavit was sworn, but might not be so at the time when the bill was filed.

Mr. Stuart and Mr. Simpson appeared for the Plaintiffs.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the objection upon the statute, I have ascertained, upon inquiry, that ever since this statute was passed, which is 28 years ago, the same practice has been adopted with respect to the filing of bills under it as has prevailed for more than a century with respect to bills of interpleader and bills to change the jurisdiction in the case of lost deeds; that is to

say, that the Six Clerks uniformly file the bills, with affidavits sworn before the bills are filed.

In the case of *Lens v. Mitchell*, which occurred last year,⁽¹⁾ an application was made in the case of a bill of [423] interpleader to detach from the bill the affidavit which had been attached to it; the fact being that the bill was filed on the 19th of February, and the affidavit, which the course of the Court required, was sworn on the 18th of February; and I made no order on the motion except that the Defendant should pay the costs of it: because I found, upon inquiring of the Six Clerks, that a similar practice had always subsisted.

Notwithstanding the hypothetical objection that an indictment for perjury could not be supported on such an affidavit in case its averments should be false, still the necessity of the case requires that the affidavit should be sworn before the bill is filed. I do not sit here to inquire whether a practice that has prevailed in this Court for so many years, and which has been only followed in the case of this Act of 53 Geo. 3, is right or wrong. I must take the uniform practice that has subsisted for a long while to be the right practice, unless it is altered by some new order of the Court.

With respect to this Act of Parliament, it is to be observed that it was passed at a time when Lord Eldon, who must have been pretty well aware of the course of this Court, was Lord Chancellor; and, if he had thought it necessary that the affidavit should be sworn after the bill was filed, am I to suppose that that learned Lord would have allowed the Act to pass the House of Lords in the form it now is? I cannot but suppose that such an Act of Parliament as this, which affected so materially the rights of the subject, did not pass without being much discussed. It is impossible that it could have been passed without much discussion; because it proceeds altogether on a new principle.

[424] If then the Legislature, in deliberately framing the Act, thought proper to require that parties seeking the benefit of it should annex to their bills affidavits of certain facts, that is, should do what this Court had long before required to be done in certain cases, I must take it for granted that, as the Legislature did not enact otherwise, it meant such affidavits to be annexed to bills filed under the Act as were then required, according to the course of the Court, in cases where bills were to be filed with affidavits annexed to them.

Next, with regard to the particular words of the statute. It enacts (see the 7th sect.) that it shall be lawful for the persons who own the ship which comes in collision with the other and does the mischief to exhibit their bill in a Court of Equity to have the value of their ship ascertained and the amount distributed amongst the persons claiming recompence from them. Then it directs that the Plaintiff or Plaintiffs to such bill shall annex an affidavit to it, denying collusion, and stating that the value of their ship does not exceed a sum to be specified: and it certainly struck me as remarkable that there should then be this third provision, namely, "and the Plaintiff or Plaintiffs in such bill shall, on filing such bill, apply to the Court for liberty to pay into Court the amount of the value of such ship as ascertained by such affidavit;" evidently implying that the application to the Court was an immediate, consecutive act on the filing of the bill; which could not be the case if the swearing of the affidavit and the annexing it to the bill were to intervene between the filing of the bill and the application to the Court.

[425] My opinion is, knowing what the practice has been, and seeing what was done in the case of *Lens v. Mitchell*, that I am not at liberty to say that what has been done in this case is wrong. The fact is that this affidavit was sworn at Sunderland on the 21st of June, and that the bill was filed on the 25th; and I cannot admit that the interval of four days, considering the distance of the place, is of itself a material space of time. Knowing what has been done in actually decided cases, namely, that things which have taken three or four days to be executed have been held to have been done *uno flatu*, I hold the filing of the affidavit on the 21st of June, and the

(1) 7th March 1840. Mr. Knight Bruce and Mr. James Russell moved, and Mr. Jacob and Mr. Smythe opposed.

annexing of it to the bill on the 25th, to be quite a sufficient compliance with the Act of Parliament.(1)

[426] SAMPAYO v. GOULD. Jan. 14, 1842.

[S. C. 11 L. J. Ch. 121.]

Settlement. Marriage Articles. Construction. Powers to Appoint New Trustees, and to Change Securities.

A marriage contract, in the Portuguese language, between British subjects resident in Lisbon, expressed that the parties were desirous that it should be regulated, made binding and carried into full and complete effect according to the laws of England. Some years afterwards the parties, who were then resident in England, filed a bill, praying that a settlement in strict conformity with the contract and containing all the covenants, clauses, powers, &c., usually inserted in marriage settlements and deemed necessary, and, at the same time, consistent with the substance of the contract, might be executed under the decree of the Court. Held, that a power to appoint new trustees as often as should be necessary, and (notwithstanding the contract provided that the settled monies should be invested, as they had been, in the English and French funds) that a power to change those securities for any other of the Government stocks or funds of England or France or for *real securities in Great Britain or Ireland*, were proper powers to be inserted in the settlement.

In contemplation of the marriage between Osborne Henry Sampayo and Christina Gould (both of whom were then resident in Lisbon but were British subjects), a marriage contract to the following effect was drawn up in the Portuguese language and executed according to the forms of Portuguese law :—

“Know all ye to whom this present instrument of marriage contract, dowry and settlement, power of attorney, convention and obligation shall come, that, in the year 1825 and on the 15th of November, I, notary, was sent for to make out this present deed, at the residence (in Lisbon) of Gerard Gould, a native of England and a merchant; and he was there present with his daughter, Christina, a minor under 25 years of age: also Gerard Gould, junior, her brother, a merchant of Oporto, and his uncle, John George Gould, merchant; there were likewise present, Osborne Henry Sampayo, merchant, a native of and formerly residing in the Kingdom of Ireland, a minor under 25 years of age, legitimated son of Antonio Teixeira Sampayo, resident in England, attended by his uncle, the Count de Pova: and, on behalf of Francisco Teixeira Sampayo, Consul-General in London, appeared his substitute, Richard Power, merchant, a resident in Lisbon, trustees appointed for the aforesaid Osborne Henry Sampayo by his aforesaid father, and by him duly constituted his sufficient attornies. And it was then and there declared by Gerard Gould that, approving of the marriage of his daughter with Osborne Henry Sampayo, he, by this act, appointed, for her trustees, his son, the aforesaid Gerard Gould, junior, and his brother, the aforesaid John George Gould, whom he constituted his full and efficient attornies, conferring upon them the necessary powers for entering into this marriage writing and for establishing the conditions of the contract, and also to manage and attend to the fulfilment of it, the amount of dowry, rights and shares which shall belong or appertain to his said daughter; and, by all the trustees and attornies, it was declared that, in conformity with the instructions of their constituents, and in right of its being permitted to the subjects of Great Britain resident in the Portuguese dominions to enter into any contracts whatsoever amongst themselves according to the laws of England; and entering, amongst others, in this contract (*sic*) the stipulation of funds, *some already existing and others, for the greater part, about to exist in*

(1) Affirmed by the Lord Chancellor; see 1 Phill. 115. See also *Dobree v. Schroder, ante*, vol. vi. p. 291.

England, they are desirous that, under the said laws of England, it should be regulated, made binding and carried into full and complete effect; for which purpose, if it be necessary, they renounce the jurisdiction of Portugal; consequently they, the said trustees and attornies, declare that, on the aforesaid Osborne Henry Sampayo and Christina Gould intermarrying, their nuptial contract is as follows:—That the said Antonio Teixeira Sampayo endows his afore-[428]-said son, Osborne Henry Sampayo, with £20,000 sterling, of which capital his said son has already £5000 employed in trade: that he, Gerard Gould, endows his said daughter, Christina Gould, with the like sum of £20,000 sterling, of which amount £3000 are now invested in the English funds in the name of his aforesaid daughter; the remaining £17,000, together with the other £15,000 that are disposable of the intended husband, shall be forthwith invested in the English and French funds; that the whole sum shall be collected and managed by the said attornies constituted and appointed by the fathers of the said intended husband and wife, who, for this purpose, are, by them, duly authorized, and who willingly and gratuitously undertake this commission, promising to fulfil it with exactitude: that the future husband and wife, at whatever time, for their decent maintenance, shall only be allowed the free disposal of the annual interest of all the afore-mentioned capital which shall be so invested in the funds, separating, however, for the pin-money of the future wife, the interest already due and which may hereafter become due on the aforesaid £3000, which shall solely and exclusively belong to the said intended wife: that the £5000, which form part of the portion of the said intended husband and now embarked in trade, shall alone remain subject to unforeseen commercial events and risks, but from which is absolutely excepted all the other part of the portion, which shall for ever enjoy the privileges conceded to dotal property; that if at any time the said £5000 should become disposable out of trade in which they are now embarked, the same shall forthwith be invested in the aforesaid funds and go in augmentation of the above capital, which, *on no account or emergency whatever, shall be alienated, diverted or mortgaged, but, on the contrary, shall remain in the said [429] funds completely free*; that, in case of the intended husband and wife living happily together for the term of 15 years complete, they shall be allowed to make a disposition in favour of their lawful issue, by and with the express concurrence of both, to the extent of half the amount of the capital so invested in the funds; that, in the event of the existence of issue at the decease of either of the parents, the dotal and inherited property shall be united, remaining to them, reciprocally, the free disposition of the acquired property; and, in the event of the decease of the children by this marriage under age (the future wife, their mother, not being any longer in existence), there shall return to the estate of the father, or, in his default, to his heirs and successors, the £20,000 sterling with which she is portioned by her aforesaid father; and the like shall be equally observed in the event of the said intended wife dying without leaving issue: and, lastly, in the same supposition of a default of lawful issue at the decease of the said intended husband, the said intended wife shall be entitled to the £20,000 sterling of her dowry, and, moreover, the estate be bound annually to pay her the interest of £10,000 sterling, by way and under the title of appanage: and, by them, the said intended husband and wife, it was spontaneously declared that they approved of this contract, its clauses and conditions in the manner and form as stipulated by the trustees and attornies in the names of those they represent; the said attornies binding and obliging, for the due fulfilment thereof, the properties and estates of their several constituents; all promising never to impeach this deed, but, on the contrary, desirous and willing that it should have full force, continuance and effective execution; and, if necessary, that it should be confined (confirmed *qu.*) by judicial decree; for which purpose they hereby hold themselves [430] duly cited, and agree to its clauses, in order to being especially condemned, each one in the part that respectively concerns him.”

Shortly after the date of the contract the marriage was solemnized in Lisbon, and the stipulated sums were invested partly in the English and partly in the French funds in the names of the Count de Pova, Francisco Teixeira Sampayo, Gerard Gould the younger and John George Gould, the trustees named in the contract; and the dividends were paid to the husband and wife.

No formal settlement having been executed in pursuance of the marriage contract;

and the Count de Pova and Francisco Teixeira Sampayo being dead, and John George Gould being desirous of retiring from the trusts, Osborne Henry Sampayo and Christina, his wife (who were then resident in England), filed a bill in December 1839 against the surviving trustees, stating that the marriage contract was very vaguely expressed, and was altogether defective for all the purposes of a marriage settlement, and deficient in all the usual covenants, powers and provisoes usually inserted and deemed necessary in English marriage settlements; and that, under the circumstances, the Plaintiffs were advised that it was proper and necessary that a marriage settlement, in strict conformity to the contract entered into at Lisbon, and containing the covenants, clauses and powers usually contained in English marriage settlements of personal property, should be executed, and that new trustees should be appointed in the room of the deceased and retiring trustees; and praying that a settlement of the trust funds, in strict conformity with the marriage contract, and containing all the covenants, clauses, powers, provisoes and agreements usually inserted in [431] English marriage settlements of personal estate or stock, and deemed necessary and, at the same time, consistent with the substance of the contract, might be executed by the decree and under the direction of the Court, and that new trustees might be appointed in the room of the deceased and retiring trustees.

By the decree at the hearing of the cause, it was referred to the Master to settle and approve of a proper settlement of the trust funds, according to the law of England, *with all usual and customary clauses and powers, the Master having regard to the provisions of the contract of marriage*; and the Master was directed to appoint three new trustees of the trust property.

The Master appointed three new trustees, and approved of a settlement of the trust funds, as directed by the decree.

The Defendants excepted to the report, first, because the Master had inserted in the settlement a power enabling the trustees, with the consent of the husband and wife during their lives and of the survivor of them during his or her life, and, after the death of the survivor and during the minorities of the children of the marriage, at their own discretion, to sell the trust funds or any part thereof, and invest the proceeds in the public stocks of England or France, *or upon real securities in Great Britain or Ireland, at interest, by way of mortgage*; and, secondly, because the Master had inserted in the settlement a power (which was in the usual form) for the appointment of new trustees from time to time.

Mr. G. Richards and Mr. Roundell Palmer, for the Defendants, said, in support of the first exception, that [432] the decree expressly directed the Master, in approving of the settlement, to have regard to the provisions of the marriage contract; that by that contract the marriage portions were to be invested in the English and French funds, and no power was given to the trustees to invest them in any other securities; consequently the Master ought not to have authorized the trustees to invest the portions in real securities.

In support of the second exception, they referred to *Bayley v. Mansell* (4 Madd. 226), where, on a bill filed for the appointment of new trustees, Sir John Leach, Vice-Chancellor, would not allow a clause to be inserted authorizing the appointment of new trustees as often as should be necessary; on the ground that there was no provision to that effect in the trust deed; and they distinguished this case from *Lindow v. Fleetwood* (*ante*, vol. vi. p. 152) on the ground that there the will, in pursuance of which the settlement was made, directed all proper and reasonable powers to be inserted in the settlement; but the marriage contract in this case contained no such direction.

Mr. Bethell and Mr. Addis, in support of the report, said that the parties to the marriage articles contracted with special reference to the laws of England; for the articles expressed that the parties "were desirous that, under the laws of England, the agreement should be regulated, made binding and carried into full and complete effect;" and the articles mentioned that part of the funds intended to be settled was then in England, and shewed that the parties contemplated that the greater part of those funds would be in England; *Hill v. Hill* (6 Sim. 136; see judgment); in which case the Court drew a distinction [433] between inserting in a settlement powers for

the management and better enjoyment of the settled property (which are beneficial to all the parties), and powers which confer personal privileges on particular parties; that the powers in question in the present case were merely powers for the management of the trust property; that *Bayley v. Mansell* was not in point; for there the Court was not dealing with an *executory* contract, as it was in the present case; that the decree directed the Master to approve of a settlement, with all usual and customary clauses and powers; and powers to appoint new trustees and to invest the trust funds in real securities were usual and customary; therefore the Master, in approving of the settlement, had done nothing more than follow the decree.(1)

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am as much bound by my own decree as if it had been the decree of another Judge; and, therefore, I must proceed to consider this question on the footing solely of the language of the decree.

Now that decree has referred it to the Master to approve of a settlement with all usual and customary clauses and powers, the Master having regard to the provisions of the contract of marriage; by which I understand that there were to be inserted in the settlement all clauses and powers which are usual and customary; but they were to be determined with this sort of regard to the contract, namely, that any clause or power which is expressly excluded by the contract, [434] although it be a usual and customary one, is not to be inserted; but if it was consistent with the contract, then it was to be inserted.

I will consider first of all the important one, namely, that one which authorizes the change of securities. Now, I should say, in the first instance, that a clause authorizing the change of securities is usual and customary, and is usual and customary only because it is found to be of the greatest possible convenience to parties. Then the question is whether there is anything on the face of this contract which excludes this usual and customary clause? Now it is certainly true that the parties have, in the first instance, pointed out as the mode of investment the English and French funds. The expression is "the English and French funds," by which they mean the English or French funds. But, upon reading over the very words of the contract, it seems to me that the parties themselves have expressly supposed that a portion of the fund might have come out of the English or French funds, and been otherwise invested; because there is this direction, "that if at any time the £5000 should become disposable out of trade in which they are now embarked, the same shall forthwith be invested in the aforesaid funds, and go in augmentation of the above capital, which, on no account or emergency whatever, shall be alienated, diverted or mortgaged." Therefore we find that the parties themselves contemplated the event that a portion of this capital might be alienated, diverted or mortgaged. How then am I to say, though they in the first instance referred generally to the French or English funds, that they have not also referred to some other disposition of the property than in the French or English funds; and, in my opinion, if you minutely consider the language [435] of every sentence in the contract, you do find that the parties did contemplate some other investment than merely the French or English funds. The consequence is that the insertion of the clause authorizing the change of securities is right.

Then, with respect to the power to appoint new trustees. Upon the face of the decree it appears that two of the original trustees are dead and that another of them is desirous to retire from the trust: and the decree refers it to the Master to appoint three proper persons to be trustees of the trust property in their room. And it appears to me that, as the Court has thus sanctioned the appointment of new trustees in lieu of the two who are dead (a matter that could not be avoided), and in lieu of one whom the Court allows, at his own request, to retire, the Court can sanction the appointment of trustees in future cases where it may be necessary. Therefore, no question being raised before me about the particular language in which the power to appoint new trustees is couched, my opinion is that the Master's report is right.

I rather think the word ought to be *Government* instead of public securities;

(1) See *In the Matter of* 52 Geo. 3, c. 101, *ante*, p. 262. The reporter has been informed that the name of the Petitioner in that case was Tittlewell.

because this Court does not allow property to be invested in public securities which are not Government securities.

[436] BRUIN v. KNOTT. Jan. 22, 24, Feb. 9, 1842; March 18, 20, 21, 29, 1843.

[S. C. on appeal, 1 Ph. 572; 41 E. R. 750 (with note).]

*Custom of London. Orphanage Part. Survivorship. Evidence.
Certificate. Infant. Maintenance.*

By the custom of London, if a freeman dies intestate leaving several children, and one of them dies an infant, his orphanage share survives to his brothers and sisters, and if another child dies an infant, his accrued as well as his original share survives in like manner: and the accumulations accompany the shares from which they arose.

A book produced from the muniment-room of the Corporation of London was held to be receivable as evidence of the custom.

If the Lord Mayor and aldermen have once certified as to the custom of London, the certificate is conclusive; and the Court never refers the same question a second time.

A freeman of London died intestate, leaving an infant son who, on his father's death, became entitled to his orphanage share of his father's personal estate, and also to other property. The infant was maintained by his mother from his father's death until his own death. Held, that the mother was not merely entitled to be repaid what she had expended in the infant's maintenance, but to have a liberal allowance made to her, having regard to the whole of the infant's property; and that the amount was not to be paid out of the orphanage share and the infant's other property, but wholly out of the former; that arrangement being most for the infant's benefit.

In October 1823 Joseph Aldridge, a citizen of London, died intestate, leaving the Defendant Ann (who afterwards married the Defendant Knott) his widow, and two infant children by her, named Joseph and Elizabeth, and the Plaintiff Sarah, the wife of the Plaintiff George Bruin, his only child by a former wife, him surviving. Shortly after his death his widow took out administration to him; and, out of his personal estate, paid his debts and funeral expenses, and retained her widow's apparel and the furniture of her bedchamber: and the balance which remained in her hands, and which was of very large amount, became distributable, *according to the custom of London*, as follows: one-third to her as the intestate's widow, another third to her as administratrix, and the remaining third amongst the three children in equal shares; but the shares of the two youngest children did not, as the bill alleged, vest absolutely in them by reason of their being infants.(1) Ann Knott paid [437] Sarah Bruin's

(1) The following is an extract from Toller on Executors, pp. 389 and 393, relative to the custom of London:—"If a freeman of the city die leaving a widow and children, his personal property, after deducting her apparel and the furniture of her bedchamber, is divided into three equal parts, one of which belongs to the widow, another to the children, and the third to the administrator in that character. The portion of the administrator is styled, in law, the dead man's part; because, formerly, the Ordinary, or his grantee, was to dispose of it in masses for the deceased's soul. But, after the disuse of this practice, the administrator was wont to apply it for his own benefit; till the Legislature, by the stat. 1 Jac. 2d, c. 17, declared that it should be subject to the law of distributions. . . . If a freeman leave several children, the share or the orphanage part of any one of them is not vested in him by the custom till the age of 21; after which period, but not before, he may dispose of it by will, or, in case of his dying intestate, it shall be distributed pursuant to the statute. If he die under that age, whether sole or married, his share shall survive to the others." The learned author then states a proposition which, though warranted by the authority to which he refers, the above report shews to be untenable. He says:

share of the orphanage part (that is, one-third of a third of the intestate's residuary estate) to Sarah Bruin and her husband; and she invested the remaining two-thirds in the purchase of stock, on account of the two infants Elizabeth and Joseph; and she received and accumulated the dividends of the stock so purchased.

Elizabeth died on the 26th of May 1829, an infant: and her mother took out administration to her. Joseph also died, an infant, on the 24th of February 1837.

The bill alleged that, on Elizabeth's death, one moiety of her share of the orphanage part and of the accumulations thereon survived, by the custom, to Sarah Bruin, and that the other moiety survived to Joseph: and that, on Joseph's death, his original share of the orphanage part, *and also that moiety of Elizabeth's share which survived to him on Elizabeth's death, survived, by the* [438] *custom, to Sarah Bruin, together with the accumulations thereon: that the Defendants pretended that the last-mentioned moiety of Elizabeth's share and of the accumulations thereon vested, on her decease, in Joseph, absolutely, and was no longer subject to the custom; and that Joseph, being 18 years of age, had made a will and bequeathed the whole of his property to his mother. The bill prayed, amongst other things, that Sarah Bruin might be declared entitled to Joseph's original share of the orphanage part and the accumulations thereon, and also to that moiety of Elizabeth's share of the orphanage part which, on her death, survived to Joseph, and also to the accumulations thereon.*(1)

Mr. Boteler and Mr. Parry, for the Plaintiffs. There is an *Anonymous case* (Prec. Ch. 537) said to have occurred in Michaelmas term 1720, in which it is stated that two cases were cited, *Ambrose v. Ambrose* and *Rawlinson v. Rawlinson*, where it had been certified to be the custom of London, and was accordingly decreed by the Lord Chancellors Harcourt and Cowper, successively, that, if a city orphan dies before 21, the survivorship holds only as to the orphanage part belonging to himself; for that, if he had, by survivorship, the part of any other of his brothers or sisters, *that* should go according to the Statute of Distributions. That report, however, must be erroneous; for search has been made, and the only case relating to the custom of London [439] which occurred in Michaelmas term 1720 is *Knipe v. Vale* (Reg. Lib. A. 1720, fo. 63; see also Viner's Abridgment, 8vo. edit. p. 213, tit. Custom of London); and, in that case, no question as to the survivorship of a survived share of the orphanage part could have arisen: for there Thomas Draper, a freeman of London, died intestate, leaving a widow and three children, John, Burgis and Mary, surviving. John attained 21 and died, having appointed Richard Cole his executor; then Mary died an infant; and the Court declared that the Defendant Burgis, and John and Mary Draper had, each of them, by the custom of London, a right to one-third of a third of the late father's estate: and that, John being dead, the Defendant Cole, as his executor, was become entitled to his share; and that Mary also being dead, and dying before she attained her age of 21, the Defendant Burgis became entitled, by the custom, to her share, by survivorship. As, therefore, one only of the children died under age, no question as to the survivorship of the share of a predeceased child could have arisen in that case.

Search also has been made, both in the Report Office of this Court and in the office of the town clerk of the city, for the cases of *Ambrose v. Ambrose* and *Rawlinson v. Rawlinson*; but no certificate as to the custom of London could be found in either of those cases. Indeed no question as to the custom arose in either of them.

It appears, from the entry of *Ambrose v. Ambrose* in Reg. Lib. (A. 1715, fo. 514), that Jonathan Ambrose, a freeman of London, died intestate in 1699, seised of real estate and possessed of personal estate, and that he left a widow who took out administration to him, and three infant [440] daughters, Elizabeth, Thomasin and

"But the survivorship of the orphanage part holds only as to the orphanage part belonging to the deceased himself; for, if he had, by survivorship, the part of any of his brothers or sisters, *that* shall go according to the statute."

Mr. Williams, too, in his valuable work, lays down the same proposition, and refers to the same authority in support of it. See *Treat. on Executors*, vol. 2, p. 955.

(1) It will be seen from the above statement that the question in the cause was, shortly, this: whether a share of the orphanage part survives more than once.

Theodosia, his only children him surviving. In February 1700 Theodosia died an infant of about two years of age; and in May 1714 Elizabeth married Thomas Ambrose: and they filed a bill against the widow and Thomasin and certain other persons, praying that the Plaintiffs might have satisfaction in respect of the intestate's personal estate, and have a conveyance of such part of his real estates as the Plaintiff, Elizabeth, should appear to be entitled to. The cause was heard on the 29th of June 1716; and the Court, after decreeing an account to be taken of the personal estate and of the rents and profits of the real estate received by the widow, ordered the personal estate, after allowing for the intestate's debts and funeral expenses and for the widow's chamber and paraphernalia, to be divided into thirds, and that one-third should be retained by the widow for her own use, that another third should go to the Plaintiff, Elizabeth, and her two sisters, Thomasin and Theodosia deceased, and that the remaining third should go according to the Statute of Distributions; and that the widow should have a liberal allowance out of the children's parts for their maintenance and education: and the Court declared that the share which, by the custom of London, belonged to Theodosia, ought to be divided between the Plaintiff, Elizabeth, and her sister, the Defendant Thomasin.

In *Rawlinson v. Rawlinson* (Reg. Lib. B. 1713, fo. 329) Sir Thomas Rawlinson, by his will, disposed of his real and personal estate for the benefit of his widow and children. He died in 1706, leaving his widow and nine children surviving. All of them, except Thomas the eldest, were infants. In [441] 1713 the bill was filed by the younger children against their elder brother and their mother and other parties, praying that the Defendants who had possessed themselves of any part of the testator's estate might account for the same, and that the shares of it which should appear to belong to the Plaintiffs might be placed out at interest for their benefit. Thomas, the eldest child, elected to take his share of his father's personal estate according to the custom of London and not according to the will; (1) and his share, according to the custom, was ordered to be paid to him; but, it being more beneficial to his brothers and sisters to take according to the will, the shares to which they were entitled under the will were ordered to be placed out on securities for their benefit until they should attain 21.

In Burn's Ecclesiastical Law (2) the *Anonymous case* in Precedents in Chancery is mentioned as *Mereweather v. Hester*; but it appears, from an extract of that case which we have procured from the registrar's book (Reg. Lib. B. 1718, fo. 333), [442] that Jonathan Leigh, the freeman in that case, left no widow and only one child; and therefore no question as to the survivorship of a share of the orphanage part could arise in that case. We submit that we have now shewn clearly that neither the case in Precedents in Chancery nor either of the cases referred to in it are any authority for the proposition which they have been hitherto considered to establish.

We now come to those cases which prove the custom to be as we contend for.

The first case is *Wilcocks v. Wilcocks*. (3) There John Wilcocks, a freeman of London, died intestate in September 1697, leaving six infant children, Joseph, Elizabeth, Rebecca, John, Jane and Bridget. John died an infant and then Elizabeth died, also an infant: and the Court first ordered one-third of their father's clear personal estate to be distributed amongst all the children in equal sixth parts, as their

(1) Until the 11th Geo. 1, c. 18, was passed, freemen of London could not dispose, by will, of the whole of their personal estate, unless they died without leaving either wife or child. Sir Thomas Rawlinson died in 1708, and the suit was heard in 1713 (12th Anne). Thomas Rawlinson, the son, said in his answer that he was advised that Sir Thomas, being a freeman of London, could not, by his will, bar him (the Defendant) of a share of one moiety of his personal estate in equal degree to the rest of his children: for that Lady Rawlinson (Sir Thomas's widow) was, by marriage settlement, barred of her customary part of the personal estate; and that the same ought to be divided into two moieties, and he ought to have his share of one moiety, according to the custom of the city.

(2) Vol. 4, p. 573, 9th edit. tit. Wills; Distribution according to the custom of London.

(3) 2 Vern. 558. Entered in Reg. Lib. as *Wilcocks v. Mayne*, B. 1705, fo. 507.

orphanage parts: it next ordered John's sixth to be distributed amongst his five brothers and sisters, including Elizabeth: and it then declared that Elizabeth's share, as an orphan of the City of London, of her father's estate, *and her share of her brother John's orphan share thereof, ought to be equally divided and distributed amongst her surviving brothers and sisters*; and they being still under age, it was referred to the Master to settle a suitable sum for their maintenance, which was to be paid out of the interest of their respective shares and estates.

In *Hervey v. Desbouverie* (Ca. temp. Talbot, 130) Lord Talbot, C., lays it down that neither the freeman nor the orphan can [443] devise against the custom; nor can they, any more, devise what accrued by survivorship than the original share.

The next case is *Jesson v. Essington*, which is reported, but not upon the present question, in Prec. Ch. 207. There Abraham Jesson, a freeman of London, died in August 1680, leaving a widow and five infant children, and having made a will of which his widow, who afterwards married the Defendant Essington, was the executrix. Two of the children, Mary and Sarah, died infants; and the bill was filed by the three survivors for an account of their late father's estate. On the 21st of March 1701 the Master reported a certain sum, being the amount of one-third of the deceased's personal estate and of an accumulation of interest thereon, after deducting certain sums for the maintenance and funerals of Mary and Sarah, *to belong to the Plaintiffs, the three surviving children*. The Defendant Essington excepted to the report; and, on the exceptions coming on to be argued on the 13th of November 1702, "the matter of the Defendant's 2d, 3d and 4th exceptions being touching the dispositions of the shares of the personal estate of the Plaintiffs' late father (who was a citizen and freeman of London) which belonged to Mary and Sarah Jesson, the Plaintiffs' sisters, who died intestate after their said father's death and in the life of their mother," the Lord Keeper ordered that the Lord Mayor and Court of Aldermen should certify what was the custom of the city in relation to the shares of the testator's estate that were due to the deceased orphans; and his Lordship reserved his decision upon the 2d, 3d and 4th exceptions until after the certificate should have been made. On the 18th of February 1703 the Lord Mayor and Court of [444] Aldermen certified that, if a freeman of London died leaving a widow and several children unpreferred by their father in his lifetime, one-third of his personal estate (his debts and funeral charges being first deducted) belonged to such children equally; and that, if any such orphan, being a male, happened to die under 21, or, being a female, under that age and unmarried, the share of such male or female so dying belonged to the surviving orphan or orphans, as part of the customary or orphanage part of the personal estate of their father deceased; whereof such father or orphan so dying had no power of disposal, by will or otherwise, contrary to the custom. Whereupon and upon hearing what was alleged by both sides, the Lord Keeper, on the 9th of March 1703, overruled the exceptions on which he had reserved his judgment.(1)

The last case is that of Thomas Ash, which is contained in a book produced by one of our witnesses from the muniment-room of the Corporation of London.

Mr. G. Richards, for the Defendants. We object to that book; it has no heading at all, and there is nothing to shew that it is connected with the Orphans' Court. Its contents might be evidence against the Corporation of London, but they cannot be evidence against a stranger.

[445] Mr. Boteler, in answer to the objection, cited *Steal v. Heaton* (4 T. R. 669).

THE VICE-CHANCELLOR [Sir L. Shadwell]. The witness by whom the book is produced says that it is kept in the muniment room of the Corporation of London under the custody of the town clerk. Now the Lord Mayor and Aldermen constitute the Orphans' Court, and the town clerk is the officer of the Lord Mayor and Aldermen: and, if the book shews how the Court has managed the estates of orphans for a long series of years, I should rather think that the course of practice which may be deduced

(1) Reg. Lib. A. 1702, fo. 117. A book also was produced, from the muniment-room of the Corporation of London, in which *Jesson v. Essington* was twice entered. It contained records of the proceedings of the Orphans' Court, and was intituled "Repertory, temp. Dashwood, Mayor." The production of it was objected to by the Defendant's counsel; but the objection was withdrawn.

from that book must be taken as the law of the Court. At present, however, I know nothing about the contents of the book; and, before I decide as to its admissibility, I must have an opportunity of looking into it, in order to see what it contains. But what strikes me at present is that this book, being found in the repositories of the Corporation of London, would be evidence of the course of dealing with the estates of orphans, which has been adopted by that portion of the corporation which constitutes the Orphans' Court. I reserve, however, my decision upon the point; but, in the meantime, the book may be read *de bene esse*.

Mr. Boteler then read from the book: "An account of the estate of Thomas Ash, late citizen and goldsmith of London, deceased;" one-third of which, after making certain deductions for the deceased's debts and funeral and for the widow's chamber, amounted to £85, 9s. 6 $\frac{3}{4}$ d., "which said sum is, by the custom, to be equally divided between eight children, Thomas, Joseph, Elizabeth, [446] Ann, Margaret, James, Mary and Elizabeth, orphans, which maketh, to every of them thereof, £10, 13s. 8 $\frac{1}{4}$ d. *Mem*: That Mary and Elizabeth, two of the said orphans, who were posthumous, are lately deceased; for whom was paid and expended, for physie and medicines during their sickness, £1, 3s. 11d.; which being deducted out of their customary parts aforesaid amounting to £21, 7s. 4 $\frac{1}{2}$ d., there remains £20, 3s. 5 $\frac{1}{2}$ d.; which, by the custom, belongs to the said six surviving children, and maketh to every of them thereof, £3, 7s. 3d."

Mr. G. Richards, Mr. James Russell and Mr. Collins, for the Defendants, contended that the cases which had been brought forward by the Plaintiffs' counsel did not establish the point in support of which they had been adduced, namely, that a share of the orphanage part which had once survived was subject, by the custom, to survive a second time; but that they proved merely that an original share would survive, which was not disputed: and they relied on the *Anonymous case* in Precedents in Chancery: and *Coomes v. Elling* (3 Atk. 676); *Withill v. Phelps* (Prec. Cha. 325); *Lewin v. Lewin* (3 P. W. 15); *Blunden v. Barker* (1 P. W. 634); *Onslow v. Onslow* (ante, vol. i. p. 18); *Fouke v. Leven* (1 Vern 88; and 4 Burn's Eccl. Law, 573); *Mereweather v. Hester* (7 Vin. 209, pl. 18).

THE VICE-CHANCELLOR [Sir L. Shadwell]. Before I pronounce my judgment I shall look at all the cases that have been extracted from the registrar's book, and consider them attentively; for I have not [447] been able to do so during the argument: and I consider myself at liberty to look at *Ash's case*, on the ground that the book in which it is contained shews how the Orphans' Court has, from time to time, dealt with the estates of orphans. That is the point of view in which I consider the book. It is very probable, if I were to refer the question in this cause to the Lord Mayor and Aldermen, in order that they might certify what the custom is, they would look into that book and be guided by its contents in coming to a conclusion upon the point: and it seems to me not to be unreasonable that they should be so guided.

Feb. 9. THE VICE-CHANCELLOR. In this case of *Bruin v. Knott* the question that I have to decide is whether, having regard to what is to be found in the printed cases, and to what is to be deduced from the decrees and orders with which I have been furnished from the registrar's book, it is so perfectly clear that a survived orphanage share, with its accumulations, is subject to the custom of London, that it would be unnecessary or unfit to require a certificate from the Court of the Lord Mayor and Aldermen upon the point.

First, with respect to the printed cases, the law seems to stand in this way. According to the *Anonymous case* in Precedents in Chancery, p. 537, it was held by Lord Chancellors Harcourt and Cowper, successively, that if a child of a freeman had, by survivorship, the part of any of his brothers or sisters, that should go according to the Statute of Distributions, and not according to the custom.

[448] In the case which is found in Burn's Ecclesiastical Law, the law is stated according to what is laid down in the case in Precedents in Chancery, namely, that the accrued orphanage share shall go according to the Statute of Distributions.

In *Coomes v. Elling* Lord Chancellor Hardwicke thought that the expenses of the funeral of an infant orphan ought to come out of the orphan's customary share. Now, that always appeared to me to be inconsistent with the survivorship of the whole of the infant's share to the other children; because, though it will be found that it has

been the practice to allow maintenance out of the orphanage share, that is nothing more than an application by one of the joint-tenants of the fund of a part, not exceeding his own share, for his own benefit : but, inasmuch as the survivorship, if it takes effect at all, takes effect immediately at the death, and the funeral takes place after the death, the application of a part of that survived share towards the expenses of the funeral is inconsistent with the survivorship : it eats into the survivorship and diminishes the right of survivorship.

On the other side there is the case of *Hervey v. Sir Edward Desbouverie* ; where Lord Talbot held it to be clear that neither the freeman nor the orphan could devise what accrued by survivorship. That is stated very clearly by him ; but it does not seem to me to go to the point ; because the point now before me is as to the accruer of a survived share.

I have read through all the copies of decrees and orders which were referred to in the course of the argu-[449]-ment ; but it is impossible to understand what was done in those cases without stating the circumstances of each. The first is *Jesson v. Essington*. There the freeman of the City of London was Abraham Jesson. He died leaving a wife, Elizabeth, who, after his death, married the Defendant Essington. Abraham Jesson left five children, namely, Abraham, Eliza, Mary, Rebecca and Sarah. Mary died after her father, and Sarah also died after her father : and I collect, from what is to be found in the course of the Master's report, which is a very long one, that Mary died before Sarah : and it appears that the charges for their funerals, as well as the charges for their maintenance, were deducted out of their shares ; and that the surplus survived to Abraham, Eliza and Rebecca. Several exceptions were taken to the report ; and, on the exceptions coming on to be argued, an order was made for procuring a certificate from the City of London ; and the certificate is given at length amongst the papers. The certificate, it should be observed, refers only to the survivorship to the children ; because it was contended by the Defendant, Essington, who had married the mother, that the share did not go to the children, but went to the mother ; and it was with reference to that point that the certificate was ordered ; and after the return of the certificate the Defendant's exceptions were overruled. The certificate does not allude to that part of Mary's share which had survived to Sarah ; and, therefore, I infer that no question was made respecting it.

Then the next case is *Wilcocks v. Mayne*. There John, the freeman of the City of London, had issue by his wife, Elizabeth, three children, Joseph, Elizabeth and Rebecca : and he had, by a second wife, Jane, the same number of children, John, Jane and Bridget. John [450] died after his father and before his sister Elizabeth, and under age ; and then Elizabeth died under age ; and the decree gives over to Jane, Bridget, Joseph and Rebecca, Elizabeth's original share and also her share of her brother John's orphanage share. But then it is to be observed that nothing is said about the funeral expenses of John ; so that, in these two cases that I have mentioned, it certainly appears that, without question being made, the accrued share was carried over by survivorship : in the one case the funeral expenses were deducted, and in the other case it does not appear that anything was said about the funeral expenses.

The next case is *Ambrose v. Ambrose*. There Jonathan, the freeman, died intestate ; and he left three children, namely, Elizabeth, who married Ambrose, and Thomasin and Theodosia. The father died in 1699, and Theodosia died in 1700, an infant and unmarried ; and it was decreed that Theodosia's orphanage share ought to be divided between her sisters, Elizabeth and Thomasin : but no question arose as to the survived share of her orphanage share.

The next case is *Rawlinson v. Rawlinson*. There Sir Thomas Rawlinson died in 1706 ; and he had nine children who survived him. But in that case no question arose as to the survivorship of any share of any one child ; but all that was held was that Thomas, the eldest son, was entitled to his orphanage share ; and as to the others, the Court determined that they had a right to elect to take either according to the father's will or against it.

The next case is *Mereweather v. Hester*. That is a very simple case ; because Jonathan, the freeman, who [451] died on the 17th of September 1717, left only one child, Hannah ; consequently, no question as to survivorship arose or could have arisen.

Then the next case is *Knipe v. Vale*. There Thomas Draper had a first wife, by whom he had two children, namely, Burgis and John; and he had a second wife, Mary, who became his administratrix; and by her he had a child, Mary. He died in 1704, leaving all the children infants. Then it appears that John attained his age of 21 years and died, and Cole was his executor. Mary died in May 1712, an infant and unmarried; and it was held that Mary's orphanage share survived to Burgis; but no question did or could arise as to the accruer of a survived share. That is the substance of the cases taken from the registrar's book.

There also was an extract made from the city books of Thomas Ash's case; and that is to the same effect, precisely, as *Jesson v. Essington*.

Now it would seem from *Ash's case*, and from the cases of *Jesson v. Essington* and *Wilcocks v. Mayne*, that a survived share of the orphanage part has been treated as subject to the operation of the custom: but it does not appear that any question whatever was raised respecting that point. Moreover, the cases in which, as I said before, the point seems to have been passed over without question or observation, are opposed by the opinion which is expressed by both Lord Chancellor Harcourt and Lord Chancellor Cowper, that a survived share goes, not according to the custom, but according to the Statute of Distributions. Besides, the deducting of the funeral expenses is inconsistent with the right by survivorship.

[452] The question before me is whether the point is so perfectly clear that it is unnecessary to have recourse to the city authorities. When I consider that, upon the fair estimate of all the cases taken together, the point is by no means made out, but that it is recorded in print that two Lord Chancellors held the contrary to what seems to have been done in the three cases that I have just now mentioned; and when I further consider that the certificate of the Lord Mayor and Aldermen will put the matter beyond all doubt, and will, probably, tend to save expense to the parties, by making the decree one from which there can be no appeal, my opinion is that I ought to send the question to the Court of the Lord Mayor and Aldermen for their opinion upon it.

The following questions were accordingly submitted to the Court of the Lord Mayor and Aldermen:—

Whether, where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant does itself survive among the other children, in case of the death of the party to whom it has come under the age of 21 years:

And whether, if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner as the original orphanage share?

On the 28th of July 1842 the Recorder of London appeared in Court and certified, on behalf of the Lord Mayor and Aldermen, that, where there are several orphan children of a freeman who dies intestate, the share which any one may take by reason of surviving a child that dies an infant survives among the other children, [453] in case of the death of the party, to whom it has come, under the age of 21 years: and if there be an accumulation of interest upon an orphanage share, the accumulation survives in the same manner as the original share.

This cause was now brought on to be heard on the equity reserved; and at the same time a motion was made on behalf of the Defendants, the notice of which was to the following effect: that the Lord Mayor and Court of Aldermen might be directed to review so much of their certificate, bearing date the 26th of July 1842, (1) as certified that, by the custom of London, if there were an accumulation of interest upon an orphanage share, the accumulation survived in the same manner as the original orphanage share: and that the Lord Mayor and Court of Aldermen might again certify to the Court whether, if there were an accumulation of interest upon an orphanage share, the accumulation survived in the same manner as the original

(1) The certificate was *dated* as above; but the Recorder did not certify, *ore tenus*, until the 28th.

orphanage share ; and that the hearing of the cause for further directions and costs, (1) might stand over until after the Lord Mayor and Court of Aldermen should have made their further certificate.

[454] Mr. Stuart, Mr. James Russell and Mr. Collins, in support of the motion, produced several cases from the records of the city, which, they contended, shewed that it was not the custom of the city that an accumulation of interest on an orphanage share survived in like manner as the original share. They added that the Court had the same power to send to the Lord Mayor and Aldermen for a second certificate, as it had to direct a new trial of an issue : and in support of that proposition they cited *Anaud v. Haniwood* (2 Ch. Ca. 117), and *Tomkyns v. Lailbroke* (2 Vez. 591), where Lord Hardwicke is reported to have said : " In that litigated case of *Blunden v. Barker* (in which I was of counsel), precedents were mentioned. First, *Hall v. Lumley*, so long ago as 1640 ; where the Court, dissatisfied with a certificate that had been given in 1635, sent it to be reconsidered ; and, thereupon, a certificate was made directly contrary to the former."

Mr. Boteler and Mr. Parry, for the Plaintiffs, in support of the certificate, referred to *King's case* in the reign of Henry 4th, *Page's case* in the reign of Elizabeth, and to other cases extracted from the city records ; and also to *Wilcocks v. Mayne*, *Ambrose v. Ambrose*, and *Jesson v. Essington* (these three cases will be found in the report of the hearing of the cause). They added that the only mode of trying the custom of London was by the certificate of the Lord Mayor and Aldermen, and that when the custom was once certified by the Recorder, the certificate was conclusive and binding on the Court for ever afterwards ; and the Court was bound to acknowledge and act upon it, not only in the suit in which it had [455] been made, but in all other suits in which the same custom might be afterwards brought into question. Com. Dig. (tit. Certificate, vol. 2, p. 184, 3d edit.), *Blacquiére v. Hawkins* (1 Doug. 378 ; see Judgment), *Annand v. Honeywood* (2 Freeman, 56). They added that, in the case cited from 2 Ch. Ca., the certificate was required, not upon the point that had before occurred, but upon a new point.

THE VICE-CHANCELLOR. No precedent has been produced to me in which this Court, merely because it was dissatisfied with a certificate, has referred the same question a second time to the Lord Mayor and Aldermen. It is an entirely different thing from directing a new trial of an issue. The City of London has certain customs ; and it has been a very ancient practice, when this Court wished to know what the custom was, to send the question to the Court of Lord Mayor and Aldermen, in order that they might certify as to the custom. But I never heard of a case in which this Court, when it has got an answer to the question, has sent back the matter to be reconsidered, merely because arguments were adduced to shew that the answer was not satisfactory, that is, not a correct answer ; and it is quite plain, from the copies of the orders in *Hall v. Lumley*, with which I have been furnished, (2) that no such thing was done in that case. It is true that, in that case, an order had been made for sending a case for the opinion of the Lord Mayor and Aldermen as to the custom ; and it appears that there [456] had been also a reference made, as to certain matters, to certain citizens, and that some of the parties were dissatisfied with what the referees had done ; and in consequence of that a reference was directed to the Master ; but it does not appear that any such thing was done as Lord Hardwicke is reported to have stated.

General credit is given to the city for knowing its own customs. And I must say that I should be extremely unwilling to make a precedent, in this particular case,

(1) The order of the 9th of February 1842 reserved further directions and costs ; but it was incorrect in that respect. Where a question is sent, as in the present case, to the Lord Mayor and Aldermen, or a reference is directed to the Master as to a particular fact, or an issue is directed to try such a fact, or a case is sent for the opinion of a Court of law, the case ought to *remain in the paper*, and on the return of the certificate, &c., to be brought on, not for further directions, but on the equity reserved.

(2) His Honor had directed Reg. Lib. to be searched for the orders in *Hall v. Lumley*.

for doing that which never has been done before, and which I have not heard any authority for doing. Consequently I shall refuse the motion; but as the Defendants may have been misled by the *dictum* in *Vezey*, I shall refuse it without costs.

The motion having been disposed of, the cause came on to be heard on the equity reserved.

The question that was then discussed arose under the following circumstances:—Joseph Aldridge the younger became entitled, on his father's death, not only to his orphanage share (the income of which was stated to exceed £400 a year), but also to real estates of considerable yearly value, and to a share of one-third of his father's personal estate under the Statute of Distributions. The Defendant Ann Knott, his mother, had maintained and educated him from his father's death [457] until his own death; and she and her second husband submitted, by their answer, that they were entitled to be reimbursed *the amount of the expenses of such maintenance and education* out of the stocks and funds in which the original orphanage share of Joseph Aldridge the younger, and his share of his deceased sister's orphanage share, and the accumulations thereof had been invested, in case the Court should be of opinion that Ann Knott was not entitled to the whole of such stocks and funds.

Mr. Boteler and Mr. Parry contended that the amount of the sums, which had been expended in the maintenance and education of Joseph Knott the younger ought not to be paid out of his orphanage share alone, but ought to be apportioned between that share and his other property; and they referred to *Ambrose v. Ambrose*, in which the allowance for the maintenance and education of Thomasin Ambrose, the infant, was ordered to be paid out of the interest or proceeds and growing rents and profits of her late father's estates, both real and personal; and also to *Wilcocks v. Mayne*, in which the allowance for maintenance was directed to be paid out of the increase of their respective *shares and estates*.

Mr. Stuart, Mr. James Russell and Mr. Collins contended that Ann Knott ought not merely to be repaid the sums which she had actually expended in her son's maintenance and education; but that a liberal allowance ought to be made to her, having regard to the whole of the property to which her son was entitled, and that the amount ought to be paid wholly out of the stocks and funds in which his orphanage share had been invested. [458] They cited *Foljambe v. Willoughby*, (1) where Sir John Leach, V.-C., ruled that where two funds are provided for the maintenance of an infant the interest of the infant must determine which of the two funds is to be applied; and they added that, in *Ambrose v. Ambrose* and *Wilcocks v. Mayne*, the question out of what part of the infant's property the allowance for his maintenance ought to be paid was not contested.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In the two cases that were mentioned by the Plaintiffs' counsel, it does not appear that the income of the orphanage shares was sufficient for the maintenance of the infants; it does not appear what was the actual income. Besides, the question now raised was not contested, nor could it be contested; for there were no parties to contest it.

I am now required to decide what ought to be done in a case where the matter is actually contested: and I think that the Court must be guided by the rule which Sir John Leach laid down in *Foljambe v. Willoughby*; and that, whenever it has to exercise a choice between [459] the different funds out of which an infant is to be maintained, it should hold that that fund belonging to the infant shall bear the

(1) 2 Sim. & Stu. 165. In that case the infants were all living; but in the present case the infant was dead; therefore it is not easy to see how that case applied, in principle, to the present; for, the infant being dead, his interest was out of the question.

No authority was cited, probably none could be found, in support of the proposition contended for by the Defendants' counsel, namely, that although Mrs. Knott claimed to be allowed no more than the sums *which she had expended* in the maintenance of her *deceased* son, she was entitled to a *liberal* allowance, having regard to the whole of his property.

burthen, which, in effect, is least beneficial to the infant, in the sense of his having the least dominion over it.

Then there is this to be observed : that, in computing what ought to be allowed out of the interest of the orphanage share, the Master must have regard to the whole of the income which the child really had. Because the matter cannot be considered in the same way as if the infant had only the orphanage share : but, as he was entitled to the rents and profits of an estate, and to a fund of personalty, which was absolutely his, and also to the orphanage share, which would be his only on his attaining the age of 21, the sum to be allowed for his maintenance must be settled with reference to all that he was entitled to.

By the order made on the hearing of the cause on the equity reserved, the Plaintiffs were declared to be entitled to the share of Elizabeth Aldridge which accrued, upon her death, to Joseph Aldridge, and to the accumulations (if any) upon the whole original and accrued shares of Joseph Aldridge : and it was referred to the Master to inquire and state what sum would be proper to be allowed, for the maintenance of Joseph Aldridge, from the death of his father to his own death, having regard to the whole of his fortune, with liberty to the Master to state special circumstances : and further directions and costs were reserved.(1)

[460] STUART v. LORD BUTE. Jan. 18, 1842.

Insufficiency. Defendant. Answer. Examination. Partners.

A Defendant, who was required to set forth in his answer to interrogatories certain entries in the books of a firm of which he was a member, stated, in his answer, that the books were in the joint custody of himself and his co-partners, and that he had asked their permission to inspect and make extracts from the books to enable him to comply with the requisitions of the interrogatories, but that they had refused to permit him so to do. Held, that the answer was insufficient ; as the Defendant had not stated that there was any contract, between him and his co-partners, which prevented him from inspecting the books, and making extracts from them, without their permission.

The Court having decided that the answer and examination put in by the Defendant, Lord Wharncliffe, to the 4th, 5th and 6th interrogatories, was insufficient (see *ante*, vol. xi. p. 445), his Lordship put in a further answer and examination stating, in effect, that the books and accounts of the partnership were in the joint custody of himself and of Lord Ravensworth and Mr. Bowes, his co-partners ; and that, before putting in his further answer and examination, he had applied to them for permission to inspect and make copies of and extracts from the books and accounts of the partnership, in order to enable him to answer and comply with the requisitions of the interrogatories ; but that they had refused and still did refuse to give him such permission.

The Master certified that the further answer and examination was insufficient with respect to the three interrogatories before mentioned : whereupon Lord Wharncliffe excepted to the certificate.

Mr. Stuart and Mr. Parry, in support of the exceptions, said that Lord Wharncliffe had shewn, by his further answer and examination, that it was wholly out of his power to give the information which the inter-[461]-rogatories required. They cited *Taylor v. Rundell* (*ante*, vol. xi. p. 391 ; and 1 Craig & Phill. 104) ; and *Murray v. Walter* (*Ibid.* 114).

Mr. Bethell appeared in support of the certificate.

THE VICE-CHANCELLOR [Sir Lancelot Shadwell]. It appears to me that enough has not been stated in this case to shew in what respect permission was necessary, or that

(1) The Plaintiffs have appealed to the Lord Chancellor from the latter part of the above order. [1 Ph. 572.]

permission was at all necessary to enable Lord Wharnccliffe to inspect the partnership books. For anything that appears to the contrary on this examination, Lord Wharnccliffe might have gone down to Newcastle and inspected the books, if he had thought fit to do so. He does not state that he and his co-partners became partners under such a contract as disabled any one of them, without the express permission of the other two, to inspect the books or make extracts from them. Nothing of the kind is stated.

With respect to what is alleged to have taken place, in the year 1838, with regard to Mr. Nicholas Wood (see *ante*, vol. xi. p. 445); I cannot comprehend how an order given by A., B. and C., being partners, to their agent or servant, can have the effect of giving up the right of the partners, unless there was some contract that it should be given up. One partner would, as a matter of course, have dominion over his agent or servant, though he was the agent or servant of the partnership. The effect of the order given, in 1838, to Nicholas Wood was to prevent any *stranger* from inspecting the books; but I do not see that any order was given which would have the effect [462] of disabling Lord Wharnccliffe, himself, from inspecting the books: and, if he had given an order as against himself, the same power which enabled him to give the order would have enabled him to revoke it.

There may have been, for anything that I know to the contrary, some contract between Lord Wharnccliffe and his two partners which, in effect, has disabled him from inspecting the books and making extracts from them without their permission. But there is no intimation of any such contract in any part of the examination; and, therefore, there was not any necessity for Lord Wharnccliffe to apply to his co-partners for permission to inspect and make extracts from the books of the partnership.

If Lord Wharnccliffe had stated that he had gone to Newcastle and had proceeded to examine the books, but that an opposition was made, I mean such an opposition as amounted to a civil representation, to his Lordship, that, if he persisted, force would be used, *that* would have been a very good reason for holding that he was not bound to do anything more. But there is no such statement in his further examination. And, as no case is stated which shews that it was necessary for his Lordship to ask permission to inspect the books and that he did ask it and was refused, my opinion is that it does not sufficiently appear, on the examination, that his Lordship is justified in not complying with the requisitions of the interrogatories; and, consequently, I must hold that the further examination which he has put in is not sufficient.

[463] STRICKLAND v. STRICKLAND. Jan. 27, 1842.

Pleading. Parties. Executors. Revivor.

If a Defendant dies, having appointed two or more executors and all of them do not prove the will, it is sufficient for the Plaintiffs to revive the suit against those who prove.

Eustachius Strickland, one of the Defendants, died, having appointed Sir George Strickland and G. Meynell his executors: but Sir George alone proved his will. The Plaintiffs revived the suit against Sir George, but not against Meynell.

Mr. Shadwell, for Sir George Strickland and Mr. Meynell, now moved that the Plaintiffs might revive within 14 days against both the executors, or that the bill might be dismissed as against them. He said that executors derived their title under the will, and if one of them proved it, they all became the personal representatives of the testator.

Mr. Bethell, for the Plaintiffs. As the Plaintiffs have revived the suit against the executor who has proved the will, they have done all that it is incumbent on them to do.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that although, where A. and B. were appointed executors and A. alone proved, the probate enured to B., yet the general rule was that it was sufficient to bring A. alone before the Court.

[464] EVERETT v. PRYTHERGCH. STRICKLAND v. STRICKLAND.
Jan. 27, Feb. 8, March 23, 1842.

Costs. Exceptions. Practice.

If exceptions to the Master's report as to scandal or impertinence are allowed, the Court, on the application of the successful party, will order the costs of the reference to the Master, and also the costs of the application, to be taxed and paid by the unsuccessful party.

In *Everett v. Prythergch* (see *ante*, p. 365) the Defendant excepted to the bill for scandal and impertinence; and the Master allowed some of the exceptions. The Plaintiff excepted to the report; and the Court allowed his exceptions.

In *Strickland v. Strickland* the Plaintiff excepted to the answer for impertinence; and the Master allowed the exceptions. The Defendant excepted to the report; and the Court allowed his exceptions.

The Defendant then moved that the costs of the reference to the Master, and also the costs of the application, might be taxed and paid by the Plaintiff.

THE VICE-CHANCELLOR [Sir L. Shadwell] at first hesitated to make the order as to the costs of the application; but, after having been furnished by Mr. Bicknell, the registrar, with the order in *Everett v. Prythergch* (in which those costs, as well as the costs of the reference, were ordered to be paid by the Defendant, who was the unsuccessful party in that case), His Honor made an order according to the notice of motion.(1)

[465] HORE v. BECHER. Jan. 28, 1842.

[S. C. 11 L. J. Ch. 153; 6 Jnr. 93. Questioned, *Fitzgerald v. Fitzgerald*, 1868, L. R. 2 P. C. 87; 5 Moo. P. C. (N. S.) 186; 16 E. R. 486. Distinguished, *Widgery v. Tipper*, 1877, 5 Ch. D. 521.]

Husband and Wife. Reversionary Interest. Release. Mistake.

A single woman being entitled to an annuity secured by bond, married. Her husband executed a release of the annuity and died, leaving his wife surviving. Held, that, as he could release the security, he could release the annuity, so as to bind his wife.

A. executed a bond to B. and C., conditioned for payment of an annuity of £100 to D. for life, and assigned an annuity of £120 for the life of one M. and a policy of insurance for £700 on M.'s life, to B. and C., upon certain trusts for further securing the annuity of £100.

M. died, and A. died shortly afterwards, having, as was then believed, received the £700 and applied it to his own use. Shortly afterwards D., in consideration of £500, released A.'s personal representative and B. and C. from the annuity of £100 and the securities for it. Some years afterwards it was discovered that A. had placed the £700 in a bank, in the names of B. and C., where it still remained. Held, that the release having been executed under a mistake was inoperative, and that the £700 remained impressed with the trusts for securing the annuity of £100.

Robert Becher executed a bond, dated the 4th of May 1813, to A. Fraser and John Becher, in the penalty of £2000, conditioned for securing an annuity of £100 a year to Mary Ann Dickenson, spinster, during her life: and, by a deed of even date with the bond, he assigned an annuity of £120, which had been granted to him for

(1) In *Desanges v. Gregory*, *ante*, vol. vi. p. 473, the costs of the application were not asked for.

the life of M. D., and also a policy of insurance for £700 on M. D.'s life, to the obligees in the bond, upon certain trusts for further securing the due payment of the annuity of £100 a year.

In April 1814 Mary Ann Dickenson married John Turton. In 1819 Robert Becher, the obligor in the bond, died intestate; and his brother, Richard Becher, took out administration to him. After Robert Becher's death the annuity of £100 became in arrear; and Mr. and Mrs. Turton threatened to commence proceedings at law and in equity against Richard Becher, as the personal representative of Robert, and against Fraser and J. Becher, as the trustees for securing the annuity, [466] in order to recover the arrears and enforce the future payment of the annuity. The parties, however, afterwards came to a compromise; in pursuance of which, Mr. and Mrs. Turton executed a deed, dated the 24th of August 1819, and thereby, in consideration of £500 paid to them by J. Becher, released Fraser, J. Becher, and Richard Becher, as the administrators of Robert, from all claims and demands in respect of the annuity of £100 or the securities for the same.

Fraser survived John Becher, and died in 1839. The Plaintiff was his executor. Mr. Turton also died; and after his death his widow married Samuel Wood.

The bill was filed against Richard Becher as the personal representative of Robert, and against Mr. and Mrs. Wood: and on the cause coming on to be heard as a short cause, one question was whether it was competent to Mr. Turton to release his wife's annuity, except during the coverture.

Mr. G. L. Russell and Mr. Hore appeared for the Plaintiff.

Mr. Stuart and Mr. J. H. Palmer, for Mr. and Mrs. Wood, said that all the payments of the annuity after Mr. Turton's death were reversionary payments; and that a husband could not deal with the reversionary interest of his wife so as to bind her if she survived him; *Purdew v. Jackson* (1 Russ. 1), *Honner v. Morton* (3 Russ. 65), and *Stiffe v. Everitt* (1 Myl. & Cr. 37): that if a husband could not assign his wife's reversionary interest so as to bind her if she survived him, he could not release it; for there was no [467] difference in principle between a release and an assignment, as the power to extinguish could not exist without the power to transfer: and that, in *Thompson v. Butler* (Moore's Rep. 522), it was expressly decided that if a married woman had an annuity for life, a release by her husband did not bind her if she survived.

Mr. Bethell and Mr. Hislop Clarke, for Richard Becher, said that the cases cited related to assignments by the husband of the wife's reversionary interest; and, therefore, they did not apply to the present case; for here the question was, not as to the effect of an assignment but as to the effect of a release by the husband: that a distinction had been always made between a release and an assignment; and that no point was better settled than that an interest, though it could not be assigned, might be released.

THE VICE-CHANCELLOR [Sir L. Shadwell]. If a man gives a bond or a promissory note to secure an annuity to a single woman, and she afterwards marries, her husband may release the bond or note: and, if he releases the security, there is an end to the annuity.

In the case in Moore's Rep. it does not appear how the annuity was secured. If it was secured on land, it is perfectly plain that the husband could not release it without the concurrence of his wife; in order to extinguish the annuity, she must have joined with him in levying a fine of the land.

The object of the suit was to have the rights and interests of the Defendants to and in certain Exchequer [468] bills, which had been purchased with proceeds of the policy on M. D.'s life, ascertained and declared by the Court.

The release of the 24th of August 1819 recited (as the parties then believed to be the fact), that on M. D.'s death (which took place in 1816) Robert Becher received the money secured by the policy from the insurance office, and converted it to his own use; and that he some time afterwards went to India, and died on his voyage home. In 1841, however, the Plaintiff accidentally discovered that the sum due on the policy had been paid into Hammersley's bank, to the account of Fraser and J. Becher, the obligees in the bond.

Mr. Stuart and Mr. J. H. Palmer said that Mr. and Mrs. Turton executed the

release, under the erroneous impression created by the recital in the deed that the money received under the policy was gone; and that it was evident that they would not have executed the release, if they had known that the money was safely deposited in Hammersley's Bank; and, consequently, the release was inoperative, so far as the fruits of the policy were concerned.

Mr. Bethell and Mr. Hislop Clarke said that the question arose between Co-defendants; and, as no bill had been filed to set aside the release, the Court must consider it to be a valid deed, and decide as to the rights of the parties accordingly.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This case must be considered with reference to the recital in the release, that Robert Becher, after the death of M. D., received and converted to his own use [469] the sum of £700 secured by the policy which was actually paid to him by the insurance office, without any knowledge of the assignment of the 4th of May 1813. It now turns out that that was an error in fact: and, therefore, the deed of August 1819, though it purports to be a release of the £700, cannot be considered as operating on that sum. It is apparent, on the face of that deed, that the parties would not have taken the course which they adopted if they had known that the £700 was deposited in Hammersley's Bank in the names of the trustees of the assignment of May 1813. The consequence is that the release was inoperative, and that the sum of £700 still remains impressed with the trusts declared, by the assignment, for securing the annuity of the £100 a year.

Declare that, under the circumstances of mistake, the release, dated the 24th of August 1819, is totally inoperative, and that the principal sum of £700, and the sum of £269, 4s. 1d. being the interest thereof, together with the Exchequer bills in which those sums have been invested, are now subject to the trusts of the original deed of the 4th of May 1813.

[470] JONES v. PUGH. Feb. 10, 1842.

[Reversed, 1 Ph. 96; 41 E. R. 567; 11 L. J. Ch. 323; 6 Jur. 613.]

Solicitor. Privileged Communications. Mortgagor and Mortgagee. Discovery. Defendant.

A solicitor invested his client's money on a mortgage, and, by the client's desire, took the mortgage in his own name, without any trust being declared by the deed. In a suit by a judgment creditor of the mortgagor, to redeem, against the solicitor and the mortgagee (who was out of the jurisdiction): Held, that the solicitor was privileged from disclosing the name of his client, and also the particulars of other mortgages of the property which had been taken, by other clients of the solicitor, in their own names. Held, also, that the case was an exception to the rule that a Defendant who submits to answer must answer fully.

The bill was filed by a judgment creditor of the Defendant, Pugh (who was out of the jurisdiction), to redeem a mortgage made in October 1834 by Pugh to the other Defendant, Roy, who was a member of the firm of Roy & Co., solicitors. It alleged that the mortgage of 1834 was made to Roy as a trustee, and that there were other mortgages on the property; and it sought a discovery of the names of the persons for whom Roy was a trustee, and of the names of the parties to and all the particulars of the other mortgages; and it required Roy to set forth a list of the deeds and other documents in his power relating to the matters stated and charged.

Roy put in an answer to the bill in which he admitted the matters alleged, but declined to give the discovery sought, or to set forth a list of the deeds, &c., on the ground that he could not do so without committing a breach of professional confidence and duty: inasmuch as the clients of his firm were in the habit of entrusting him and his co-partners with monies to be laid out on securities, sometimes in the names of the clients, and sometimes in the Defendant's names, under a private trust and confidence that the names of the clients should not be disclosed. He added, that no trust was declared by the mortgage deed of 1834, but [471] the mortgage money was made payable to the Defendant absolutely, and he was authorized to give a good

discharge for it when paid, and to transfer the security ; and that he had no knowledge as to that or any of the other mortgages, except what he had obtained in the course of his confidential employment as solicitor to the several mortgagees ; and that the deeds, &c., in his power were their property.

The Plaintiff excepted to the answer, on the ground that the Defendant ought to have given the discovery and set forth the list required by the bill : and the Master allowed the exceptions. The Defendant then took exceptions to the report.

Mr. Bethell and Mr. Cole appeared in support of those exceptions ; and

Mr. G. Richards and Mr. L. Wigram, in support of the report.

THE VICE-CHANCELLOR [Sir L. Shadwell] held that the Defendant would not have been bound either to give the discovery or to set forth the list, if he had availed himself of his professional character either by demurring or by pleading to the bill ; but that, as he had thought proper to put in an answer, and as the answer was filed before the General Orders of August 1841 (1) came into operation, he was bound to answer fully : and, on that ground, His Honor overruled the exceptions to the Master's report.

THE LORD CHANCELLOR [Lyndhurst], however, on appeal, reversed His Honor's order, his Lordship being of opinion, on the [472] authority of *Harvey v. Clayton* (2 Swanst. 221, note), that the present case was one of the exceptions to the rule that a Defendant who answers at all must answer fully. (See 1 Phill. Rep. 96.)

[472] WARD v. ARCH. Feb. 11, 1842.

Statute of Limitations. 3 & 4 Will. 4, c. 27. *Annuity. Trustee and Cestui que Trust.*

A testator who died in 1795 devised his real estates to trustees to sell, and out of the interests of the proceeds, and out of the rents of the estates until they should be sold, to pay certain annuities. No payment has been made in respect of any of the annuities for more than 20 years before the bill was filed ; but the trustees entered into possession of the estates on the testator's death, and the surviving trustee continued in possession until about eleven years prior to the filing of the bill. Held, that the Plaintiff's right to the annuities was not barred by the Statute of Limitations.

Ebenezer Whiting, by his will, dated the 4th of August 1795, gave the residue of his real and personal estate to John Woods and two other persons, their heirs, executors, &c., in trust to sell and invest the proceeds in Government securities, and out of the dividends thereof or the rents of his real estates until the same should be sold, to pay to his wife, Elizabeth Whiting, for her life, an annuity of £300, by quarterly payments, on the days therein mentioned, the first payment to be made on such of those days as should happen next after his death ; and to pay to the Plaintiff, Frances Ann Ward, for her life, an annuity of £20 in like manner ; and to pay the remainder of the dividends and rents to Elizabeth Whiting for her life ; and, after her death, to pay to the Plaintiff, Frances Ann Ward, for her life, a further annuity of £30, the first payment to be made on such of the before-mentioned days as should happen next after Elizabeth Whiting's death : and the testator gave all the residue and remainder of [473] his estate and effects, after payment of the annuities, to his four sisters.

The testator died on the 2d of September 1795. Upon his death the trustees entered into possession of his real estates : and his personal estate being wholly insufficient to pay Elizabeth Whiting's annuity of £300, they, as the bill alleged, paid her £100 a year during her life out of the rents of the real estates ; but they never made any payment whatever to the Plaintiff, Frances Ann Ward, in respect of either of the annuities given to her by the will.

Elizabeth Whiting died on the 27th of March 1804 ; and the Plaintiff, Frances

(1) The 38th Order allows a Defendant to protect himself, by answer, from answering any interrogatory to which he might have demurred.

Ann Ward, was her executrix: but the trustees did not make any payment to her, in respect of the arrears of Elizabeth Whiting's annuity, except that, shortly after that lady's death, they paid the Plaintiff £50 out of the rents of the estates.

John Woods survived his co-trustees, and continued in possession of the estates until his death. He died in 1826.

In May 1837 the bill was filed to have the trusts of the will carried into execution and to have the arrears of the three annuities raised by sale of the testator's real estates, and provision made for the future payment of the two annuities given to the Plaintiff, Frances Ann Ward.

Some of the Defendants insisted, by their answers, that the Plaintiff's claim to the annuities and the arrears thereof was wholly barred by the Statute of Limitations; or, at all events, that she could not claim [474] any arrears of the annuities given to her, except for six years prior to the filing of the bill.

Mr. Walker and Mr. Willcock, for the Defendants, who relied on the Statute of Limitations, said that the last payment in respect of the annuity of £300 was made shortly after the year 1804: that an annuity was a legacy; and that, by the 42d section of the Statute of Limitations (3 & 4 Will. 4, c. 27), it was enacted that no arrears of rent or of interest in respect of any sum of money charged upon or payable out of any land, or in respect of any legacy, should be recovered, but within six years next after the same respectively should have become due: that Frances Ann Ward's claim to the annuities of £20 and £30 was barred by the 40th section of the Act, which enacts: that no action, suit or other proceeding shall be brought to recover any sum of money charged upon or payable out of land, or any legacy, but within 20 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same. *Sheppard v. Duke* (*ante*, vol. ix. p. 567).

Mr. Bethell and Mr. Elderton, for the Plaintiffs, said that the trustees entered into possession or receipt of the rents of the estates charged with the annuities immediately after the testator's death; and that John Woods, the surviving trustee, continued in such possession or receipt until the year 1826: that, when the relation of trustee and *cestui que trust* was once constituted, the doctrine of adverse possession (which was defined by the third section of the Act) did not apply: that the trustees, by receiving the rents, must be considered to [475] have received the annuities; and their receipt was the receipt of their *cestui que trust*. They referred to the 15th section of the Act, and also to the 25th, which enacts that when any land or rent shall be vested in a trustee, upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of the Act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

Mr. G. Richards, Mr. Stuart, Mr. Hislop Clarke, Mr. Taylor and Mr. Freeling were the other counsel in the cause.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The trustees were trustees to pay the annuities; and their possession of the estates out of which the annuities were directed to be paid continued down to the year 1826; therefore it is plain that the objection to the bill, founded on the Statute of Limitations, cannot be supported.

[476] LORD AMHERST v. THE DUCHESS DOWAGER OF LEEDS. Feb. 18, 1842.

[S. C. 6 Jur. 141.]

Will. Construction. Legacy.

Testator, by his will, gave an annuity of £1000 a year to his wife, for her life, and directed his plate and furniture at H., his family mansion, to be sold. By a codicil, he desired that his wife should be accommodated with any plate she might choose

for her own use, and that an inventory should be made of it, and that it should be returned at her death: "and I give to her absolutely any one of my silver inkstands which she may select: I also give to my dear wife, any part of the beds, bedding, linen, carpets, or other household furniture at H., *which she may require for her own use*, as likewise any wardrobes or glass cases at H. *according to her wish*; and I give to her, in addition to all other provisions, £400 *per annum* during her life, *to be applied to the rent of any residence* she may choose to live at, and to be raised and paid in like manner as the annuity bequeathed to her by my will."

Held, that the wife was entitled, *absolutely*, to such parts of the furniture as she might select; and that she was entitled to be paid the £400 a year, although she had fixed her residence with her son, at the family mansion.

The late Duke of Leeds, by his will, dated the 30th of July 1836, gave to his wife, Charlotte Duchess of Leeds, the sum of £2000 and certain specific legacies: and he gave his freehold estates to the Plaintiffs, their heirs, executors, &c., in trust as a fund for the discharge of his debts, and all mortgages and incumbrances which should affect the same at his decease, and his funeral and testamentary expenses and legacies, in aid of the residue of his personal estate; and upon trust, out of the surplus rents, after defraying the interest of all charges thereon and all deductions and out-payments, to pay an annuity of £1000 a year to the duchess, for her life, by quarterly payments, the first payment to be due at the end of three months after his decease; and, subject thereto, in trust for his son-in-law, Sackville Walter Lane Fox, for his life, and after his decease, in trust for his (the duke's) grandson, Sackville George Lane Fox, for his life, with remainder to the first and other sons of Sackville George Lane Fox, successively, in tail, with remainders over: and he bequeathed his jewels and plate to the Plaintiffs, [477] upon trust, as to such parts of his plate as Sackville Walter Lane Fox, or, in case of his decease, the trustees should, in his or their absolute and uncontrolled discretion, deem suitable and sufficient to be preserved for the use of the parties interested in his real estates under his will, and, as to the whole of his jewels, in trust to preserve and appropriate the same for the use and enjoyment of the persons who should, from time to time, become beneficially entitled to his freehold estates under his will, so as to be annexed as heirlooms thereto: and as to all his pictures, prints, cameos, intaglios, busts, statues, gems, medals, china, books and household goods and furniture at Hornby Castle, and as to all the monies to arise by the sale of such parts of his plate as should not be appropriated for the purpose of being preserved as heirlooms, and all the residue of his personal estate and effects, he bequeathed the same to the Plaintiffs, in trust to convert the same into money, and to apply the proceeds, as the primary fund, in payment of his debts, funeral and testamentary expenses and pecuniary legacies, and to lay out the surplus in the purchase of lands to be settled to the same uses as he had declared of his freehold estates: and he directed the Plaintiffs, in the sale of any of his estates contiguous to or convenient to be enjoyed with his settled family estates in the North or West Ridings of Yorkshire, or of any of his plate or other effects at Hornby Castle thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of Hornby Castle for the time being, on such terms as the Plaintiffs should think fair and proper; and he desired that, as soon as might be after his death, such arrangements might be made, with respect to his personal effects at Hornby Castle (which were of great value) as might be sufficient for their security and pre-[478]servation, and might tend to avoid any injury or inconvenience from their removal, should that become necessary, as far as might be consistent with the object of his will: and he appointed the Plaintiffs and Sackville Walter Lane Fox his executors.

The testator made a codicil, dated the 29th of May 1838, which was partly as follows:—"I desire that my dear wife, should she survive me, may be accommodated with any plate, for her own use, of whatever description she may choose from Hornby Castle, (1) having an inventory of the same, to be returned at her death to my

(1) Hornby Castle did not pass by the will; but was entailed on the Marquis of Carmarthen, the testator's son and heir.

executors, and then to go as before directed by my will ; and I give to her, absolutely, any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire in the first drawing-room at Hornby aforesaid : I also give to my dear wife *any part* of the beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and chaiselongues, *or other household furniture at Hornby aforesaid, which she may require for her own use*, and likewise any wardrobes or glass cases at Hornby aforesaid, *according to her wish* ; and I give to her, in addition to all other provisions, £400 per annum during her life, *to be applied to the rent of any residence she may choose to live at*, and to be raised and paid in like manner, and in all respects, as the annuity bequeathed to her by my will : and as to so much of the furniture and effects at Hornby Castle, made saleable by my will as part of the primary fund for the payment of my debts, as are not hereby withdrawn from such disposition but will remain liable to be sold for that purpose, [479] it is my will that my trustees, before making any other disposition thereof, shall have the same valued in such manner as they shall deem fair and proper, and offer them to my son, the Marquis of Carmarthen, if he shall survive me, at a deduction of 20 per cent. from such valuation ; he to signify his acceptance or refusal of such offer within three months next after my decease : and in all other respects I confirm my said will."

The testator died on the 10th of July 1838, leaving the Marquis of Carmarthen, his heir, and the other persons named in his will, surviving.

The bill, after setting forth the will and codicil, alleged that doubts had arisen as to the rights and interests of the Dowager Duchess of Leeds in and to the household goods and furniture and other household effects at Hornby Castle at the time of the testator's death, and as to her right to the annuity of £400 bequeathed by the codicil ; that, shortly after the testator's death, the household goods and furniture and other household effects at Hornby Castle were valued as being subject to probate duty, and that the household goods and furniture were valued at £8062, 13s. 6d., the linen at £517, 8s. 9d., and the china and glass at £932, 9s., amounting in all to £9512, 11s. 3d. ; that, since the testator's death, the duchess had fixed her residence at Hornby Castle, and had written to the Plaintiff, William Alderson, as one of the executors and trustees of the will, informing him that she had so done, and desiring that, therefore, the annual sum of £400 might be paid to her account at her bankers ; that the duchess, in exercise of the power given to her by the codicil, had made a selection of part of the household goods and furniture and other household [480] effects, and claimed, under the codicil, to be absolutely entitled to the parts so selected ; and that she had sent to the executors an inventory of the articles not selected by her, with a valuation of such articles, such valuation being as follows :—household goods and furniture £1680, 12s., linen £34, and china and glass £38, amounting in all to £1752, 12s. ; that the Defendant, Sackville Walter Lane Fox, alleged that the selection so made by the duchess was an undue exercise of the power given to her by the codicil ; and that she was not entitled to retain so large a quantity of the goods, furniture and other effects ; and that Hornby Castle, from its magnitude, was not a residence suitable to her income and means of living ; and that it was not a suitable residence for her within the meaning of the testator ; and that she was entitled to select so much only of the goods, furniture and other effects as was sufficient for a suitable residence for her ; and that she was entitled for her life only, and not absolutely, to that portion of the goods, furniture and effects ; and that the annual sum of £400, bequeathed by the codicil, was to be paid for the rent of a residence for her, and was not to be paid to her absolutely, or applied in any other way for her benefit ; but that the duchess claimed to be absolutely entitled to the £400 per annum, without any reference whatever to her habitation or the rent thereof.

The bill prayed that an account might be taken of the household goods, furniture and other effects at Hornby Castle at the time of the testator's death, and of the value thereof, and that the rights and interests of the duchess and all other parties in the same under the will and codicil might be ascertained and declared by the Court ; and that the right of the duchess to the [481] annual sum of £400, bequeathed by the codicil, might be ascertained and declared in like manner.

The duchess in her answer said that, in exercise of the power given to her by the codicil, she directed Mr. Dowbiggin (an upholsterer in London) to make, as her agent

and on her behalf, a proper selection of the household goods and furniture and other household effects at Hornby Castle suitable to her rank; and that such selection was made accordingly and adopted by her; and that she had, for the present and since the late duke's death, fixed her chief residence at Hornby Castle, but she had not any legal right to remain there; and that she occasionally resided in London and also in Scotland.

Dowbiggin deposed that he had been instructed by the duchess to select, from the household goods, furniture and effects in Hornby Castle, such as were proper for furnishing a house suitable to her rank, and that the duchess, or some person on her behalf, furnished him with an extract from the codicil, as his guide in making the selection; and that he made the selection in accordance with his said instructions and with the extract so furnished to him.

Mr. G. L. Russell, for the Plaintiffs, stated that the questions were, first, whether, as the Duchess of Leeds had selected by far the most valuable parts of the furniture at Hornby Castle, she had not made an unfair use of the power given to her by the codicil.

Secondly, whether she was entitled to the selected articles absolutely, or for her life only; and,

[482] Thirdly, whether, as she had taken up her residence at Hornby Castle, she was entitled to be paid the £400 a year.

Mr. G. Richards and Mr. Lloyd, for the duchess, said, first, that, by the codicil, the duchess was empowered to take any part of the beds, bedding, &c., at Hornby Castle which she might require for her own use, and any wardrobes and glass cases according to her wish; that the words "according to her wish" were more general even than the words "for her own use;" and that the only restrictive effect of those latter words was that the duchess was not to take any of the beds, bedding, &c., which she did not require for her own use; and that it was not alleged that she had done so. *Walker v. Walker* (5 Madd. 424).

Secondly, that the duchess was entitled absolutely to the articles of furniture which she had selected; for the testator had directed, with respect to the plate of which the duchess was to have the use, that an inventory should be taken of it, and that it should be returned after her death, and then go as directed by his will; but when he gave her, as he did in the very next sentence, such part of his furniture as she might require for her own use, he did not direct that an inventory should be taken of it, or that it should be returned after her death; and,

Thirdly, that though the late duke had expressed the purpose for which the £400 a year was to be applied, he had not imposed a condition on the duchess to [483] apply it to that purpose; (1) and that she had not taken up her abode permanently at Hornby Castle, but had merely gone there on a visit to her son, the present duke.

Mr. Stuart and Mr. Shee, for Sackville Walter Lane Fox and his children, said that the duchess had exercised her power of selecting from the furniture at Hornby Castle to an excessive extent; that, instead of selecting "any part," she had taken nearly the whole of it; for the furniture was valued at £9512, and all that remained was of the value of £1752 only; that the late duke never contemplated that the duchess would reside with her son at Hornby Castle; but supposed that she would live in a house worth £400 a year; and, when he empowered her to choose such of the furniture as she might require for her own use, he meant such of the furniture as would be necessary to furnish a house, the rent of which would be £400 a year; whereas the duchess had selected furniture suitable to Hornby Castle; that she had not proved that the furniture which she had chosen was such as she required for her own use; and that it ought to be referred to the Master to inquire whether that was the case.

Secondly, that the duchess was entitled, only for her life, to the articles which she had selected; for, by the codicil, she was to have merely the use of them, and, after her death, they were to be sold.

Thirdly, that the purpose for which the £400 a year was given was incorporated

(1) If a legacy is given to purchase a ring, the legatee is not bound to lay out the money in purchasing a ring.

with the gift ; and as the [484] duchess had, as appeared from her letter to the Plaintiff Alderson, fixed her residence at Hornby Castle, the purpose for which the £400 a year was given had failed ; and, consequently, the gift could not take effect.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not require any reply.

First of all, the late duke, by his will, gives all his freehold estates to Lord Amherst and his co-devisees, upon trust out of the surplus rents, after keeping down the interest on the mortgages thereon and making certain other deductions, to pay to his wife, that is the present duchess dowager, or her assigns, during her natural life, an annuity of £1000 sterling, clear of all taxes and deductions, by equal quarterly payments, the first payment to be due at the end of three calendar months next after his decease, and such annuity to be paid proportionably up to the day of her decease ; and, subject to such annuity, in trust for Mr. Sackville Walter Lane Fox and his children. Then he gives his copyhold and leasehold estates to the trustees, upon trusts corresponding, as far as the law permits, with the trusts declared of his freehold estates. Next he gives his jewels and plate to the trustees, in trust, as to such part of his plate as they should think proper to preserve for the use of the parties interested in the surplus of his real estates under his will, and as to the whole of his jewels, to permit the same to go as heirlooms to his devised estates ; and, as to such part of his plate as his trustees should not think proper to preserve, in trust to sell it and apply the proceeds as part of his residuary personal estate ; then he gives certain family portraits and his furniture in his house in St. James's Square to the trustees, upon the same trusts as he had before declared of his [485] jewels and such part of his plate as should be preserved. Then he gives all his pictures, prints, cameos, intaglios, busts, statues, gems, medals, china, books and household goods and furniture at Hornby Castle, and all the residue and remainder of his personal estate, to Lord Amherst and his co-trustees, upon trust to sell and convert the same into money, and to apply the proceeds, as the primary fund, in the discharge of his debts and funeral and testamentary expenses and pecuniary legacies, and in exonerating his devised estates from mortgages, and to invest the ultimate residue in the purchase of lands to be settled to the same uses as he had before declared of his devised estates. And he directs his trustees, in the sale of any of his estates contiguous to or convenient to be enjoyed with his settled family estates in the North and West Ridings of Yorkshire, or of any of his plate or other effects at Hornby Castle thereby authorized or directed to be sold under any of the trusts or powers thereinbefore contained, to offer them, in the first instance, to the proprietor of Hornby Castle for the time being, on such terms as his trustees should think fair and proper ; and that, as soon as might be after his decease, such arrangements should be made with respect to his personal effects at Hornby Castle, which were of great value, as might be sufficient for their security and preservation, and might tend to avoid any injury or inconvenience from their removal, should that become necessary. I mention that, because it seems to afford help in construing the codicil.

The codicil, so far as it is necessary to be stated for the present purpose, is as follows :—"I desire that my dear wife, should she survive me, may be accommodated with any plate for her own use, of whatever [486] description she may choose from Hornby Castle aforesaid, having an inventory of the same, to be returned at her death to my executors, and then to go as before directed by my will ; and I give to her absolutely any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire in the first drawing-room at Hornby aforesaid : I also give to my dear wife any part of the beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and chaiselongues or other household furniture at Hornby aforesaid, which she may require for her own use ; and likewise any wardrobes or glass cases at Hornby aforesaid, according to her wish."

The first question is whether it is not apparent from these words that the duke meant to give to the duchess absolutely what he professed to give to her. When I see that he commences with a limited gift, namely, of the use of the plate at Hornby Castle, and then changes the phrase and says : "I give to her, absolutely, any one of my silver or gilt inkstands which she may select, and also my satin-wood secretaire," and then goes on to say, "I also give to my wife any part of the beds and bedding," I cannot but think that the fair effect of the words is to give her absolutely any of the enumerated articles which she might require for her own use. Especially as I

find that that very sentence terminates in this manner, "and likewise any wardrobes or glass cases at Hornby aforesaid, according to her wish." Now, whether the words "according to her wish" had reference to some wish before expressed or to such wish as she might thereafter express, it clearly appears to me that the whole sentence describes an absolute gift to the duchess. And I think so more particularly, because I observe, in the latter part of the [487] codicil, these words, "and as to so much of the furniture and effects at Hornby Castle made saleable by my will as part of the primary fund for the payment of my debts, as are not hereby withdrawn from such disposition but will remain liable to be sold for that purpose" (plainly shewing that he conceived that the prior part of the codicil had the effect of withdrawing what might be taken by the duchess from the disposition made by the will), "it is my will that my trustees, before making any other disposition, shall have the same valued in such manner as they shall deem fair and proper, and offer them to my said son, the Marquis of Carmarthen, if he shall survive me, at a deduction of 20 per cent." Now that is a material variation from the mode of disposition directed by the will; and, in my opinion, the passage which I have last read amounts to this, namely, that, in the first place, the duchess was to take what she might require, and the residue was to be delivered to the son, the present duke, provided he chose to pay for them less by 20 per cent. than the sum at which they should have been valued. It seems to me, therefore, that the fair construction is that, in the first place, the late duke did mean to subtract from the disposition made by his will of the furniture at Hornby Castle such articles as the duchess should select, and, in the next place, such articles as the present duke should be willing to purchase at four-fifths of the valuation that should have been made of them.

If the parties think that the duchess dowager has selected articles that did not come within the description of "beds and bedding, linen, carpets, curtains, chairs, dining-room or other tables, sofas, ottomans and [488] chaiselongues or other household furniture," there must be an inquiry as to that point before I can express any opinion upon it.

Then the next question is with respect to the annuity of £400 a year. The testator says, "And I give to her, in addition to all other provisions, £400 per annum, during her life, to be applied to the rent of any residence she may choose to live at, and to be raised and paid in like manner, in all respects, as the annuity bequeathed to her by my will." The duke had directed, by his will, that the annuity of £1000 a year should be paid to the duchess, down to the time of her decease, by four quarterly payments. Now the payment to the duchess must be made first; and those words which are thrown in, "to be applied to the rent of any residence," shew only that what was passing in the duke's mind was that there might not be that family arrangement which has taken place, and that the duchess might be obliged to seek a residence for herself: therefore he directs, not that the trustees shall provide a residence for her and apply the £400 a year in paying the rent of it; but that the £400 a year shall be paid to the duchess, leaving her to apply it; and I cannot but think that the duke must have been aware that that might happen which has happened. At all events, there is nothing, either in the will or in the codicil, which shews that he considered it as certain that the duchess dowager and the present duke would not reside together.

My opinion is that the duchess is entitled, absolutely, to the beds and other specified articles of furniture at Hornby Castle, which the codicil empowers her to select; [489] and that she is also entitled to receive the annuity of £400, whether she resides at Hornby Castle or elsewhere.

If, as I before said, it is contended that the duchess has selected articles which she has no right to select, there must be a reference to the Master before I can decide that question.

[491] LLOYD v. JONES. Feb. 19, 1842.

Mortgagor and Mortgagee. Interest.

A mortgagee in possession, who becomes overpaid pending a suit to redeem, will be charged with interest on the balance, from the date of the report, and on the rents subsequently received by him, from the respective times when those rents were received.

The bill in this cause was filed against a mortgagee in possession to redeem the mortgage.

At the time when the Defendant put in his answer, the rents and profits which he had received were not sufficient to cover the amount due to him for principal and interest; but, pending the proceedings in the Master's office under the decree, he received further rents and profits; in consequence of which a balance of £64 was due from him at the date of the report.

On the cause coming on for further directions,

Mr. Wakefield and Mr. Koe, for the Plaintiff, insisted that the Defendant ought to be charged with interest on all the sums which he had received on account of rents and profits since he had been overpaid. They cited *Quarrell v. Beckford* (1 Madd. 269); *Burton v. Todd* (Sugd. Vendors, Appendix No. 20; and 1 Swanst. 255); *Wilson v. Metcalfe* (1 Russ. 530).

[492] Mr. G. Richards and Mr. Cockerell, for the Defendant, said that, in the cases cited, the principal and interest had been satisfied before the bill was filed; and that there was no authority for charging a mortgagee with interest where he had been overpaid in the progress of the suit.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that he had no authority to charge the Defendant with interest prior to the date of the report; but ordered him to pay interest at four per cent. on the £64 from that time, and an account to be taken of the sums subsequently received by him, and interest to be charged on those sums at the same rate from the times when they were received.

[492] HOLLIS v. BRYANT. Feb. 22, May 2, 1842.

Jurisdiction. Insolvent Debtor. Act of 1 & 2 Vict. c. 110. Debtor and Creditor. Receiver.

The assignee of an insolvent debtor, under 1 & 2 Vict. c. 110, being unable to recover an estate belonging to and in the possession of the insolvent, owing to the existence of an old commission of bankrupt against the insolvent (which, however, had been long since abandoned, in consequence of all the creditors under it having compromised and released their debts), is entitled to maintain a suit in Chancery against the insolvent and the assignee in bankruptcy, for the recovery of the estate, and for a receiver of the rents in the meantime.

Where a creditor puts in force against his debtor the compulsory clauses of 1 & 2 Vict. c. 110, the Insolvent Debtors Court has no power to compel the debtor to file a schedule of his property.

A motion was made in this cause for a receiver of the rents of certain real estates in Kent, Surrey and Sussex, of which the Defendant Bryant was in possession, as absolute owner thereof, and for an injunction to restrain him from continuing to receive the rents.

An affidavit made by the Plaintiff's solicitor, in support of the application, stated as follows:—That in 1839 [493] the Plaintiff recovered judgment against Bryant in an action on a promissory note for £60: that at the commencement of the action, and when the judgment was obtained, Bryant was and had been for nearly thirty years, and still continued a prisoner for debt within the rules of the Queen's Bench prison:

that in the belief that he had not any real or personal property which could be made available by legal process in execution of the judgment, the deponent, as the Plaintiff's attorney, sued out a *ca. sa.* against Bryant, and lodged a detainer against him with the marshal of the prison, and charged him in execution upon the judgment; and he was still detained in the custody of the marshal, upon such execution of the Plaintiff and also of various other creditors to a large amount: that he had been and still was resident, not within the walls of the prison, but at large within the rules, and appeared to be living at considerable expense: that the Plaintiff, not being able to obtain any further satisfaction of his debt, caused application to be made under the provisions of the Act of the 1st & 2d Vict. (c. 110), to the Court for the Relief of Insolvent Debtors in England, for the appointment of him, the Plaintiff, to be assignee of the estate and effects of Bryant, under and according to the said statute: that the Court granted a rule to be served upon Bryant and his detaining creditors to shew cause, on a certain day, why such appointment should not be made: that the rule was duly served accordingly; and upon the application to make it absolute, Bryant opposed it on the ground that he was not within the Act, inasmuch as a commission of bankruptcy had issued against him sometime back, *and was still pending and being acted upon, and operating upon all his property*: that, notwithstanding, [494] the Court appointed the Plaintiff assignee of Bryant's estate and effects, under the statute, and all his estate and effects were still vested in the Plaintiff as such assignee: that since the appointment of the Plaintiff as such assignee *Bryant had refused to file any schedule of his property* in the Court for Relief of Insolvent Debtors, or to give the Plaintiff or the deponent any information respecting the same: that shortly after the appointment of the Plaintiff as such assignee, the deponent, as the Plaintiff's solicitor, caused notices of such appointment to be served on Bryant's tenants, in consequence of which two of them refused to pay the rent due from them to Bryant, and Bryant thereupon commenced actions against them for the rents due, and such actions were still pending and being prosecuted: that a commission of bankrupt was issued against Bryant,(1) under which he was found a bankrupt: that the deponent had inspected the proceedings under the commission, and it thereby appeared that Bryant in various proceedings opposed the commission and insisted upon the illegality thereof, and endeavoured to defeat the same; and that in the course of such proceedings he filed various affidavits, in which he deposed that he was not a bankrupt: that, after much litigation in respect of the validity of the commission, the creditors under the commission held a meeting on the 31st of October 1827, at which they came to a compromise with Bryant, and agreed to accept certain sums of money in satisfaction of their debts, and on being paid those sums, to consent to the commission being superseded: that it appeared from the proceedings under the commission that no proceedings had been taken thereunder since 1828, and the assignees [495] appointed under it were dead; and the Defendant Belcher had been sometime since appointed official assignee to the commission;(2) but by the proceedings under it, it did not appear that such appointment was made at the instance of any creditor under the commission: that the deponent, on the Plaintiff's behalf, obtained an appointment for the 20th of April 1841, for the examination of Bryant under the commission: that Bryant attended the meeting, but refused to be examined, as to his estate and effects or otherwise under the commission, at the instance of the Plaintiff or of Belcher, on the ground that the Plaintiff was not a creditor or interested under the commission; and in consequence of such refusal the Commissioner of the Court of Bankruptcy, before whom the meeting took place, refused to proceed with the examination, and directed Belcher not to take any proceedings under the commission except at the instance of a creditor who had proved a debt under it: that Mr. Bennett, who attended the meeting as solicitor to the commission, stated to the deponent that he well knew that Bryant had a release from all his creditors under the commission, and that he, Bennett had

(1) It was stated, in another affidavit made in support of the motion, that the commission was issued in 1810.

(2) By 1 & 2 Will. 4, c. 56, s. 39, all then existing London commissions of bankrupt were removed into the Court of Bankruptcy established by that Act.

seen it, but that Bryant would not produce the same to disturb the commission, for purposes best known to himself: that, in consequence of the refusal of the commissioner to proceed under the commission except at the instance of the creditors who had proved debts under it, the deponent addressed circular letters to those creditors, with a view to ascertain if any of them could be produced for that purpose; and he also had interviews with the representatives of several of such creditors, who were long since dead, [496] and urged them to take the necessary proceedings under the commission to obtain payment of their respective claims, if the same were not already paid and satisfied; that several of them stated their readiness to prosecute such claims; but, after examining their papers and inquiring into the matter, it appeared that their debts had been satisfied and discharged, and they did not interfere any further with respect to Bryant's estate; and the deponent verily believed, from the result of the interviews with the creditors, that no further proceedings would be taken in their behalf: that deponent believed, from the correspondence which had taken place, and the interviews which had been had with the parties interested under the commission, that all the creditors who had proved their debts under it had been long since satisfied, and that Bryant had then in his possession a good and sufficient release or other discharge to him, in respect of the debts which had been proved under the commission; and that none of the creditors would further prosecute the commission, or interfere in any manner with Bryant's estate: that deponent believed, from the result of the correspondence and interviews with the creditors under the commission, that Bryant refused to produce the release or to give any information respecting it, for the purpose of remaining in the possession of his estates, and preventing the same from being made available to the payment of the debts which he had incurred subsequently to the date of the commission.

Mr. Anderdon and Mr. Terrell now moved for the injunction and receiver.

Mr. Wakefield and Mr. Steere opposed the motion, for the Defendant Bryant, on the ground that the Court [497] of Chancery had no jurisdiction in the case; but that the Plaintiff ought to seek relief either in the Court of Review or in the Insolvent Debtors Court. They added that there was no instance in which the assignee of a bankrupt or insolvent had been allowed to sue the bankrupt or insolvent. (1) They cited *Nias v. Adamson* (3 Barn. & Ald. 225), *Crofton v. Poole* (1 Barn. & Adol. 568), and *Drayton v. Dale* (2 Barn. & Cress. 293).

Mr. Lewis appeared for the Defendant Belcher.

THE VICE-CHANCELLOR [Sir L. Shadwell]. In this case the Plaintiff cannot obtain any relief in the Court of Bankruptcy, because he is incapable of coming in under the commission. Neither can he obtain any relief in the Insolvent Debtors Court, because the commission of bankrupt against Bryant is still in force; (2) and

(1) The Plaintiff was suing Belcher as well as Bryant, Belcher being the legal owner of the property sought to be recovered.

(2) The 40th sect. of 1 & 2 Vict. c. 110, enacts: "That where the order vesting the estate and effects of any such prisoner in the provisional assignee of the said Court, in pursuance of the provisions of this Act, shall be or become void, by reason of such prisoner being declared bankrupt within such period as above mentioned, or being an uncertificated bankrupt at the time of such order, the said order shall, nevertheless, together with the petition of such prisoner, if any, remain of record in the said Court: and the said Court shall and may require such prisoner to file his schedule, and shall and may cause such prisoner to be brought up to be dealt with according to this Act, and all things to be done thereupon, or preparatory thereto, as in other cases, according to this Act; and the said Court shall and may, at any time when it shall seem fit, appoint other assignee or assignees in such case, in the same manner as in other cases; and that if, at any time after such vesting order shall have been made, such prisoner shall obtain his certificate under any such fiat in bankruptcy, the rights, powers, title and interest of the provisional assignee and other assignee or assignees appointed under this Act, in, over and respecting any property, real or personal, whatsoever, remaining to such prisoner after the obtaining of such certificate, or thereafter in any way coming to him, and under or in pursuance of the warrant of attorney to be executed by such prisoner under the provisions of this Act, shall, from

Bryant will not take any steps either to [498] obtain his certificate, or to get the commission superseded; and all the creditors who proved their debts under the commission are incapacitated from prosecuting it, as they have, long since, come to a compromise with Bryant, and released him from their debts. This, therefore, seems to me to be a case in which the Plaintiff has a right to seek relief in this Court, under the 51st sect. of the 1st & 2d Vict. c. 110, which enacts: "That it shall be lawful for the assignee or assignees of any such prisoner, and such assignee or assignees is and are hereby empowered to sue, from time to time as there may be occasion, in his or their own name or names, for the recovery, obtaining and enforcing of any estate, effects, or rights of such prisoner, but in trust for the [499] benefit of the creditors of such prisoner, according to the provisions of this Act, and to give such discharge and discharges to any person or persons who shall be respectively indebted to such prisoner as may be requisite; and to make compositions with any debtors or accountants to such prisoner, where the same shall appear necessary, and to take such reasonable part of any such debts as can, upon such composition, be gotten, in full discharge of such debts and accounts; and to submit to arbitration any difference or dispute between such assignee or assignees and any person or persons for or on account or by reason of any matter, cause, or thing relating to the estate and effects of such prisoner: provided, nevertheless, that no such composition or submission to arbitration shall be made, nor any suit in equity be commenced, by any assignee or assignees, without the consent in writing of the major part in value of the creditors of such prisoner, who shall meet together pursuant to a notice of such meeting, to be published at least 14 days before such meeting in the *London Gazette*, and also in some newspaper most usually circulated in the neighbourhood of the place where such prisoner had his or her last usual residence before his or her imprisonment as aforesaid, nor without the approbation of the said Court or of one of the commissioners thereof." This then being, as I think, a case to which that section applies, the only remaining question for me to decide is whether the property in respect of which the Plaintiff asks a receiver is so circumstanced as that I ought to grant his application.

Now I find the property in this situation. Bryant, the insolvent, is in the possession of the property; but he has no interest in it so long as the order of the Insolvent Debtors Court vesting all the insolvent's pro-[500]-perty in the Plaintiff remains in force. The whole legal estate is vested in Belcher, which disables the Plaintiff from obtaining the relief which he is entitled to; and, as the party in possession has no interest (except in the surplus which may remain after all his debts are paid), I am of opinion that this is a case in which I ought to grant a receiver.

On the 20th of April a motion was made, before the Lord Chancellor, on behalf of Bryant, to discharge the Vice-Chancellor's order.

On the 2d of May his Lordship delivered the following judgment.

THE LORD CHANCELLOR [Lynchhurst]. This was an appeal from an order of the Vice-Chancellor appointing a receiver in this cause.

The facts of the case were these. Several years ago a commission was issued against Mr. Bryant. Mr. Bryant contested that commission; and, at last, a compromise was entered into between him and his creditors. Mr. Bryant paid a certain sum of money, which the creditors accepted; and no further proceedings have ever since taken place under that commission. It appears that the original assignees under the commission are dead; and, a short time since, the proceedings under that commission were transferred to the Court of Bankruptcy; and Mr. Belcher, one of the Defendants on the present record, was appointed official assignee. Those are the circumstances so far as relates to the bankruptcy. The present Plaintiff, Mr. Hollis, was a creditor

and after the obtaining of such certificate, be the same as if the vesting order made under this Act had been valid at the time of making thereof: provided, always, that nothing herein contained shall be construed to affect the title, rights and interests of the assignees under any such fiat in bankruptcy, or to alter or diminish the effect of any such certificate as aforesaid, but that the title, rights and interests of such last-mentioned assignees, and the benefit of such certificate to such prisoner, shall be the same, to all intents and purposes, as if this Act had not been made."

of Mr. Bryant; not a creditor under the bankruptcy; [501] but a creditor upon a transaction arising many years afterwards. Not being able to obtain payment of his debt, he brought an action in the Common Pleas against Mr. Bryant, and recovered judgment in that action. Mr. Bryant had for many years of his life lived within the rules of the Queen's Bench prison; and, in consequence of that, a detainer was lodged against him. Upon the lodging of that detainer the Plaintiff, Mr. Hollis, applied to the Insolvent Debtors Court to be appointed assignee under the provisions contained in the Insolvent Debtors Act, which are of a compulsory nature. That application was resisted by Mr. Bryant, who attended by counsel; but the result was that the order was made and Mr. Hollis was appointed assignee. Some controversy arose at the Bar as to whether or not there was any vesting order. It is quite clear that there was a vesting order, though it was contended that that vesting order was not valid; but, in fact, the order never was discharged. It was a subsisting order, and, therefore, when Mr. Hollis was appointed assignee under the Act of Parliament all the right and interest, subject to the existing bankruptcy, which Mr. Bryant had in any part of his property, vested in that assignee, that is, in the Plaintiff, Mr. Hollis. Mr. Hollis endeavoured to compel Mr. Bryant to file a schedule under the Insolvent Debtors Act; but he was not successful in that application; and, in truth, the Act of Parliament is defective in that particular; for there are no adequate means by which the Commissioners of the Insolvent Debtors Court can, under those clauses of the Act, compel a party to file a schedule. Mr. Hollis attempted also to recover his debt by some application under the bankruptcy; but, not being a creditor under the commission, his applica-[502]-tion in that respect was unsuccessful. It appears, therefore, that Mr. Hollis had no alternative but to proceed in the manner in which he has done.

The argument at the Bar and the point principally raised and contested, indeed the sole point, was this, that he ought to have instituted the present suit, but that he ought to have gone on in the Insolvent Debtors Court.

Now, adverting to the 40th section of the 1st & 2d Vict. c. 110, it is quite clear that he could not proceed in the Insolvent Debtors Court; because, in consequence of the existence of the commission, the assignment which was made to Mr. Hollis was not valid for any beneficial purposes to him. It was valid so far only as it enabled him to conduct certain inquiries with respect to the state of Mr. Bryant's property. But it is expressly provided that though not valid in its original operation, so as to give the party any means of obtaining payment of his debt, it is valid for the purpose of inquiry; and, when a certificate under the commission is obtained, then the order becomes valid for all purposes. Therefore, until a certificate is obtained under the commission, or until the commission is superseded, that order is, in point of fact, for all beneficial purposes to Mr. Hollis, suspended: it was inoperative. But it is perfectly clear that Mr. Bryant will not take steps to supersede his commission: nor will he take steps for the purpose of obtaining his certificate; and, therefore, that vesting order remains, for all beneficial purposes, suspended. That being the case, what alternative had Mr. Hollis to pursue but to institute a proceeding like the present?

[503] I am of opinion the proceeding was perfectly regular; and the order for the appointment of a receiver follows as a matter of course.

Consequently the Vice-Chancellor's order must be affirmed with costs.

[503] STORER v. JACKSON. Feb. 22, 1842.

Practice. Injunction.

The Court refused to hear a motion to dissolve an injunction, pending a motion, of which the Plaintiff had given notice, for production of documents mentioned in a schedule to the answer, no unnecessary delay having taken place in giving notice of the latter motion.

Motion to dissolve an *ex parte* injunction on the coming in of the answer, pending a motion, of which the Plaintiff had given notice, for production of documents mentioned in the schedule to the answer.

THE VICE-CHANCELLOR refused to hear the motion to dissolve until the motion for production had been disposed of: because the contents of the documents were part of the discovery which the Plaintiff was entitled to extract from the Defendant, and the Plaintiff had not been guilty of any unnecessary delay in giving notice of his motion; so that it was not a mere contrivance to avoid the motion to dissolve.

Mr. Bethell, for the Defendant.

Mr. G. Richards and Mr. Mylne, for the Plaintiff.

[504] TURNER v. DORGAN. MYATT v. DORGAN. March 7, 1842.

Practice. Order. Contempt.

A. and B. each instituted a creditors' suit against C., the executrix of their deceased debtor.

A decree having been made in A.'s suit, C. obtained an order staying B.'s suit. C. being in contempt for want of answer in that suit, the order was drawn up in the other suit.

Both the above suits were instituted by creditors, for the administration of the estate of the same deceased debtor; and, a decree having been obtained in the first, the Defendant, the executrix of the deceased, moved to stay the proceedings in the second suit.

THE VICE-CHANCELLOR [Sir L. Shadwell] granted the motion; but, as the Defendant was in contempt for want of answer in the second suit, a question arose as to the form in which the order ought to be drawn up.

His Honor, following an order made under similar circumstances, in a cause of *Weeks v. Williams* (with a copy of which the registrar had furnished him), directed the order to be drawn up as an order in the first suit, that being the suit in which the party moving was not in contempt.

Mr. G. Richards and Mr. Glasse, for the motion.

Mr. Bethell and Mr. Berrey, for Myatt, the Plaintiff in the second suit.

[505] ELLIOTT v. FISHER. March 11, 1842

Will. Conversion.

Testator devised a real estate to his daughter for life, and then to be sold and the proceeds divided amongst her children. One of her children died in her lifetime, having devised his share of the estate to his son.

Held, that the deceased child took his share of the estate as personalty in reversion expectant on his mother's death; and consequently that his executrix, and not his son, was entitled to it.

Thomas Watman, being seised of an estate, partly freehold and partly copyhold, called the Gale estate, and having surrendered the copyhold part to the use of his will, devised the estate to his daughter Ann Elliott for her life, and then to be sold by his trustees thereafter named, and the proceeds divided amongst all the children of his said daughter, share and share alike, excepting Bella Fisher; and he appointed John Biglands, John Chambers and William Donald trustees of his will.

The testator died in 1818. His eldest son, Robert Watman, was his heir at law and customary heir.

On the testator's death his daughter, Ann Elliott, entered into possession of the Gale estate; and continued in possession of it until her death. She had ten children, including Bella Fisher. All of them, except Thomas, who was her eldest son, survived her. He, by his will, dated the 19th of September 1840, gave to his son, the Defendant, Thomas Robert Watman Elliott, and his heirs, all his, the testator's, share of the estate called Gale, as willed to him by his late grandfather, Thomas Watman,

subject to his mother's life interest therein; and he appointed the Plaintiff, Fanny Elliott, sole executrix of his will. He died shortly after the date of his will. His mother, Ann Elliott, died on the 5th of November 1841.

Two of the questions raised by the bill were whether the legal estate in fee in the Gale estate was vested [506] under the will of the testator, Thomas Watman, in the children of Ann Elliott, exclusive of Bella Fisher; or whether it descended, on the death of that testator, to his eldest son, Robert Watman.

Another, and the principal question, was whether, regard being had to the will of the testator, Thomas Watman, the Gale estate was to be considered as converted into personalty or not?

The cause was heard as a short cause.

Mr. Walker and Mr. Phillips appeared for the Plaintiffs.

Mr. De Gex, for the Defendant Thomas Robert Watman Elliott, who was entitled to a share of the Gale estate under the specific devise in the will of Thomas Elliott, his father, in case it was not converted by the original testator's will, said that Thomas Elliott died in the lifetime of his mother, Ann Elliott, and consequently before the period of conversion had arrived.

Mr. Schomberg appeared for other Defendants.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Thomas Elliott took his share of the estate under his grandfather's will as personalty in reversion expectant on the death of his mother, and therefore the Plaintiff, Fanny Elliott, is entitled to it as his personal representative.

Thomas Watman did not devise the Gale estate to his trustees in trust to sell, but merely directed his trustees to sell it after the death of his daughter, Ann Elliott; and consequently the legal estate in fee did not pass by his will, but descended to his eldest son, Robert Watman.

[507] DAUBENY v. COGHLAN. March 14, 15, 1842.

[S. C. 11 L. J. Ch. 177; 6 Jur. 230.]

Will. Construction. Mistake. Evidence. Practice. Exceptions. Report.

Testator bequeathed £5000 in trust for all and every the child and children of his niece, C. A., and of his nephew, the late James C., to be divided amongst them, if more than one, share and share alike, and, if there should be but one such child, then in trust for such only child; the shares of sons to be paid to them at 21, and the shares of daughters at that age or on their marriage.

The testator never having had a nephew named James C. who had died leaving issue, the children of his late nephew, Henry C. (who was the only one of his nephews who had left issue), claimed to be interested under the bequest; upon which the Master was directed to inquire what persons were meant by the testator. It appeared (amongst other things), from the evidence before the Master, that the testator had had four nephews surnamed C.; that two of them were named James, and another Henry; that one James died 40 years ago, and the other about 16 years before the date of the will, and that Henry died about 10 years before the date of the will, and was the only nephew of the testator who left issue; and the Master found that *his* children were the persons intended.

The Court, however, on hearing exceptions to the report, held that the finding was was not warranted by the evidence, and referred it back to the Master to review his report.

If the Court, on hearing exceptions to the report, considers the evidence produced before the Master not to be sufficient to warrant his finding, it will not allow the exceptions simply; but will allow the exceptions, and refer it back to the Master to review his report; thereby giving the unsuccessful party an opportunity of laying further evidence before the Master.

Andrew Coghlan, late of the City of Bath, a lieutenant-colonel in the Army, died on the 31st of March 1837, having given by his will, dated the 14th of that month

the sum of £5000 stock to the Plaintiffs and the Defendant, Sarah Coghlan, his widow, in trust to pay and apply or assign and transfer the same to or amongst all and every the child and children of his niece, Catherine Anthony, and of his nephew, the late James Coghlan, to be divided between and amongst them, if [508] more than one, share and share alike, and, if there should be but one such child, then to such only child; the shares of such of them as should be sons to be paid to them on their attaining the age of 21 years, and the shares of such of them as should be daughters to be paid to them at such age or on their being married, which should first happen.

The testator never had a nephew named James who died leaving issue; and, in consequence of the uncertainty thence arising as to the persons who were intended to take by the description of the children of the testator's late nephew, James Coghlan, the bill was filed by two of the executors against Sarah Coghlan, the testator's widow and executrix, the children of Catherine Anthony and the children of Henry Coghlan, deceased, who was the only nephew of the testator who had left issue, to have the trusts of the will carried into execution under the direction of the Court.

The cause was first heard on the 1st of June 1838, and was reheard on the 7th of May 1839. By the decree made at the rehearing, the Master was directed to inquire and state what persons were meant by the testator by the description of all and every the child and children of his niece, Catherine Anthony, and of his nephew, the late James Coghlan.

The Master certified that a pedigree of the testator's family, together with a state of facts and certain affidavits and extracts from registers of baptisms, &c., had been laid before him on the part of the Defendants, Mary Coghlan and Charlotte Coghlan (the children of the testator's late nephew, Henry Coghlan), and that, in opposition to the claim of Mary Coghlan and Char-[509]-lotte Coghlan, certain affidavits had been laid before him on the part of the Defendants, Michael Anthony, Susan Anthony and Louisa Mary Anthony (the children of the testator's niece, Catherine Anthony), and that it appeared from the pedigree and evidence that there were only two nephews of the testator of the name of James Coghlan, namely, James, the son of the testator's brother Charles, and James, the son of the testator's brother James; and that both of them died long before the testator, that is to say, James, the son of James, died about 40 years ago, an infant and unmarried, and James, the son of Charles, died in the month of June 1821, having married one Ann Henderson, but leaving no issue; wherefore the Master was of opinion that the testator clearly made a mistake when he coupled, with his gift to the children of his niece Catherine Anthony, the gift to the children of his late nephew James Coghlan. The Master further certified that it also appeared by the pedigree and evidence that the testator had no nephew by the name of Coghlan who left children, except his nephew Henry; and that the testator was, in various ways, made acquainted with the fact that his last-mentioned nephew had left children; and therefore, if it was to be presumed, as the Master thought it must be, that the testator meant to benefit some other of his great-nephews and nieces besides the children of his niece Catherine Anthony, he could only effect that intention by coupling with her name the children of his late nephew, Henry; and as the children of Henry were the only persons capable of taking under the said bequest, the Master found that the children of Henry were the persons meant by the testator, in so much of his said bequest, as purported to refer to the child and children of his late nephew, James; and as to the children of Henry, the Master found that [510] on the 7th of November 1815 Henry married Maria Mitchell, and was never married to any other person; and that by such marriage he had five children and no more, namely, James, Mary, Henry, Charlotte and Elizabeth, three of whom only were living at the testator's death, namely, Mary, Henry and Charlotte; and that Henry, the son, died on the 28th of May 1839; and that Mary was married to the Defendant Joshua Nolan; and that Charlotte was born on the 23d of September 1821.

The Defendants, the children of Catherine Anthony, excepted to the report on the following grounds: first, that no sufficient evidence had been laid before the Master that there were only two nephews of the testator of the name of James Coghlan: secondly, that no sufficient evidence had been laid before the Master that the testator clearly made a mistake when he coupled with the gift to the children of his niece Catherine Anthony a gift to the children of his nephew James Coghlan:

thirdly, that no sufficient evidence had been laid before the Master that the testator had no nephew of the name of Coghlan that had left children, except his nephew Henry; and even if sufficient evidence had been laid before the Master of that fact, the same would not have warranted the Master in coming to the conclusion that the testator intended to benefit the children of his nephew Henry: fourthly, that no sufficient evidence had been laid before the Master that the children of the testator's nephew Henry were the persons meant by the testator in so much of his bequest as purported to refer to a child or children of his late nephew James: and, fifthly, that no evidence had been laid before the Master that the testator was aware at the time of making his will that his nephew James, the son of his [511] brother James, had died without leaving any children or child him surviving.

An affidavit made by Sarah Coghlan, the testator's widow, in support of the state of facts carried into the Master's office on behalf of the children of Henry Coghlan, was observed upon in the course of the argument and of the judgment. It was to the following effect:—That the testator's nephew James, the son of his brother Charles, died in London about 16 years before the date of the testator's will, without having had any child, *to the best of the deponent's knowledge and belief*; that the testator had another nephew named Henry, who was the son of the testator's brother, James Coghlan, and that Henry died at Dublin in August 1827, leaving issue three children, *as deponent had heard and believed*, that is to say, Mary, Henry and Charlotte, him surviving; that, to the best of deponent's knowledge and belief, the testator saw his nephew Henry but once, namely, in Ireland, some time in the year 1809 or 1810, but in which year the deponent could not then recollect; at which time the said Henry, the nephew, was not married and had not been married; that at or about the period last before mentioned and subsequent thereto, the testator frequently told the deponent that it was his intention to bequeath by his will, to his nephew Henry, the houses at Tooting mentioned in the pleadings, because Henry, being a lawyer, knew how to manage such property better than any of his other relations; or the testator made use of words to that or the like effect; that the testator, as the deponent verily believed, was aware that his nephew Henry had died leaving children surviving him; but the number, ages, and persons of such children the deponent knew were personally unknown to the testator, [512] who was also aware, *as the deponent believed*, that his other nephew, James Coghlan, died without leaving any children or child him surviving; that *she believed* the testator was aware of the deaths of his nephews James and Henry soon after they respectively died; that the only occasions upon which the deponent heard the testator express any intention of naming his nephew Henry in his will happened in the year 1809 or 1810, as before mentioned, when the testator told deponent that he would bequeath to Henry the houses at Tooting; that the testator himself gave instructions to his solicitor to prepare his will, which, the deponent believed, the solicitor did from a former will of the testator, which last-mentioned will was returned to the testator at his desire by the solicitor, and the same was subsequently destroyed by the testator; that the engrossment of the will was sent to the testator by his solicitor, and that the testator kept the same in his possession for two or three days, and then wrote a note to his solicitor, stating he had read the will and could not otherwise but approve of it, and that he had sent for two friends to be present at the execution of it as witnesses thereto, and had appointed a certain hour the following day for the purpose, at which time the testator duly executed the same will; that the testator, though weak in body, was perfectly sound in mind, and very circumstantial in the directions he gave to his solicitor respecting his will and his conversations as to the amount of his property; and that the testator, before he executed his will, read the same over to the deponent and asked her if she approved of the same, and stated that if she did not approve thereof, it was not too late to alter it; that *she was perfectly satisfied in her own mind that the name of the testator's nephew James was inserted in the will by mistake instead of Henry, although the deponent was* [513] *unable to account for such mistake*, except that the Christian name of the testator's brother, the father of the said Henry, who died about 40 years ago, being James, some confusion of names or persons might have arisen in the mind of the testator at the time of making his will: that neither the testator nor the deponent discovered that the name of James was inserted in such will when the same was executed by the

testator, and when he previously read the same to the deponent as before mentioned : that the testator had another nephew of the surname of Coghlan, other than the said James and Henry (that is to say), Edmund Blennerhasset Coghlan, the son of the late Colonel Edmund Coghlan, a brother of the testator, who died about five years ago, in the lifetime of the testator, without having been married : that she never heard the testator upon any occasion express any intention to bequeath by his will, to his nephew Henry or to his children, any interest in the sum of £5000 stock, which was by the testator's will bequeathed to or in trust for the child and children of the testator's niece, Catherine Anthony, and of the testator's nephew, James Coghlan : that the testator was very much displeased with the conduct of his nephew James, who held a commission in the same regiment, but not at the same time as the testator ; and which commission the testator procured for him ; but his conduct, whilst in the regiment, so much displeased the testator that he refused to interest himself for his said nephew when he subsequently got into difficulties : that she believed the testator would not have given anything, by his will, to his nephew James had he been living at the time the testator made his will ; but whether the testator would have made any bequest in favour of a child or children of his said nephew James, the deponent could not say as to her belief or otherwise : that she was not aware [514] that the testator's nephew Henry displeased the testator by his conduct in any way, except by marrying a person whom the testator considered beneath him in station of life : that so strong was the impression on the deponent's mind that the testator had named his nephew Henry as a legatee in the will, that soon after the death of the testator she wrote and sent a letter to the testator's niece, Catherine Anthony, apprising her of the death of her uncle, and requesting to be informed of the exact ages and names of her children, and the names and ages of the children of her deceased brother, whose Christian name, the deponent stated in her letter, she thought was Henry ; and in such letter the deponent requested Catherine Anthony not to delay giving in the names of the children, as they must be sent to the executors : that soon after the death of the testator's nephew Henry, Captain Edmonds, the paymaster of the regiment in which the testator held a commission, wrote a letter to the testator to apprise him of the death of Henry, and to suggest that the testator should do something, by his will, for his, Henry's, family ; which suggestion the testator and the deponent considered Captain Edmonds was not warranted in making ; and the testator treated it as an act of interference by Captain Edmonds in the private affairs of the testator, not warranted by their acquaintance ; and accordingly he did not answer the letter as the deponent verily believed.

Sir C. Wetherell and Mr. Lovat, in support of the exceptions. First, this is not a case in which extrinsic evidence is admissible to shew who was the person intended by the testator.(1) Where a person is known by a name which [515] he does not properly bear, and a legacy is left to a person of that name, then evidence is receivable to shew who was the party the person intended. But, in the present case, the object is to strike out the name of one person and to substitute the name of another person for it : and, for that purpose, extrinsic evidence is not admissible. *Delmare v. Rebello* (3 Bro. C. C. 446) ; *Holmes v. Custance* (12 Ves. 279) ; *Miller v. Travers* (8 Bing. 244).

Secondly, supposing that this was a case in which evidence was admissible, still the evidence that was produced before the Master was not sufficient to support the conclusion to which he has come : for it appears that the testator had two nephews named James : one the son of his brother Charles, and the other the son of his brother James, both of whom were dead at the date of the will ; but there is no *positive* evidence to shew that the testator knew that either of them was dead without issue. Therefore, the description in the will is correctly applicable to the children of either of those two nephews : and this is nothing more than a case in which the legatees are well described, but it turns out that there are no persons answering the description. It appears, from the affidavit of the testator's widow, that the testator never saw his nephew Henry more than once, and that was as long ago as 1809 or 1810 ; and that

(1) The exceptions were grounded not on the inadmissibility, but on the insufficiency, of the evidence.

the expressions which he used in favour of Henry had reference only to the houses at Tooting.

Mr. Bethell and Mr. Chandless, in support of the report. The description in this case is not a description of a nephew; but of the children of a nephew. The [516] bequest is not to an individual by name, but to persons answering a particular description. There is, it is true, no person fully answering that description; but there are persons answering nine-tenths of it. If the bequest had been to James, we admit that we could not have contended that Henry was meant: but the gift is to the children of a late nephew; therefore the testator must have intended to designate a nephew who was dead and had left children. The testator, however, had no nephew who had died leaving children, except his nephew Henry. James died 16 years before the will was made; and, as the testator interested himself about him, it may be fairly concluded, independently of the evidence, that he knew that James had not left any issue. It is plain then that the testator made a mistake in the Christian name of the nephew whose children he intended to benefit: for it would be absurd to say that he intended to benefit persons whom he knew did not and never could exist.

The doctrine of this Court is that if a testator is shewn to have known certain facts and circumstances, but expresses himself in a manner which is at variance with that knowledge, you have a right to say that those expressions must have been used by some accidental mistake. The evidence is abundantly sufficient to shew that there has been a mistake in the Christian name of the father of the claimants. In every other respect they correctly answer the description; for they are the children of the testator's nephew Coghlan.

In *Blundell v. Gladstone* (*ante*, vol. xi. p. 467; and 1 Phill. 279) the Court decided on the principle which we are contending for, although it [517] was a much stronger case against the application of that principle than this case is: for, there, the description applied partly to one person and partly to another: and, consequently, there was a competition between two rival claimants: but, here, there is no competition, for there is no person *in esse* or who can come into *esse* who can answer the description. The description, therefore, applies to nobody: it is, if taken strictly, the description of an impossible person. And, that being the case, the testator either must have made some mistake in point of language, or have laboured under some erroneous impression when he made the bequest in question. Here the claimants are the children of a nephew of the testator, and of a nephew who bore the name of Coghlan, and was the only nephew of the testator who bore that name at the date of the will, or who had left children; and, independently of the evidence, the testator must be presumed to have known those facts: for every testator is presumed to know the state of his family. The Master, therefore, was warranted in coming to the conclusion at which he has arrived, and the exceptions which have been taken to his report must be overruled.

Mr. Wilbraham and Mr. Walpole appeared for the Plaintiffs, the executors of the testator's will.

THE VICE-CHANCELLOR [Sir L. Shadwell]. This appears to me to be a reasonably plain case.

We should, first of all, look at the very words of the will and see whether it is not evident, on the face of it, that this testator chose to make his will, to a certain extent at least, in the dark.

He gives a sum of £5000 stock to the trustees of [518] his will, "in trust to pay and apply, or assign and transfer the same to or amongst all and every the child and children of my niece, Catherine Anthony, and my nephew, the late James Coghlan."

Then certain words follow which shew, or lead to the inference at least, that at the time when the testator made his will he was ignorant whether the individuals who were made the objects of his bounty were really in existence or not. He says, "To be divided between and amongst them if more than one, share and share alike, and if there shall be but one such child, to such only child." Those words are evidence of an intention to decide in defiance of knowledge.

Now, there are two circumstances which throw the matter into doubt; one is, that the father of the children who claim was named Henry, and the other that James, who was the son of Charles, died without issue. Why then might not the

testator as much have forgotten the one fact as the other? How am I to know that he forgot one more than the other? If he forgot both, it was as reasonable for him, *primâ facie*, to devise in favour of the unknown children of James, the son of Charles, as in favour of the unknown children of Henry. There is nothing whatever, on the face of the will, which at all tends to shew that the testator forgot one of the facts more than the other: and the presumption rather is that he would be aware of the fact that the father of the children who claim was named Henry, than that he would be aware of the fact that the son of Charles, who died 16 years before the will was made, had died without children. There is nothing whatever in the will from which I can collect that the testator knew one fact more than the other. He might have forgotten both.

[519] Then, with respect to the evidence which has been given: it is of the loosest and most unsatisfactory nature. I do not, however, mean to impeach the veracity of Mrs. Coghlan. On the contrary, it appears to me that the very diffuse way in which she has spoken shews that she meant to empty, as it were, all her mind on the subject into the affidavit. But she has stated things which appear to me to be very extraordinary: for she says that the testator read over the will to her; asked her the particular question whether she approved of it or not, and said that if she did not it was not too late to alter it. She does not state what answer she gave, but it is quite plain that she did approve of it. Now, if by the statement which she makes, namely, that the testator read the will over to her, she wishes to have us understand that she was aware of every portion of the will, or, at any rate, of that particular portion of it which is now under consideration, it is most extraordinary that, with the knowledge which she says she had in her own mind that Henry was meant, she should never have suggested it. That seems to me to be most extraordinary.

I must say that it appears to me to be much more likely that the testator knew at the time when he made his will (more especially in a case where I find a bequest made to individuals in so general a way as to shew that the testator was not aware whether they were *in esse* or not) that Henry was the name of the father of the children who claim, than that he knew of the fact (in the sense of having it present to his mind) that James had died without children, that is, that James who died 16 years before the will was made.

Upon the whole, my opinion is that there is nothing whatever which enables me to say there is any more [520] mistake in this case than there is a mistake when a person gives to the children of A., and it turns out that A. has no children.

When the judgment was concluded, a discussion arose between Sir C. Wetherell and Mr. Bethell as to whether the Court ought to allow the exceptions simply, or to refer it back to the Master to review his report. Upon which,

THE VICE-CHANCELLOR [Sir L. Shadwell] said: It has been the habit of the Court, where a report has been made upon certain evidence, to consider that the parties might have been able to bring forward more evidence than that which has satisfied the Master, but abstained from doing so, because they found that the Master was satisfied with that which they did bring forward. Unless, therefore, it can be made out to me that there cannot be any further evidence adduced, I rather think that I should best comply with the rule of the Court if I were to send it back to the Master to review his report.

In a case where the Court refers it to the Master to inquire whether there is a good title to an estate, a discussion frequently arises before the Master as to some particular fact; and the parties, in support of the title, bring forward some evidence which satisfies the Master; and the Master then reports that the title is a good one. The question is then brought before the Court upon exceptions to the Master's report: and if the Court is of opinion that the Master ought not to have reported in favour of the title, or, in other words, that the evidence was not sufficient, what injustice would it [521] be to prevent those who, but for the intimation of the Master's opinion in their favour, might have brought forward further evidence from bringing forward that evidence. The order, therefore, which I shall make in this case is, let the exceptions be allowed (that is with reference to the evidence that was laid before the Master), and refer it back to the Master to review his report.

[521] THE PROVOST AND SCHOLARS OF QUEEN'S COLLEGE, OXFORD, v. SUTTON.
March 18, 1842.

[S. C. 11 L. J. Ch. 198 ; 6 Jur. 906.]

Legacy. Specific Legacy. Mistake.

A legacy was given to the Provost and Fellows of Queen's College. The proper name of the corporation was "The Provost and Scholars." Held, that the Provost and Scholars were entitled.

Testator bequeathed, amongst other stock-legacies, £30,000 consols to the Provost and Fellows of Queen's College, to be by them expended within three years after his death, in the purchase of such books for the use of, and to be added to the library of, the college, as the Provost and Fellows for the time being should, in their discretion, think fit: and in a subsequent paragraph he directed that if, at his decease, he should not have a sufficiency of stock standing in his name to answer the several stock-legacies aforesaid, his executor should purchase and make up the deficiency out of his residuary estate. The stock standing in the testator's name at his death was sufficient to answer the bequest to the college. Held, that that bequest was specific.

The Rev. Robert Mason, D.D., a member of Queen's College, Oxford, by his will, dated the 25th of September 1833, bequeathed to the Provost and Fellows of Queen's College, in the University of Oxford, the sum of £30,000 three per cent. consolidated Bank annuities, to be by them expended within the space of three years next ensuing the date of his decease, in and for the purchase of books, for the use of and to be added to the library of the said college, as they, the said provost and fellows of the said college for the time being, should in their discretion, think fit. The testa-[522]-tor then gave several other stock-legacies; and, towards the conclusion of his will, directed as follows:—"And I will and direct that if, at the time of my decease, I shall not have a sufficiency of Bank annuities standing in my name to answer the several stock-legacies aforesaid, my executor hereinafter named shall purchase and make up such deficiency by and out of the residue of my real and personal estate." He then gave all the residue of his real and personal estates to the Defendant, and appointed him sole executor of his will.

The testator died on the 7th of January 1841.

His personal estate was more than sufficient to pay the legacies bequeathed by his will; and he had stock in the three per cent. consols sufficient to answer the bequest to the college.

The bill, which was filed by the Provost and Scholars of Queen's College (which was the proper corporate name of the college), prayed that the Defendant might be decreed to transfer the £30,000 consols to the Plaintiffs.

The Defendant in his answer stated that, upon his being applied to by the Plaintiffs to transfer the stock to them instead of the provost and fellows of the college, he took the opinion of counsel as to the propriety of making such transfer; when he was advised that though the provost and fellows were by the terms of the bequest trustees only of the legacy, yet that, if they were trustees thereof by the tenor of the will, he could not properly make a transfer thereof to the provost and scholars, and that he would incur responsibility and risk by so doing; and he submitted that the legacy was not specific.

[523] Previously to the hearing of the cause the following admissions were agreed to by the parties:—First, that the name by which the college was incorporated was "The Provost and Scholars of Queen's College in the University of Oxford:" secondly, that all corporate acts by the Plaintiffs were determined upon and performed by the provost and fellows of the college: thirdly, that in common parlance and popular language the name of the provost and fellows was used instead of the Plaintiffs' name of incorporation: fourthly, that the library of the college was held by the Plaintiffs in their corporate capacity for the use of the college: and, fifthly,

that the library was principally composed of books given by many different benefactors at different times for the benefit of the college.

On the cause coming on to be heard,

Mr. Walker and Mr. Simpson, for the Defendant, objected that the provost and fellows of the college ought to have been made parties to the bill in their individual capacities; as there was ground for contending that they were intended to be trustees of the legacy for the body corporate. *Attorney-General v. Sibthorp* (2 Russ. & Myl. 107); *Attorney-General v. Tanerel* (*Ibid.* 111, note; and 1 Eden, 10; and Amb. 351).

THE VICE-CHANCELLOR [Sir L. Shadwell]. As in common parlance, the name of the provost and fellows is used instead of the proper corporate name of the college, and as the library is held by the body corporate, I think that that body was intended to take. For the legacy is to be expended in the purchase [524] of books to be added to the library of the college; and no persons could add books to the library unless they were the owners of the library. The objection, therefore, must be overruled.

Mr. G. Richards and Mr. W. R. Williams, for the Plaintiffs, contended that the legacy was specific; first, because the testator had directed it to be laid out within a certain specific time: and, secondly, because he had directed that if, at the time of his decease, he should not have a sufficiency of Bank annuities *standing in his name* to answer the stock-legacies given by his will, his executor should purchase and make up the deficiency out of the residue of his real and personal estate. They said that the effect of that direction was to incorporate the words "standing in my name" with every bequest of stock contained in the will. They relied principally on *Fontaine v. Tyler* (9 Price, 94), where a bequest in the following terms was held to be specific:—"If I shall not have so much as £10,000 capital stock in the three per cent. Reduced or consolidated Bank annuities, or one or both of them, I will that my executors hereinafter named shall make up the capital sum of £10,000 in the Reduced or consolidated Bank annuities, or one or both of them, and shall hold the same upon trust for all and every children of my late niece Frances, who shall be living at my decease, equally to be divided between them." They cited also *Bethune v. Kennedy* (1 Myl. & Cr. 114; see 117), where the Master of the Rolls said, "The true test by which to try whether a bequest is or is not specific, is to inquire what would be the result if there had been pecuniary legacies with a deficient fund, or a necessity for a sale for payment of debts—to [525] inquire whether or not in such a case the bequest would have been protected in a competition with the claims of pecuniary legatees. A party claiming under a gift of all the property that a testator possessed of a specific kind, would not, I apprehend, be bound to contribute; and there is nothing in the particular expressions employed in the will under consideration to make a difference in that respect. Upon the terms used in this will, therefore, which it may be observed are plainly distinguishable from those which occurred in *Alcock v. Soper*, I am of opinion that this is a specific bequest of a sum invested in the long annuities, and to be enjoyed by the tenant for life in the state in which the testatrix left it."

Mr. Walker and Mr. Simpson, for the Defendant, said that, if the testator had had no stock standing in his name at his death, the Plaintiffs would have contended that the legacy was not specific but general: that the direction that the legacy should be expended within a specified time did not make it specific: *Webster v. Hale* (8 Ves. 410), where a bequest of £4000 in the three per cent. stock, *to be paid as soon as possible*, was held not to be specific: that, in *Fontaine v. Tyler*, the words in which the legacy was given invested it, *in the first instance*, with the character of a specific legacy; and it was on those words that the Lord Chief Baron held it to be specific: but, in the present case, the legacy was given generally; and all that the testator intended by the direction which had been so much relied on for the Plaintiffs was to provide a fund for payment of that and his other stock-legacies; and that the providing of a fund for payment of a legacy did not make it spe-[526]-cific, but was merely directory. *Mann v. Copland* (2 Madd. 223); *Roberts v. Pocock* (4 Ves. 150); *Smith v. Fitzgerald* (3 Ves. & Beam. 2).

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am clearly of opinion that the legacy under consideration is specific.

The testator gives, to the Provost and Fellows of Queen's College in the University of Oxford, the sum of £30,000 three per cent. consolidated Bank annuities, to be by them expended, within the space of three years next ensuing the date of his decease, in and for the purchase of such books for the use of and to be added to the library of the said college, as they, the said provost and fellows of the said college *for the time being*, shall, *in their discretion*, think fit. It is plain, therefore, that the testator intended that the provost and fellows *for the time being* should exercise their discretion: and, consequently, they might say: "We are entitled to have the legacy as on the day of the testator's death;" for they could not exercise their discretion as to the books in which the fund was to be laid out without having a fund to lay out.

Moreover, there is no substantial difference between this case and the case of *Fontaine v. Tyler*. There the testator directed that, if he should not have so much as £10,000 capital stock in the three per cent. Reduced or consolidated Bank annuities, or one or both of them, his executors or the survivor of them, or the executors or administrators of such survivor, should make up the capital sum of £10,000 in the Reduced or consolidated [527] Bank annuities, or one or both of them; and should hold the same upon trust for all and every the children of his late niece Frances, late wife of James Fontaine, who should be living at his decease, equally to be divided between them. In the present case the testator has directed that if, at the time of his decease, he should not have a sufficiency of Bank annuities standing in his name to answer the several stock-legacies which he had before given, his executor should purchase and make up the deficiency out of the residue of his real and personal estate. So that he has taken in view and provided for the same circumstance as the testator in *Fontaine v. Tyler* took in view and provided for; and that provision was the ground relied on, by the Lord Chief Baron, for holding the bequest in that case to be specific.

The only difference between that case and the present is that, in the one, the direction to purchase the additional stock precedes the gift, and in the other it follows the gift. It is however of very little, if any, importance in what situation the words in a will stand: they must have their due effect given to them in whatever part of the instrument they occur. If, in this will, the direction to purchase additional stock had stood before the gift of the legacy, then this case would have been the same in form (as, in my opinion, it is in substance) as the case of *Fontaine v. Tyler*.

On both grounds, therefore, I think that the Plaintiffs are entitled to the £30,000 stock, and also to the dividends which have accrued on that sum since the testator's death.

[528] FORBES v. PEACOCK. March 15, May 30, 1842; July 11, 1843.

[Reversed, 1 Ph. 716; 41 E. R. 805; with note to which add, *In re Venn and Furry's Contract* [1894], 2 Ch. 108.]

Lendor and Purchaser. *Charge of Debts.* *Receipt for Purchase-Money.* *Notice.* *Title.*
 Costs. *Practice.* *Case Sent to Law.*

Where a testator has charged his real estate with his debts, and the executor proceeds to sell the estate, the purchaser has a right to ask him whether all the debts are paid or not, and if he declines to answer, the purchaser will be considered to have had notice that all the debts have been paid, and will be answerable for the application of his purchase-money.

The question whether an executor or trustee who sells an estate can give a good receipt for the purchase-money is not a question of conveyance but of title.

The decisions in *Bentham v. Wiltshire*, 4 Madd. 44; and *Page v. Adam*, 4 Beavan, 269, disapproved of.

A Defendant, a purchaser, demurred to a bill for specific performance, and his demurrer was overruled. He then asked for a case to be sent to a Court of law, which was granted; and the opinion of the Judges was against him. Ultimately, however,

the bill was dismissed with costs. Held, that the Defendant was entitled to his costs at law as well as in equity.

The demurrer put in in this cause having been overruled (see *ante*, vol. xi. p. 152), an order was made, on the 16th of December 1840, by which it was referred to the Master to inquire and state whether a good title could be made to the estate in question in the cause; and, in case the Master should find that a good title could be made, then he was to inquire and state when such title was first shewn, and whether the Defendant or his solicitor ever and when made any and what objection to such title, or any and what requisition relating thereto: and, for the purposes aforesaid, the parties were to produce before the Master, upon oath, all deeds and writings in their custody or power relating thereto, *and to be examined on interrogatories* as the Master should direct: and the Court reserved the consideration of further directions and of the costs of the [529] suit until after the Master should have made his report.

The following objections to the title to the estate were carried into the Master's office on the Defendant's behalf:—

First. Because all the debts, funeral and testamentary expenses, and the pecuniary legacies given by the will of John Fisher Throckmorton, the testator in the cause, were fully paid shortly after his death, and no such debt or legacy was unpaid at the date of the agreement of the 28th of May 1840, and that there was a very large surplus of the testator's personal estate after payment of his debts and legacies; and that such surplus was, shortly after his death, invested by Elizabeth Throckmorton and the Plaintiff in the purchase of stock in the funds, and upon other securities; and that Elizabeth Throckmorton received the dividends and interest thereof down to the time of her death; and that the funds so purchased were then standing in the names of the said Elizabeth Throckmorton and the Plaintiff, or were otherwise in the power of the Plaintiff, as the surviving executor of the testator's will; and that the other securities were then vested in the Plaintiff, or were then in his power as such surviving executor; and that, therefore, the Plaintiff had not any interest in the estate in question, or any power to sell the same, or to make a valid conveyance thereof to the Defendant.

Secondly. That the Plaintiff had not shewn, and that, in fact, it was not known, who was the heir at law of the testator, or, if known, such heir at law refused to join in the conveyance of the estate to the Defendant.

[530] Thirdly. That the Plaintiff had not shewn, and that it was not known who were or was the parties or party entitled, under the will, to receive the purchase-money for the estate; or, if known, such parties or party refused to join in the conveyance of the estate to the Defendant, or to sign a receipt for such purchase-money.

On the 18th of March 1841 the following interrogatories for the examination of the Plaintiff in support of the Defendant's objections were left with the Master:—

First. Have not all the debts and funeral and testamentary expenses of John Fisher Throckmorton, the testator in the pleadings named, and all the legacies given by his will, been fully paid or satisfied? Were not the same fully paid or satisfied shortly after the testator's death, or when else? Were or was any and what debt or debts of the said testator owing or unpaid at the date of the agreement of the 28th day of May 1840, in the pleadings mentioned: if yea, to whom and for what, and were or was the same owing on any and what security or securities, and what is the date of every such security, and between and by whom made, and what are the short and material contents thereof, and where and in whose possession or power is the same now? or was any and what legacies or legacy given by the said will owing or unpaid at the date of the said agreement, and to whom, and by what right or title? Is it not the fact that no debt of the said testator, nor any legacy given by his will, is now owing or unpaid? Was there not a very large or some surplus of the personal estate of the said testator after payment of his debts and legacies? Was not such surplus, or some part or parts thereof, shortly after the death of the said [531] testator, or at some other time or times, invested by Elizabeth Throckmorton in the pleadings named, or the said Complainant, or one of them, as the executors or executor

or trustees or trustee of the said testator's will, or by their or one and which of their order, in the purchase of some shares or share of the public stocks or funds of this country, or upon some other securities or security? Did not the said Elizabeth Throckmorton, or some other person by her order or for her use, receive, for her own use, the dividends or interest, or some part or parts of the dividends or interest of such stocks, funds and securities or security, or of some and which of them, or some part or parts thereof respectively, or of some other and what part or parts of the personal estate of the said testator, or some payment or payments, and from whom, on account of such dividends or interest, down to the time of her death, or down to some other and what time, or at some time or times prior to her death? Are or is not some shares or share of the public stocks or funds of this country now standing, or were or was not the same, lately or at some and what time or times and when last standing in the names or name of the said Elizabeth Throckmorton and the said Complainant, or one and which of them, or in the name of the said testator, in the books of the Governor and Company of the Bank of England: and are or is not the same or some of them, or some part or parts thereof, in some manner and how in the power of the said Complainant, as the surviving executor or trustee of the testator's will: and are or is not, or were or was not, lately or at some time or times and when last, some other security or securities for money vested in the said Complainant, or in some manner and how in his power as such surviving executor: and do or does not or did not the several stocks, funds and securities [532] or security inquired after by this interrogatory, or some and which of them, or some and what part or parts thereof, form the clear surplus, or some part of the clear surplus of the said testator's personal estate?

2d. Who are or is the heirs or heir at law of the testator in the pleadings named; and where do or does such heirs or heir reside? Is it not the fact that it is not known who are or is such heirs or heir, or, if known, is it not the fact that such heirs or heir refuse or refuses to join in the conveyance of the estate in the pleadings mentioned to the Defendant? Have or has such heirs or heir consented to join in such conveyance, and how does it appear that such consent has been given?

3d. Who are or is the parties or party entitled, under the said testator's will, to receive the purchase-money for the said estate; and where do or does such parties or party reside? Is it not the fact that it is not known who are or is such parties or party, or, if known, is it not the fact that such parties or party refuse or refuses to join in the conveyance of the said estate to the said Defendant, or to sign a receipt for such purchase-money? Have or has such parties or party consented to join in such conveyance, and to sign such receipt; and how does it appear that such consent has been given?

The Master disallowed the interrogatories on the ground that the Defendant had no right to examine the Plaintiff as to the matters inquired after.

On the 4th of May 1841 the Master made his report in pursuance of the order before mentioned, and thereby found that, on the 29th of May 1840, an abstract of the [533] title to the estate in question in the cause was delivered to the Defendant, and that it had been laid before him, the Master, on the part of the Defendant, together with certain objections made by the Defendant to the title as shewn by the abstract; that, on the part of the Plaintiff, there had been laid before him two statements containing answers to such objections, the one of such statements brought into his office on the 25th of February 1841, and the other on the 3d of April following; that he had investigated the title appearing on the abstract, and was of opinion that a good title was thereby shewn to the estate and premises; and, such title appearing on the face of the abstract when the same was delivered, he found that a good title was shewn on the day on which the abstract was delivered: and, in pursuance of that part of the order which directed him to inquire whether the Defendant or his solicitor ever and when made any and what objections to such title, or any and what requisition relating thereto, the Master found that, on the 6th of June 1840, the Defendant applied to the Plaintiff's solicitor for a copy of the second of the schedules to a certain deed of conveyance, dated the 11th of May 1813, mentioned in the abstract, and stated that he wished to know who was the heir at law of one, John Fisher Throckmorton, in the abstract named, and whether Robert Cooper, the

executor of the said J. F. Throckmorton, was dead, and if the parties entitled to the testator's residuary estate were all of age: and the Master further found that, on or about the 24th of June 1840, the Defendant delivered to the Plaintiff's solicitor a copy of the opinion of Richard Holmes Coote, Esq., barrister-at-law, dated the 23d of June 1840, upon the title to the estate and premises; and that, on or about the 8th of October 1840, the Defendant's solicitor wrote a letter to the Plaintiff's solicitor, requesting to be in-[534]-formed of the residences of the witnesses to J. F. Throckmorton's will, *and to inquire whether there were any debts due from the estate which remained unsatisfied*, and, if not, whether the *cestuis que trust* had sent over any authority to sell, or had signified their approval of the steps that had been taken.

The Defendant took the following exceptions, which were intituled as exceptions to the Master's report:—

First, for that the Defendant carried in before the Master, under the before-mentioned order, interrogatories founded upon the Defendant's state of facts and objections in the report mentioned for the examination of the Plaintiff; which interrogatories the Master thought fit to disallow: whereas the Master ought to have allowed those interrogatories, and ought not to have made his report stating that a good title was shewn to the estate in the pleadings mentioned, until the Plaintiff had put in his examination to the interrogatories.

Secondly, that the Master ought to have stated that a good title was not shewn to the estate, for the reasons (amongst others) stated in the first, second and third objections to the title carried in on the part of the Defendant, and referred to in the report.

The exceptions now came on to be argued.

Mr. Bethell and Mr. Bird, in support of the first exception, said that the Master had received the Defendant's state of facts and objections to the title, in which it was stated that all the testator's debts had been paid, but had refused to allow that statement to be verified; that the Defendant had a right to have a case made for the opinion of a Court of law upon the title; [535] that, in framing the case, it would be necessary to state under which of the two implied powers of sale the Plaintiff was acting; that, if the estate was sold for the purpose of paying the testator's debts, the Plaintiff alone could make a good conveyance and give a good discharge for the purchase-money; but if the Plaintiff was selling the estate for the purpose, not of administration but of distribution, then the parties entitled to the proceeds of the sale must join in the conveyance and in the receipt for the purchase-money; and, consequently, the purchaser had a right to know whether all the debts had been paid or not, especially as the testator died so long ago as the year 1815; and, therefore, the presumption was that all his debts had been long since satisfied. Moreover, that it was extremely doubtful whether the Plaintiff had a power to sell, except for payment of the testator's debts. *Bentham v. Wiltshire* (4 Madd. 44).

THE VICE-CHANCELLOR. This first exception appears to me to be irregular. It is an exception, not to the report, but to what the Master did previously to framing his report.

Mr. G. Richards and Mr. James Parker, in support of the report. The Defendant ought to have applied to the Court for an order that the Master might be directed to receive the interrogatories. *Simmons v. Gutteridge*.⁽¹⁾ We contend, however, that the master was right in [536] disallowing the interrogatories; for, under the words which are found in this will, the surviving executor had a power to sell, whether any

(1) 13 Ves. 262. The following seems to be the course of proceeding with respect to interrogatories for the examination of a party in the Master's office:—The Master settles the interrogatories and then certifies that he has done so. If either party thinks that the Master has allowed any interrogatories which he ought to have rejected, or has disallowed any which he ought to have received, that party must except to the report. But if the Master disallows interrogatories altogether, he does not certify his disallowance; so that, in that case, there is no certificate to be excepted to; and the party who carried in the interrogatories must wait until the report is made, and then except to it on the ground that the Master ought not to have rejected the interrogatories. See 2 Dan. Pract. 817–819.

of the testator's debts did or did not remain unpaid at the time of the sale; and, therefore, it was quite immaterial to inquire whether any of such debts remained unpaid or not. *Shaw v. Borrer* (1 Keen, 559); *Tylden v. Hyde* (2 Sim. & Stu. 238); *Ball v. Harris* (ante, vol. viii. p. 485; and 4 Myl. & Cr. 264); *Eland v. Eland* (*Ibid.* 420); *Johnson v. Kennett* (3 Myl. & Keen, 624). In these two last cases it was decided that the rule of a purchaser being protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that, if the debts were afterwards paid, that could not vary the rule. In *Bentham v. Wiltshire* the real and personal estates were not blended together as they are in this case. [THE VICE-CHANCELLOR. If Sir John Leach had seen the case of *Ward v. Devon* (stated ante, vol. xi. p. 160), which was decided by Sir William Grant, and of which I have a manuscript note, I do not think that he would have decided as he did in *Bentham v. Wiltshire*.] The question as to the materiality of the [537] interrogatory now under consideration, and also of the two other interrogatories, was, in effect, decided by your Honor on the argument of the demurrer in this case. If, as your Honor states in your judgment, a purchaser of a real estate charged with debts is not bound to inquire whether the debts have been paid or not, what right can he have to make the inquiry; more especially when he makes it, not for the purpose of supporting the title, but of destroying it? His right must depend upon his obligation; and, if he has no obligation to make the inquiry, he can have no right to do so.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I cannot but think that, as the matter stands upon the first exception, I must overrule it.

My notion of the law is that where, as in the present case, a testator has directed all his debts to be paid, and then appoints certain persons his executors and trustees, if, at any time after his death, those who have the power sell any part of the testator's real estates, and nothing is said about the matter, the purchaser will have a good title; because, upon the face of the will, there is a charge of debts, and *non constat* that all the debts have been paid.

At the same time, I think that, if it should appear to be highly probable, at the time when the executors propose to sell, that the debts have been paid, a very important question may arise whether a good conveyance can be made by them alone, and whether the concurrence of the persons interested in the proceeds of the sale may not be necessary. It strikes me, therefore, that where the objection is made by the purchaser that the executors cannot make a good title because all [538] the debts have been paid, if the question is put by him simply—are there or are there not any debts remaining unpaid?—he has a right to an answer.

But then the question is whether, as this first interrogatory is framed, I must not overrule the exception that relates to it. That interrogatory is most minute. It asks, not only whether all the debts and funeral and testamentary expenses of the testator were not fully paid and satisfied prior to the date of the agreement for the sale of the estate, but also whether there was not a large surplus of the testator's personal estate after payment of his debts, and in what securities that surplus was invested, and whether the testator's widow did not receive the dividends and interest of those securities. Now, of what possible importance can it be to the Defendant to know all those minute circumstances, or to know anything more than whether any of the testator's debts remained unpaid? That was one of the interrogatories which the Master disallowed.

Then the Defendant has taken two exceptions, the first of which is thus expressed: "For that the Defendant carried in, before the said Master under the said order, interrogatories, founded upon the said Defendant's state of facts and objections in the said Master's report mentioned or referred to, for the examination of the Plaintiff, which interrogatories the said Master has thought fit to disallow: whereas the said Master ought to have allowed (not settled) the said interrogatories." Now, my opinion is that the interrogatory is wrong in point of form; for there was no reason why it should have been framed in this minute and extensive manner. Therefore, although I think that the Defendant had a right to know whether all the debts were paid or not, [539] and that the Master ought to have allowed an interrogatory inquiring simply as to that fact, yet I do not think that he ought to have allowed an interroga-

tory inquiring into all the particulars which this first interrogatory extends to ; and, consequently, I must overrule the exception that relates to that interrogatory.

May 30. On this day an order was drawn up overruling the first exception, and directing a case to be made for the opinion of the Barons of the Exchequer upon the following questions :—

First, whether the Plaintiff, under the testator's will, had power to sell the hereditaments in the pleadings mentioned, and convey the same to the Defendant in fee-simple, in case the debts of the testator remained unpaid.

Secondly, whether the Plaintiff had such power in case it was uncertain whether any debts of the testator remained unpaid ; and,

Thirdly, whether the Plaintiff had such power in case no debts of the testator remained unpaid. And it was also ordered that the further consideration of the second exception, and of the further directions and the costs of the suit, should stand over until the return of the Barons' certificate.

The case was argued in May 1843 ; and on the 1st of June the Lord Chief Baron (Lord Abinger), Mr. Baron Gurney and Mr. Baron Rolfe returned the following certificate :—“ We have heard this case argued by counsel, and have considered the same, and we are of [540] opinion that, whether there are or are not debts unpaid, and whether it is or is not uncertain whether any debts remain unpaid, the Plaintiff has a power to sell and convey the hereditaments mentioned in the case to the Defendant in fee-simple.”

July 11, 1843. The cause now came on to be argued on the matter of the second exception, and on the equity reserved, and for further directions on the Master's report, and as to costs.

Mr. Bethell and Mr. Bird said that, owing to the length of time which had elapsed since the testator's death, there was a strong presumption that all his debts were paid ; that the Court had decided that the Defendant had a right to know whether any of the debts remained unpaid ; and, as the Plaintiff had declined to give him any information on that subject, the Court would not compel the Defendant to complete his contract in the absence of the parties beneficially interested in the proceeds of the sale ; for the circumstances of the case afforded intrinsic evidence that the executor was not selling the estate for the purpose of paying the charges on it created by the will ; *Watkins v. Cheek* (2 Sim. & Stu. 199 ; see 205) : that *Johnson v. Kennett* (*ante*, vol. vi. p. 384), as decided by His Honor, also bore strongly on the present case ; and that the Lord Chancellor affirmed the principle of that decision ; and reversed the decree only because he differed from His Honor in the conclusion which he drew from the facts of the case. *Wheat v. Hall* (17 Ves. 80) ; *Mortlock v. Buller* (10 Ves. 292).

[541] THE VICE-CHANCELLOR. If it had been admitted in *Johnson v. Kennett* that there were any debts remaining unpaid, the bill ought to have been dismissed. The decree that was drawn up is clearly wrong on the face of it. (*Ante*, vol. vi. p. 390.)

Mr. Cooper and Mr. James Parker. It is clearly established, by your Honor's decision on the demurrer in this case, and by the opinion of the Barons of the Exchequer on the case sent to them, that the Plaintiff can make a good title to the estate agreed to be sold ; and, consequently, he is now entitled to have the second exception overruled, and to have a decree for a specific performance. [THE VICE-CHANCELLOR. I am of opinion that the certificate of the Barons of the Exchequer upon the case submitted to them is right ; but neither that case nor the bill stated that Mr. Forbes had been asked whether any of the testator's debts remained unpaid and that he had refused to answer. Therefore, I have now before me a very different question from that which was before the Barons of the Exchequer or before me when the demurrer was argued. If a testator charges his real estate with payment of his debts, *that, prima facie*, gives his executor power to sell the estate and to give a good discharge for the purchase-money : that was all that I decided on the argument of the demurrer. And all that the certificate of the Barons of the Exchequer decides is that the executor has power to sell and convey the estate to the purchaser whether any of the testator's debts remain unpaid or not. It is a very important question whether the executor has power to give a good receipt for the purchase-money ; for, in my opinion, if [542]

he cannot, he cannot make a good title. That question was not, nor could it with any propriety have been submitted to the Court of law; for it is purely a question of equity.] The Defendant had no right to inquire whether there were any debts in existence or not; for, in *Eland v. Eland*, Lord Cottenham, C., following the decision of Lord Lyndhurst in *Johnson v. Kennett*, held that the rule that a purchaser is protected from seeing to the application of his purchase-money by a general charge of debts and legacies, had reference to the state of things at the death of the testator; and that, if the debts were afterwards paid, leaving the legacies charged, that did not vary the rule. [THE VICE-CHANCELLOR. If there is a general charge of debts and the purchaser makes no inquiry, he is exempted from the necessity of seeing to the application of his purchase-money. But here the purchaser has asked the executor whether any of the testator's debts were unpaid at the date of the contract, and the executor has refused to give him an answer. Under those circumstances, if it should turn out that all the debts were paid, I should hold that the purchaser had notice of that fact, and that he was bound to see that his purchase-money was properly applied. The mere abstract fact that all the debts were paid at the time of the purchase is indeed immaterial; but if the purchaser will ascertain that fact, then I should recommend him to see that he gets an effectual receipt for his purchase-money. The decisions in *Johnson v. Kennett* and *Eland v. Eland* have no bearing on the question now before me. All that Lord Lyndhurst decided in *Johnson v. Kennett*, was that the transactions which had taken place between the vendor and the purchaser in that case did not amount to notice that all the debts had been paid. That was the point on which he differed from me and reversed the decree which, as I be-[543]-fore observed, was wrong on the face of it.] The decision in *Shaw v. Borrer* is founded on the same doctrine as was laid down in *Johnson v. Kennett* and *Eland v. Eland*; and the result is that, where the will contains a general charge of debts, it is wholly immaterial to the purchaser whether the debts have been paid or not; and, therefore, he has no right to make any inquiry of the executor on the subject.

Page v. Adam (4 Beav. 269) is another and a most decisive authority in our favour. There the answer admitted that all testator's debts were paid at the date of the contract, and that the sale was not made for the purpose of paying the debts; and yet Lord Langdale, M.R., held that, as the will contained a general charge of debts, the purchaser was exonerated from any liability in respect of the application of his purchase-money. Therefore, it is wholly immaterial that the purchaser in the present case has asked the executor whether all the debts were paid or not, and that the executor has refused to answer.

THE VICE-CHANCELLOR. It certainly seems to me that Lord Langdale has expressly decided against my opinion; and if the decision in *Page v. Adam* is to be considered as the law of this Court, it does decide the question.

Mr. James Parker. The power of sale in this case does not at all depend upon the charge of debts. The testator has directed that, at the death of his wife, the residue of his estate should be collected, including the profits of the house and lot, if not previously sold, to be then disposed of [544] and divided as he afterwards directs. So that he has blended the whole of his residuary property, both real and personal, into one common fund; and his executor has the same power with respect to his real estate as he has with respect to his personal estate; that is (the widow being dead and the time of sale having arrived), he is enabled, independently of the charge of debts, to sell the real estate and to give an effectual discharge for the purchase-money. The case of *Tylden v. Hyde* was substantially the same as the present case, except that there was no charge of debts; and Sir John Leach held that the executors could make a good title to the estates agreed to be sold, and could, by themselves, without the concurrence of the *cestuis que trust*, effectually convey the estates to the purchasers. So, in *Ward v. Devon*, there was no charge of debts; and yet it was held that the executors could make a good title. [THE VICE-CHANCELLOR. I do not think that the question, whether the executors could give a good discharge for the purchase-money arose in that case. The question was whether they had a power of sale.] The question was whether they could make a good title; and, as it was held that they could, they must have had power to give a discharge for the purchase-money. Here, the time of sale has arrived, and it is the duty of the executor to sell (whether there

are debts or not), in order to blend the proceeds of the sale with the residuary personal estate, therefore, we submit that the executor can give a valid discharge for the purchase-money without the concurrence of the *cestuis que trust*.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I should be very glad that my opinion should be reversed. The only question is what has been understood to be the rule of this Court for more than a cen-[545]-tury. I have long been of opinion that the rule is a most inconvenient one.

Until the decision in *Page v. Adam* it never had been held that, where there was a charge for payment of debts, and where the purchaser knew that the debts were paid, he was exempt from seeing to the application of his purchase-money (that is) in a case where there was a trust for sale and an obligation to pay the proceeds to A. and B. I admit that cases where the payments have been directed to be made in such a manner that it was quite impossible, at the time, that all the parties interested could release, have been exempted from the operation of the rule.

But the case before me is this: the testator has, by words (I agree with Mr. Parker) given an authority to the executor, has given him a power to sell, with a direction that he shall sell, and that the proceeds are to be divided as follows:—Then he says that his sister has four children, and his deceased brother has left three, perhaps four, children; “but to them, be they seven or be they eight, I give,” &c. So that there are only seven or eight persons named as participants, and no difficulty is represented as to them.

It seems to me that what Lord Lyndhurst says in *Johnson v. Kennett* does not apply to the present case. Lord Lyndhurst there states general propositions, to the truth of which I willingly subscribe, as I do to those propositions mentioned by Lord Cottenham in his decision in the appeal case of *Eland v. Eland*. The observation I have to make on that case is that, before his Lordship comes to lay down the law, in speaking of the case of *Johnson v. Kennett* (which always appeared to [546] me to be a mere series of blunders, that is to say, a certain case was stated at the Bar, on which an opinion was given, and then the decree was drawn up in direct contravention of the facts, because the decree directs an account of the debts)—His Lordship says, in page 428 of the report: “The Vice-Chancellor considered the case the same as if nothing but legacies had been originally charged.” That was my construction on the particular facts. Lord Lyndhurst was against me on the construction of those particular facts. Then Lord Cottenham goes on to make this observation: “If that doctrine had been supported, it would have gone far to destroy the rule altogether: because, before it can come to that, the mortgagee must (and, if he is to be liable, he must in every case) go into an investigation of the fact of how far the debts have been discharged.” I never did say so, nor does it appear to me to follow as a consequence. All that I said was that, if he knew the fact that the debts had been paid, then he could not be protected by the fact that the debts were charged generally on the estate. But, to the general proposition which Lord Cottenham states, I subscribe.

Now, what is the general principle? The Court has drawn a distinction from an early time. It has said that, if there is a mere direction to sell and to divide the proceeds, the purchaser of the estate must see to the application of the purchase-money, and the parties amongst whom the proceeds are to be divided must give receipts to the purchaser; but, in a case where a testator charges his estate with debts and directs that there shall be a sale either by an express trust or by a general power, the Court says it is quite impossible for the purchaser to ascertain who are the creditors of the testator, and to see that they are paid; and, if he is not [547] bound to look to the persons whose claims are first to be satisfied, of course he is exempted from looking to the claims of the persons who take as *cestuis que trust*. That is the principle of the rule: and, that being the principle of the rule, I am yet to learn how that principle does not apply to a case where the purchaser is, in effect, informed that the debts have been paid; and I consider that what is stated to have taken place in this case between the vendor and the purchaser does amount to that.

Now, no case has been produced in which it has been decided that the purchaser, knowing that the debts have been paid, is exempt from the necessity of seeing to the application of the purchase-money, except this case of *Page v. Adam*. I have the

greatest possible respect for my Lord Langdale's opinion; and feeling, as I do, that the principle which this Court has adopted is a most inconvenient one and operates very much to the discomfort of parties in various family matters, my own personal wish is that the law should be altered: but I do not imagine I am at liberty to think that the law is made so clear by this single decision in *Page v. Adam*, that I am justified in saying that this purchaser has got a good title. [Mr. Bethell. In *Page v. Adam* the debts were not all paid at the time of the sale.] I observed that: but it does not appear to me to make a substantial difference. My notion is that the law upon the point must, at least, be considered as unsettled; and my own personal opinion as a Judge is that the decision in *Page v. Adam* is contrary to the current of authority; and I am bound by my duty as a Judge to say to the purchaser that, in my opinion, if he takes his title he will take a bad title.

[548] Lastly, it was said that this is a matter of conveyance only: but I do not think so, and for this reason; because, in order to convey and make a good title, the person to convey must not only have the power of conveying the legal estate, but have, in himself or in others over whom he has dominion, the power of conveying all the equitable interest as well. If a person has the whole equitable estate in himself, and there is a trustee who has got the legal estate in him, if the question were whether he who has got the equitable estate has a good title, you would say, in common language, that he can make a good title; because he can convey the whole beneficial interest, and has a power of compelling a conveyance of the legal estate. In this case Mr. Forbes, the executor and trustee, has a power to convey the legal estate; but he cannot, by any act of his own, give the intended purchaser an effectual receipt for the purchase-money, that is to say, he cannot convey the equity to the purchaser. He may convey the legal estate; but he has no dominion over the devisees of the money, so as to compel them to give the equitable interest in the estate: and, therefore, it appears to me not to be a matter of conveyance merely, but a matter of title. And, as my opinion is that the law has not yet gone so far as to authorize the decision in *Page v. Adam*, the bill must be dismissed. At the same time I am most desirous that my opinion should be canvassed before higher authority, and be reversed.

At the conclusion of the judgment Mr. Cooper said that, if the bill was to be dismissed, it ought to be dismissed without costs; or, at all events, the Defendant ought not to have his costs at law; as he had asked for [549] the case after the decision on the demurrer; and the opinion of the Barons, like the decision on the demurrer, was against him.

THE VICE-CHANCELLOR said that neither party was wrong in asking for the opinion of a Court of law upon a mere question of law; and that the costs of the case were part of the costs of the cause, incurred with a view to the final termination of the suit.

The order, as drawn up, stated that the Court held the second exception to be sufficient, and did allow the same; and ordered that the deposit made with the registrar on filing the exceptions should be paid to the Plaintiff and Defendant in equal moieties: and, with respect to the further directions, that the bill should be dismissed with costs (including the Defendant's costs at law), to be taxed by the Master and paid by the Plaintiff.(1)

[550] SCOTT v. PASCALL. PASCALL v. SCOTT. *March 16, 19, 1842.*

[Affirmed, 1 Ph. 110; 41 E. R. 573.]

Practice. Depositions. Cross-Cause.

After publication in the original cause, the Plaintiffs in the cross-cause, without the leave of the Court, examined witnesses in their cause, some of whom had been

(1) An appeal from this order is pending before the Lord Chancellor. [1 Ph. 717.]

examined in the original cause, and as to matters, some of which were in issue in the original cause. The Court, on the application of one of the Defendants to the cross-suit, ordered the depositions to be suppressed.

The bill in *Scott v. Pascall* was filed to set aside a deed on the ground that it had been executed under duress. The object of the bill in *Pascall v. Scott* was to support the deed; so that the former was an original and the latter a cross-cause, and the same matters were in issue in both; the cross-cause, however, was not confined to those matters.

The Plaintiffs in the cross-cause did not examine any witnesses in chief in the original suit: but after publication had passed in that suit, and notwithstanding their solicitor had been served with a notice on behalf of Elizabeth Scott, the Plaintiff in the original and one of the Defendants in the cross-cause, stating that she should object to their going into evidence in their suit as to any of the matters in issue in her suit, after publication should have passed in the latter, they, without the leave of the Court, proceeded to examine in chief in their own cause witnesses, some of whom had been examined in chief in the original cause and as to matters, some of which, at least, were in issue in the original cause.

A motion in the cross-suit was now made on behalf of Elizabeth Scott, that the depositions of the persons named in the notice of motion to the interrogatories exhibited by the Plaintiffs in the cross-cause, which the notice specified, might be suppressed.

[551] An affidavit was made in opposition to the motion, stating that, when the Plaintiffs in the cross-cause examined their witnesses, they had not seen the depositions in the original cause.

Mr. Stuart and Mr. Parry, in support of the motion, cited *Wilford v. Beaseley* (3 Atk. 501); *Ridley v. Obee* (3 Price, 26); *Conethard v. Hasted* (3 Madd. 429); *Ward v. Eyles* (Mos. 377); *Sawyer v. Bowyer* (1 Bro. 388) and *Purcell v. Macnamara* (17 Ves. 434). They added that though the two last cases related to the examination of a witness by the Master, the principle on which they were decided was applicable to the present case; and that *Sawyer v. Bowyer* shewed that the proper order to be made was that the depositions, which had been irregularly taken, should be suppressed.

Mr. Teed and Mr. Rogers, for the Plaintiffs in the cross-suit, cited *Pract. Reg.* page 87, and *Norcliff v. Worsley* (1 Ca. in Ch. 234), and said that the cases cited by the other side were distinguishable from the present case: that in *Wilford v. Beaseley* the depositions in the cross-cause were taken after the decree had been made in the original cause, and that the object of the cross-suit was to reverse that decree; and, besides, the purport of the depositions in the original suit must have been known to the Plaintiff in the cross-suit; that in *Ridley v. Obee* the Plaintiffs in the cross-cause asked that their cause might be heard at the same time as the original cause; which the Plaintiffs in *Pascall v. Scott* did not; that, in *Conethard v. Hasted*, there was only an original cause, and the depositions which the Defendant sought [552] to have read at the hearing of the cause had been taken under an order which was clearly irregular; for it had been obtained, *as of course*, after publication passed; and that *Sawyer v. Bowyer* and *Purcell v. Macnamara* shewed only that it was irregular for the Master, after decree, to examine a witness to the same matter as the witness had been examined to in chief. They added that there were other Defendants to the cross-cause besides Elizabeth Scott, but that they did not join in the application; and that the cross-cause and the depositions in it which were sought to be suppressed embraced matters which were not in issue in the original suit, and in respect of which the Plaintiffs sought relief against the other Defendants, and not against Elizabeth Scott.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is reasonably plain that I ought to make the order which is asked by the notice of motion.

The case of *Sawyer v. Bowyer* was the same in principle, though not in form, as the present; and the Lord Chancellor, Lord Thurlow, ordered the depositions to be suppressed.

In a case which was before me a short time since (see *Hodson v. Ball*, *ante*, vol. xi.

p. 456), where a supplemental bill (which was, in effect, a bill of review, as it sought to alter the frame of the original decree) had been put on the files of the Court without the leave of the Court, I thought it right to order it to be taken off the file. So, in cases where permission has been given to amend a bill by stating certain matters, and the Plaintiff has stated in it matters which he was not justified in stating by the permission given, the Court has ordered the bill to be taken off the file.

[553] Here, though there has been no actual, dishonest dealing, yet the course of the Court is to guard against perjury with a vigilant eye. It was improper to examine witnesses in the cross-cause, after publication passed in the original cause; and, therefore, I shall order the depositions referred to in the notice of motion to be suppressed. Order made with costs, as prayed by the notice of motion.(1)

Reg. Lib. B. 1841, fo. 540 b.

[553] RAND v. MACMAHON. *March 16, May 26, 1842.*

[S. C. 6 Jur. 450.]

Will. Establishing Will. Practice.

A will was proved in the West Indies, and a duly authenticated copy of it was sent to this country, accompanied by an affidavit, made by one of the attesting witnesses when the will was proved, shewing that the will had been executed and attested pursuant to the Statute of Frauds; and that copy was admitted to probate in this country, and was produced in the Court of Chancery, with the affidavit annexed to it.

The Vice-Chancellor, however, refused to establish the will, without full proof of its due execution and attestation.

The Court of Chancery will establish a will made and proved in the colonies, on the production of a duly authenticated copy of it, provided the due execution and attestation of the original are proved by the attesting witnesses.

This was a suit to establish the will of Samuel Long, Esq., late of the island of St. Christopher in the West Indies, and to have the trusts of it performed under the direction of the Court.

The will was dated on the 6th of February 1823, and the testator died on the 9th of that month. His will was proved in St. Christopher's; and, afterwards, a duly [554] authenticated copy of it was proved in the Prerogative Court of the Archbishop of Canterbury.

At the hearing of the cause, the copy of the will was produced in Court, together with an affidavit made by one of the attesting witnesses on the will being proved in St. Christopher's, the effect of which was that the will had been signed, published and attested in the manner required by the Statute of Frauds; (2) and, upon that evidence,

Mr. G. Richards and Mr. Hislop Clarke, for the Plaintiff, asked the Court to establish the will. They referred to *Pullan v. Rawlins* (4 Beavan, 142), and to the notes of cases which are subjoined to the report of that case.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, in *Pullan v. Rawlins*, the testator died in 1795, and, consequently, his will proved itself; but, in the present case, the testator died so recently as 1823; and His Honor ordered the cause to stand over in order that the matter under consideration might be more fully investigated.

May 26. The cause having come on again on this day,

(1) Affirmed by the Lord Chancellor, 1 Phill. 110.

(2) The Statute of Frauds was in force in the island of St. Christopher.

Mr. Richards and Mr. H. Clarke produced an office copy of the following decree, dated 26th April 1841, made by the Master of the Rolls in

Ellis and Another v. Maxwell and Others.

"This cause coming on the 21st day of April instant to be heard and debated before the Right Honourable [555] the Master of the Rolls, in the presence of counsel learned on both sides: Upon debate of the matter, and hearing an official probate copy of the will of William Maxwell, the testator in the pleadings named, and the codicil thereto under the official seal of His Grace the Archbishop of Armagh, and signed by John Hawkins, deputy registrar of the Court Prerogative of Ireland, and *the proofs taken in this cause* and the Defendants' answers read, and what was alleged by the counsel on both sides; his Lordship did order that this cause should stand for judgment; and this cause standing this present day for judgment in his Lordship's paper of causes, in the presence of counsel on both sides, his Lordship doth declare that the will of William Maxwell, the testator, is well proved, and that the same ought to be established, and the trusts thereof performed and carried into execution," &c.

Reg. Lib. A. 1840, fol. 888.

The registrar's book also, containing the entry of the decree in *Bayly v. Bayly*, was produced in Court: and it then appeared that the testator in that cause died on the 26th of October 1798; and that, on the cause coming on to be heard, the Lord Chancellor ordered it to stand over, in order that the *testator's will*, dated the 17th of October 1798, *might be proved*.

The cause was again brought on for hearing; and then, upon debate of the matter and hearing of the transcript of the will under the seal of the island of Jamaica, proved in the Prerogative Court of the Archbishop of Canterbury by Job Matthew Raikes, one of the executors in England, and *the proofs taken in the cause*, read and what was alleged by the counsel on both sides; his Lordship declared the will well proved, and that the [556] same ought to be established, and did order and decree the same accordingly.

Reg. Lib. A. 1801, fol. 994.

In *Harrison v. Weale* it was referred to the Master, at the hearing of the cause, to inquire and state who was the heir at law of the testator, W. G. Harrison (who died on the 14th of November 1825); and, if the Master should find there was no such heir, the Plaintiff was to be at liberty to *exhibit interrogatories in the Examiner's Office, for the examination of witnesses to prove the due execution of the testator's will*; and, for that purpose, the Plaintiff was also to be at liberty to *sue out a commission for the examination of witnesses in Jamaica*. The Master reported that there was no heir at law of the testator; the cause then came on to be heard for further directions, and, upon hearing the official transcript of the will, which had been proved in the Prerogative Court of the Archbishop of Canterbury by the executor in England, and *the proofs taken in the cause, read*, the Court declared the will well proved, and that it ought to be established.

Reg. Lib. A. 1839, fol. 1459.

THE VICE-CHANCELLOR said that, in *Bayly v. Bayly*, evidence was entered into, and, for anything that appeared to the contrary, the will might have been proved; that that case shewed, merely, that this Court would allow a certified transcript of the will to be produced instead of the original; that, in the present case, one only of the attesting witnesses went before the registrar of the Court in St. Christopher's and proved the will; and that if what had been done in St. Christopher's had been done here the Court could not have established the will.

[557] Mr. Richards then said that, as the Court thought that the will could not be established, he must ask for a commission to examine the witnesses to it in St. Christopher's.

The other counsel in the cause were Mr. Stuart, Mr. Girdlestone, Mr. L. Wigram and Mr. Bagshawe.

[557] ROGERS v. GRAZEBROOKE. March 24, 1842.

Payment of Money into Court. Defendant.

A. and B. insured, in their joint names, certain leasehold premises which A. had mortgaged to B., and B. paid the premium on the insurance, and the policy was delivered to him. Afterwards the premises were destroyed by fire; and then A. became bankrupt, and his assignees prevailed on the insurance company to pay the money due on the policy to them; and they afterwards paid it into the bank to the credit of the accountant in bankruptcy. B. filed a bill against the assignees, praying that the money received from the company might be applied in satisfaction of his mortgage debt. The answer of the assignees tended to impeach the mortgage on the ground of usury. The Court, however, ordered them to pay the amount of the money into Court.

The Plaintiff was a bill broker; the Defendants, Grazebrooke and Drew, were the creditors' assignees, and the other Defendant, Alsager, was the official assignee of Reuben Hunt, a bankrupt. The case made by the bill was shortly as follows:—In October 1839 the Plaintiff having in his hands two bills of exchange drawn by Hunt, one for £500 and the other for £150, and Hunt, being desirous of obtaining further advances of money from the Plaintiff, deposited with the Plaintiff a lease and assignment of certain hereditaments, fixtures, implements and utensils, as a security, by way of equitable mortgage, for all sums of money which he might thereafter owe to the Plaintiff, and lawful interest thereon. The Plaintiff afterwards (from time to time) [558] made advances to Hunt; so that, on the 4th of June 1840, Hunt, as well upon the bills of exchange (which were dishonoured) as in respect of such advances, was indebted to the Plaintiff in £3000 and upwards: in consequence of which the Plaintiff became desirous of obtaining a legal mortgage of the hereditaments and premises; and accordingly by an indenture, dated the 4th of June 1840, Hunt assigned to him the hereditaments, and also the steam-engine, boiler, pipes, valves, pumps, cocks, lathes, fixtures, tools and implements used by him in his business of a millwright, and all the fixtures, goods, chattels and effects then being in and about the hereditaments, and which were specified in the schedule thereto, subject to a proviso for redemption, on payment by Hunt to the Plaintiff of £1000 and interest at the rate of five per cent. per annum. On the same day Hunt and the Plaintiff insured the mortgaged premises for £2000 in the Phoenix Insurance Office in their joint names, the Plaintiff being described in the policy as the mortgagee, and Hunt as the mortgagor; and the premium on the insurance was paid by the Plaintiff, and the policy was delivered to him. Shortly afterwards the mortgaged premises were destroyed by fire. In August 1840 Hunt became bankrupt; and the Plaintiff and Hunt's assignees severally claimed the £2000 from the insurance company. The claim was at first resisted by the company, but ultimately the assignees made a compromise with them, and agreed to accept £1100 in full discharge of their liability; and that sum was accordingly paid to the assignees, and they gave to the company a release in full, and also an indemnity against any claim which should be made by the Plaintiff. The Plaintiff applied to the assignees to discharge what was due to him on his mortgage out of the £1100, but they refused so to do.

[559] The bill prayed for a declaration that the £1100 was applicable in the first instance to the satisfaction of what was due to the Plaintiff on his mortgage, and for an account of what was so due; and that the Defendants might be ordered to pay the amount to the Plaintiff, he offering, upon such payment being made, to assign the mortgaged premises to the Defendants.

The Defendants, in their answer, said that they had no personal knowledge of the transactions mentioned in the bill, or of the transactions between the Plaintiff and the bankrupt, nor any information relating thereto, except as thereafter appeared; but that in June 1841 the Plaintiff alleged that the bankrupt was indebted to him in the principal sum of £3091, 2s. 9d., upon an account which he annexed to an affidavit, and that such sum was due to him upon mortgage of the premises mentioned in the

bill, and that he applied to the Commissioner of Bankrupts acting under the fiat for a sale of those premises; that, in consequence of such application, the Defendants inquired into the nature of the dealings and transactions of the Plaintiff and the bankrupt, and caused the Plaintiff and his attorney and the bankrupt and other persons to be examined before the Commissioner touching such dealings and transactions, and by such examinations and otherwise, and especially by the admissions of the Plaintiff upon such examinations, they discovered (as the fact was) that the debt claimed by the Plaintiff to be due to him from the bankrupt and his alleged mortgage security were founded in usury and upon a usurious contract, and that the mortgage security was void under the usury laws; and the Commissioner of Bankrupts so decided, and refused to admit the Plaintiff to prove any debt under the fiat; [560] that, from such examinations, it appeared, and the Defendants believed the fact to be and doubted not to prove that all the dealings and transactions between the Plaintiff and the bankrupt, in respect of which the Plaintiff claimed to be a creditor of the bankrupt and entitled to the mortgage and to the policy of insurance or the money paid thereunder, took place after he had the security of the equitable mortgage and the other securities mentioned in the bill, and consisted of advances of money upon bills of exchange, or the discount of bills of exchange, upon an agreement to be allowed by the bankrupt upon such advances or discount, interest at 10 per cent. for three months, or at 40 per cent. per annum, and that the Plaintiff was allowed by the bankrupt to retain such interest accordingly; that the Plaintiff, after the bankruptcy and before he made the before-mentioned application to the Commissioner, prevailed on the bankrupt to destroy many of his books which contained entries relating to such dealings and transactions, and from which the true nature of them would appear, and also some of his documents and vouchers, and to fabricate others which would support the case which the Plaintiff desired to present to the Commissioner, and, in particular, that the Plaintiff, before the bankruptcy, rendered to the bankrupt some account in which the interest charged and retained by him appeared, but, after the bankruptcy, he delivered to the official assignee an account, either omitting such charges or asserting them as monies lent or advanced to the bankrupt; that in the account so rendered to the bankrupt himself was charged a sum of £60 on the 31st of May 1840, as for interest or discount; and that in the account delivered to the official assignee the same sum was charged as money lent; that among the vouchers was an I O U for the £60, by which it appeared that [561] the same was given for interest; that the Plaintiff's attorney, having seen such voucher, destroyed it with the Plaintiff's privity, and procured another to be given by the bankrupt and produced it to the official assignee or the Commissioner, in support of the Plaintiff's claim; and that he did so because the production of the one destroyed would have shewn that the Plaintiff's securities were tainted with usury: that the Defendants believed that the Plaintiff, after he had received the security mentioned in the bill, did become the indorsee and holder of the two bills of exchange, and discounted the same upon being allowed £125, 6s. 8d. for the discounting the bill for £500, and £35 for discounting the bill for £150, such discount far exceeding interest at the rate of five per cent.: that they believed that both the bills were afterwards paid or renewed, and that neither of them formed any part of the account in respect of which the Plaintiff claimed to be a mortgage creditor of the bankrupt: that they believed that, after the bankrupt had made the equitable mortgage to the Plaintiff, the latter did, from time to time, make advances of money to the bankrupt upon bills of exchange or by discounting bills of exchange, and that no sums were lent or advanced by the Plaintiff to the bankrupt, nor was any bill of exchange discounted for him except on the terms of the Plaintiff being allowed interest at the rate of 10 per cent. for three months, or some such rate, and more than five per cent. per annum: that they believed that the assignment by way of mortgage was made without any sufficient valuable consideration, and that the £1000 therein mentioned was not in fact due from the bankrupt to the Plaintiff, and that the mortgage was made by the bankrupt as the continuation of the usurious transaction before mentioned, and to be a security for what was or should be due to the Plaintiff [562] in respect thereof: that they believed that the bankrupt and the Plaintiff did effect an insurance with the Phoenix Insurance Office, on the leasehold

premises and the chattels thereon, for £2000, namely, £250 on the buildings, £750 on the machinery and fixtures, and £1000 on patterns in the millwright's shop; but which patterns were not included in the mortgage; and that the insurance was made in the joint names of the Plaintiff and the bankrupt, as mortgagee and mortgagor, and that the premium was paid by the Plaintiff, and the policy delivered to him: that the leasehold premises and the articles therein were destroyed by fire, as mentioned in the bill: that the Defendants, the creditors' assignees, having become aware of the usurious nature of the securities under which the Plaintiff claimed an interest in the property destroyed by fire, applied to the insurance company to pay to them the amount of the loss, and that the company, after some resistance, paid them £1090, upon receiving a discharge in full and being indemnified against any claim to be made by the Plaintiff: that £250 of the £1090 was paid in respect of the value of the buildings, £340 in respect of the value of the chattels mentioned in the schedule to the mortgage deed, and £500 in respect of the patterns: that David Cannon was originally appointed the official assignee under the bankruptcy, but that he had since died, and the Defendant Alsager had been appointed in his place; and that Cannon, before his death, *duly paid over or accounted for the money received from the insurance office: and the Defendants submitted to the judgment of the Court whether such money was still in their sole possession or power, or whether the same was not subject to the orders of the Court of Bankruptcy or of the Commissioner acting in execution of the fiat.*

[563] Mr. Bethell and Mr. W. M. James, for the Plaintiff, now moved that the Defendants, Grazebrooke and Drew, might be ordered to pay the money which they had received from the insurance office into Court. They said that the policy having been effected in the joint names of the mortgagor and mortgagee, they were jointly interested in the proceeds of it; and that the Court would not allow one joint owner of property, or those who claimed under him, to hold or deal with the property against the will of the other joint-owner: that the money in question was the subject in dispute between the litigating parties, and that it ought to be preserved by the Court for the party who might be eventually declared to be entitled to it.

Mr. Teed and Mr. Prior, for the Defendants, said that the answer did not admit the Plaintiff's title to the money in dispute, but impeached it on the ground of usury: that the question whether the transactions which had taken place between the Plaintiff and the bankrupt, and in respect of which the insured premises had been mortgaged to the Plaintiff, could not be decided until the hearing of the cause, and that, in the meantime, the Court would not order the Defendants to pay the money into Court, especially as it had been paid into the Bank of England to the credit of the accountant in bankruptcy,⁽¹⁾ where it was as secure as it would be if paid into the Court of Chancery.

[564] THE VICE-CHANCELLOR [Sir L. Shadwell]. The question here is whether the case is so clear against the Plaintiff that I ought not to order the money in question to be paid into Court.

The circumstances stated in the answer, upon which the Defendants resist the Plaintiff's claim, are stated in a very general manner; so that I cannot decide the point upon the answer: and I cannot but think that it may turn out consistently with the answer that the Plaintiff is entitled, to some extent at the least, to the relief which he asks by his bill. The relation which subsisted between the Plaintiff and the bankrupt was that of mortgagee and mortgagor; and in those characters they effected a policy of insurance on the mortgaged premises in their joint names. The premises were then destroyed by fire; and the money due on the policy was received by the Defendants in their character of assignees of the mortgagor, who, shortly before, had become bankrupt: and it appears, from their answer, that they have treated and disposed of the money as wholly belonging to the estate of the

(1) See 5 & 6 Will. 4, c. 29, ss. 3 and 4. By 1 & 2 Will. 4, c. 56, s. 22, the whole of a bankrupt's property is directed to be possessed and received by the official assignee alone; and by a General Order made in pursuance of 5 & 6 Will. 4, c. 29, s. 4, the official assignee is to pay into the bank, to the credit of the accountant in bankruptcy, all monies from time to time received by him, when they shall amount to £100.

bankrupt. It is, however, quite new to me that, in respect of a joint security, one of the parties may receive the whole of the money payable upon it, and apply it to purposes irrespective of the claims of the other party. There is no reason why the assignees of a bankrupt should not be subject to the operation of the law of this Court in the same way as other persons are: and if they have received money which they ought not to have received, it is no answer to the owner that they, as assignees, have disposed of it in a particular manner. If they have received the money under such circumstances that it ought to be secured in Court, it follows, as a necessary consequence, that they are answerable for it, notwithstanding-[565]-ing what they have done with it, and therefore must pay the amount into Court.

Order the Defendants Grazebrooke and Drew to pay the £1090 received from the insurance company into Court.

The Defendants moved the Lord Chancellor to discharge the above order. His Lordship said that he was not concluded by the decision of the Commissioner under the fiat that the transactions in respect of which the mortgage was executed were tainted with usury, nor could he come to the same conclusion from the statements in the answer, so far, at least, as the bills of exchange for £500 and £150 were concerned: but, as the patterns appeared not to have been included in the Plaintiff's security, the sum which the Defendants had received from the insurance company, in respect of those articles, ought not to have been ordered to be paid into Court; and that the Vice-Chancellor's order must be varied accordingly.

[566] ABRAHAM v. NEWCOMBE. April 22, 1842.

Consent. Feme Covert. Practice.

The Court will not take the consent of a married woman who is under age, to the payment of money to which she is entitled, to her husband. *Gullin v. Gullin*, ante, vol. vii. p. 236, overruled.

In this case THE VICE-CHANCELLOR held that the consent of a married woman who was under age, to the payment out of Court, to her husband, of a sum of money to which she was entitled, could not be taken.

The point was submitted to His Honor by Mr. Kinglake, who referred to the conflicting authorities of *Gullin v. Gullin* (ante, vol. vii. p. 236) and *Stubbs v. Sargon* (2 Beav. 496).

[566] SOUTH v. WILLIAMS. April 22, 1842.

[11 L. J. Ch. 410; 6 Jur. 332.]

Will. Construction. Release of Debts.

Testator bequeathed his residuary estate in trust for his son and daughter equally, and declared that certain sums which he had lent to his son should be deducted from his share of the residue, and that certain sums which he had lent to C. W., his daughter's husband, on bonds, *should be taken and allowed in account as part of her share; and, if the balance should appear to be against C. W., the trustees were to refrain from putting the bonds in force against him*, and to take a security from him for payment of the balance by instalments. The daughter died in the testator's lifetime. Held, nevertheless, that C. W. was released from the debts due from him, and was answerable only for the excess (if any) of those debts beyond the amount of a moiety of the residue.

J. Breach, by his will, dated the 31st of January 1835, gave the residue of his personal estate, after payment of his debts, funeral and testamentary expenses and

legacies, to Thomas South and Thomas Robson, the [567] trustees and executors of his will, in trust for his son, Philip James Breach, and his daughter, Susan Elizabeth, the wife of Charles Williams, equally, as tenants in common; but subject, as to the respective shares of his said son and daughter, to the declaration thereafter contained. The testator then expressed himself as follows:—"And whereas, on the dissolution of partnership between my son, P. J. Breach, and my son-in-law, Charles Williams, I advanced to my said son the sum of £500 as a consideration for his quitting the partnership concern: and whereas my said son, P. J. Breach, is also justly indebted to me in the sum of £306, 1s. 3d. upon his bond bearing date the 25th day of March 1832, payable with interest: Now I do hereby declare and direct that the said several sums of £500 and £306, 1s. 3d., or so much thereof respectively as shall be owing to me at the time of my decease, shall be deducted from the share of my said son, P. J. Breach, of my said residuary estate, but that no interest due or to become due in respect of either of the said principal sums shall be demanded from or paid by him my said son: And whereas, upon the marriage of my said son-in-law, Charles Williams, with my said daughter, Susan Elizabeth, I gave and paid to the said Charles Williams the sum of £1000 as a marriage portion with my said daughter: and my said son-in-law is also justly indebted to me in the sum of £2256, 1s. 3d. upon his bond bearing date the 25th March 1832, and also in the further sum of £1500 on his bond bearing date the 20th day of December 1834: Now I do hereby declare and direct that the said sum of £1000 so paid to the said C. Williams as a marriage portion, and also the said two several sums of £2256, 1s. 3d. and £1500, with any interest that may be due or become due on the said sum of £1500, but exclusive of any interest [568] (which shall not be demanded from or paid by the said C. Williams) on the said sums of £1000 and £2256, 1s. 3d., or either of them, or so much thereof respectively as shall be owing to me at the time of my decease, *shall be taken or allowed in account*, as part of the share of his wife (my said daughter, Susan Elizabeth) of my said residuary estate: and in case the balance shall appear to be against the said Charles Williams and Susan Elizabeth, his wife, then I request and direct my trustees and executors *to refrain from putting in force the aforesaid bonds or either of them against the said C. Williams*, and also to refrain from calling for or enforcing immediate payment of all or any part of such balance, but to require and take from the said C. Williams such security, real or personal, for the payment thereof, with lawful interest, by instalments, at such periods and in such manner as my said executors in their discretion shall think fit; but, nevertheless, upon the terms that the said C. Williams, his executors or administrators, do and shall secure and assure the payment of the interest of such balance, by equal half-yearly payments, upon the trusts and for the purposes of this my will."

Susan Elizabeth Williams died in September 1836. The testator died in February 1841.

The bill was filed by the executors and trustees of the will against C. Williams and his children by his late wife, and against Philip James Breach, to have the trusts of the will performed and the rights and interests of the parties to and in the testator's residuary estate ascertained and declared by the Court. It stated that Philip James Breach and Charles Williams were indebted to the testator, at his death, in the principal [569] sums in which they were stated, in his will, to be indebted to him, together with a considerable arrear of interest thereon: that, so far as the testator's liabilities had come to the knowledge of the Plaintiffs, his assets were sufficient to discharge all such liabilities and to provide for the pecuniary legacies given by his will; and, so far as the Plaintiffs had been able to ascertain the same, the aggregate of the debts in the will stated to be owing from Charles Williams to the testator did not exceed the share to which, *had Susan Elizabeth Williams survived the testator*, she would have been entitled in the testator's residuary estate, treating such debts as part of his residuary estate: that Charles Williams claimed to treat the provision in the will touching the debts or aggregate of debts therein stated to be owing from him to the testator *as amounting to a legacy or a release to himself thereof, and to remain unaffected accordingly by the death of his wife*; and that, under such circumstances, he insisted on a right to retain such debts and to be protected from all proceedings for recovery of the same; and that he further alleged that he was in insolvent circumstances and wholly unable to pay such debts or to give any security for the same: while Philip

James Breach and the children of Susan Elizabeth Williams alleged the provision insisted on by C. Williams to amount only *to a legacy, to his wife, of the debt owing from him to the testator as in the will mentioned, and that the same having lapsed by her death*, had become undisposed of and distributable amongst the testator's next of kin, that is to say, amongst the children of Susan Elizabeth Williams as representing their late mother, and Philip James Breach.(1)

[570] The cause now came on to be heard.

Mr. Wakefield and Mr. Goodeve, for the Plaintiffs, the executors and trustees of the will.

Mr. Bethell and Mr. Romilly, for Charles Williams. We submit that, according to the true construction of the will, our client is, as between himself and the testator's estate, formally released from the debts of £2256, 1s. 3d. and £1500.

The testator's object was that his son and his daughter should share his bounty equally; and, in order to effect that object, he has directed that the sums which he had advanced and lent to his son and to his son-in-law should be treated, in the division that was to be made of his property between his son and his daughter, not as debts due to his estate, but as items of account. The personal liabilities of the son and son-in-law are entirely put an end to, and the sums advanced and lent to them by the testator cease to bear the character of debts, and are to be regarded only for the purposes of the account between the son and the daughter. The [571] testator has, in express terms, released the interest of the debts; and we submit that he has released the principal also. If the daughter had survived the testator, she could not have been treated as a creditor of her husband. A release by him, for her share of the residue exclusive of the debts, would have been a good discharge to the executors.

The next question is whether the death of the daughter in the testator's lifetime prevents the will from operating as a release of the sums advanced and lent to her husband. We contend that the operation of the will, so far as those sums are concerned, is not at all affected by that event.

Where a testator, by his will, releases a debtor to his estate from the debt, the debtor is a legatee of the debt. Though the daughter died in the testator's lifetime, her husband is still alive; why then is he not entitled to claim the legacy left to him in the shape of a release of debts? If a testator gives a legacy of £100 to A. B., and directs it to be paid out of a larger legacy given to C. D.; A. B. will not lose his legacy if C. D. dies in the testator's lifetime. So also, where a testator bequeaths the residue of his estate to his two children, and directs one of them to release a debt due to him from A. B., but to give credit for it in account; the death of that child in the testator's lifetime does not prevent the release of the debt from having its intended effect. If the testator's son had died shortly before the testator, it could not have been contended that his estate was liable to pay the sums which he had received from his father. Neither can it be contended that, because the daughter died in the testator's lifetime, her husband still [572] remains a debtor to the testator's estate. What the testator meant was that neither his son nor his son-in-law should be required to pay the sums which he had advanced them; but that the son should consider what had been advanced to him, as part of his share of the residue; and that the daughter should consider what had been advanced to her husband as part of her share of the residue.

In *Hills v. Wirley* (2 Atk. 605) the testatrix directed certain annuities to be paid by a person to whom she had given certain household goods on the condition of mak-

(1) The principal question that arose in the suit was thus shortly and clearly stated in a case which the Plaintiffs laid before an eminent counsel: "Whether the whole share of the residue bequeathed to Mrs. Williams is altogether lapsed and undisposed of; or whether any and which of the sums mentioned in the will as having been given, paid or advanced to Mr. Williams, can be considered as bequeathed to him." The following answer was given to that question: "I am of opinion that the whole share of the residue bequeathed to Mrs. Williams is not altogether lapsed and undisposed of; but that the deductions directed to be made from that share, in respect of the sums given, paid and advanced to Mr. Williams, take effect; and there is an intestacy as to the balance only, after taking into account those deductions."

ing those payments. The gift of the household goods failed, because the testatrix had described them as being comprised in a schedule annexed to her will; but no schedule was annexed to it. Lord Hardwicke, however, said: "One thing is very plain; that the testator (testatrix) intended her legatees should have the annuities; and, therefore, if there is any room to assist them, the Court will do it, notwithstanding the accident that happened of the testatrix's annexing no schedule of the household goods. . . . The essential rule in all these cases is that, as long as the fund itself exists upon which the legacy is charged, though it devolves either upon the heir or executor, yet they take it subject to the charge." In *Oke v. Heath* (1 Vez. 135) a lady had power to appoint £4000 to any of her kin; and, in default of appointment, that sum was to go amongst her next of kin according to the Statute of Distributions. By her will she appointed the money to her nephew, and, in consideration thereof, he was to pay his mother an annuity for her life, and to give a bond for securing the payment of it. The nephew died [573] in the testatrix's lifetime: Lord Hardwicke, however, held that the annuity was, nevertheless, a subsisting legacy, and was payable out of the testatrix's estate. *Elliot v. Davenport* (1 P. W. 83) shews that where, as in this case, the release is independent of the gift, the release takes effect though the gift fails.

Mr. Stuart and Mr. F. Bayley, for the children of the testator's daughter. In order to bring this case within the principle of *Elliot v. Davenport*, the counsel for the son-in-law ought to have shewn that the will contains an *absolute* release of the debt. But this will not only does not shew any intention on the part of the testator to release the debts in all events, but it shews an intention to keep them alive. The son-in-law was no object of the testator's bounty beyond the interest of one of the debts which he owed to the testator: and, supposing that the testator did intend that the debts due from his son-in-law should be lost to his daughter, it by no means follows that his next of kin are to bear the loss. The testator might have considered that the daughter had benefitted by the advances made to her husband: and we submit that the effect of the will, so far as it relates to the son-in-law and the daughter, is to give to the daughter a legacy of so much as one moiety of the residue should exceed the debts due from her husband.

Mr. John Baily, for the testator's son, who, as one of the testator's next of kin, was in the same interest as Mrs. Williams's children, relied on *Elliot v. Davenport* as an authority in his favour; because in this case as in [574] that, the release was connected with and dependent on the gift; and, the gift having failed, the release failed with it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. Although it is perfectly true that the primary object of the testator was an equal division of the residue of his personal estate between his son and his daughter, yet it appears to me impossible not to see that he did intend a certain benefit to his son-in-law; and that benefit was to be had in this manner. The will contains a recital of a certain quantity of debt due from the son, which, to a certain extent, the son is released from. That is not very material. I am not bound to consider, as regards the son, what was the effect of that. But then, with respect to the son-in-law, the will recites that the testator had paid to him £1000 on his marriage, and that the son-in-law was indebted to the testator in two other sums, the amount of which is stated on his bonds. Then the testator directs that those three sums "shall be taken or allowed in account as part of the share of his wife of my residuary estate; and, in case the balance shall appear to be against the said Charles Williams and Susan Elizabeth, his wife, then I request and direct my trustees and executors to refrain from putting in force the aforesaid bonds, or either of them." By which I understand he means that an equation shall be struck between, on one side, the quantity of debt due from the son; and, on the other, that sum which would be composed of the £1000 advanced upon the marriage of the son-in-law, and of the other two sums which were due from the son-in-law on his bonds; and that, when the equation is made, the trustees shall no longer put in force the aforesaid bonds. It is quite plain that the testator was perfectly [575] aware of what he was about: he says, "they shall no longer put in force the aforesaid bonds, or either of them, against the said Charles Williams;" which is a direction, in effect, that he shall be released from the bonds. Shortly afterwards, the testator directs the

trustees and executors "to refrain from calling for or enforcing immediate payment of all or any part of such balance; but to require and take from the said Charles Williams such security, real or personal, for the payment thereof, with lawful interest, by instalments, at such periods and in such manner as my executors in their discretion shall think fit." The will, therefore, directly operates to change the whole nature of the debt which was due from Charles Williams, the son-in-law, to the testator: for the operation will be, first of all, to determine what it is that shall ultimately be payable by him; and next, to declare that the bonds which he had given shall not be enforced at all; and, thirdly, that for that amount which, upon the striking of the balance, shall be determined to be due, such security shall be given, real or personal, as the executors may determine upon; which they could not have done without the direction of the testator. Therefore my opinion is that the death of the testator's daughter has made no difference with respect to that part of the transaction.

July 11. The cause was placed in the paper on this day, in order that the minutes of the decree, which the parties had not been able to agree upon amongst themselves, might be settled; and, after some discussion, they were arranged as follows:—

Declare that John Breach, the testator, has, by his will, released the Defendant, Charles Williams, from all [576] interest which may have accrued due on the sum of £2256, 1s. 3d. in the pleadings mentioned: and declare that the testator has also released the Defendant, C. Williams, from all sums due to him at the time of his death in respect of the sums of £2256, 1s. 3d. and £1500 in the will mentioned, provided those sums, together with interest on the last-mentioned sum up to the day of the death of the testator, and together with the sum of £1000 advanced by the testator on the marriage of the said Defendant, shall not exceed, and to such extent only as the same shall not exceed the half part of the residue of the estate of the testator, to be calculated as hereinafter is directed: and let it be referred to the Master to inquire and state who were the next of kin of the testator at the time of his death; and, in case the Master shall find that all such next of kin are parties to this suit, let the Master take an account of the personal estate and effects of the testator come to the hands of the Plaintiffs, his executors, they submitting to account, or to the hands of any other person or persons, &c., &c.: and let the Master take an account of the testator's debts, funeral and testamentary expenses and legacies, and compute interest on his debts and legacies, &c.: and the Master is to cause advertisements to be published for creditors, &c.: and let the Master inquire and state what was due to the testator at the time of his death, in respect of the sums of £500 and £306, 1s. 3d. from the Defendant, Philip James Breach: and let the Master also ascertain what was due to the testator at the time of his decease, in respect of the sums of £2256, 1s. 3d. and £1500: and let the Master ascertain the clear residue of the testator's estate after payment of his debts, &c.: and let the Master include in his account of the testator's residuary personal estate the sums of £500 and £306, 1s. 3d., [577] and also the sums of £1000, £2256, 1s. 3d. and £1500, with the interest which the Master shall find to have been at the time of the death of the testator due thereon: and let the Master divide such clear residue into two equal half parts; and declare that the Defendant, Philip James Breach, is entitled to one of such half parts, after deducting therefrom what may be so found due in respect of the sums of £500 and £306, 1s. 3d.: and declare that in case the sum to be found due from the Defendant, Charles Williams, as aforesaid, shall exceed the half part of such residuary estate so to be calculated and ascertained as aforesaid, then the Defendant, Philip James Breach, is entitled to so much as the sum to be found due from Charles Williams shall exceed the half part of such residuary estate so to be calculated and ascertained as aforesaid; and if the amount to be found due from the Defendant, Charles Williams, shall fall short of the half part of the residue so to be ascertained and calculated as aforesaid, then declare that the next of kin of the testator at the time of his decease are entitled to so much of the half part of the residue, so to be calculated and ascertained as aforesaid, as shall exceed the amount to be found due from the Defendant, Charles Williams, as aforesaid: and for the better taking of such accounts, &c.

[578] CAMPBELL v. ANDREWS.(1) April 28, 1842.

Plaintiff. Practice.

Plaintiffs filed a supplemental bill, for the purpose of bringing before the Court the assignees of a Defendant who had become bankrupt. The Plaintiffs were fully described in the original bill, but in the supplemental bill their places of residence were omitted. Held, on motion, that they must give security for costs.

This was a supplemental suit, for the purpose of bringing before the Court the assignees of a Defendant to the original bill, who became bankrupt pending the suit. The Plaintiffs were, in fact, the same persons as were Plaintiffs in the original suit: but in the supplemental bill they were not described except by their names; and, on that account,

Mr. Bethell and Mr. Webster, for the assignees, now moved before answer, either that the supplemental bill might be taken off the file with costs; or that all proceedings might be stayed until the Plaintiffs should have either given security for costs, or amended the supplemental bill by inserting their places of residence. They said that the bill was an original one as against the assignees, and that they were not bound to look out of it for the description of the parties who were suing them.

Mr. K. Parker and Mr. Grove said that the original bill contained a full description of the Plaintiffs, and that, if there was anything in the objection, it ought to have been taken by demurrer and not by motion.

THE VICE-CHANCELLOR [Sir L. Shadwell] said that, for anything that appeared to the contrary, the Plaintiffs might have changed their places of residence, or even be out of the jurisdiction; and that they must give security for the costs of the supplemental suit, and all proceedings in it must be stayed in the meantime; and also that they must pay the costs of the motion.

[579] MARTIN v. MARTIN. May 4, 1842.

[S. C. 11 L. J. Ch. 291; 6 Jur. 360.]

Will. Construction. Advowson. Next Presentation. Intestacy.

A testator, who was both patron and incumbent of a living, devised the advowson and all his other real estates, and also his personal estate, to trustees in trust to pay the *rents*, dividends, interest, and annual income of his real estates, until they should be sold as thereafter directed, and also of his personal estate to his sister, until she should have a child, and immediately after her having a child, in trust to stand seised and possessed of his real estates, if not then sold, and of his personal estate and the *rents*, dividends, interest and annual income thereof, in trust for her children or child who should attain 21, their heirs, &c.; and if she should have no such child, then in trust after her death, for the trustees, their heirs, &c. The testator then directed his trustees to sell the advowson and his other real estates, with all convenient speed after his death, and to stand possessed of the proceeds upon the trusts before declared of his personal estate: and he empowered his trustees to apply the *rents*, dividends, interest and annual income of the presumptive shares of his sister's children, of his real estates (if not then sold), and, if sold, then of the money arising therefrom, and of his personal estate, for their maintenance during their minorities; and directed that the surplus *rents*, dividends, interest and annual income should be invested and accumulated for the benefit of the children from whose shares the same should be saved.

(1) *Ex relatione.*

At the testator's death, his sister (who was his heir) had three infant children ; and his living having become vacant by his death, the question was whether the children, their mother or the trustees were entitled to present to it. Held, that as the presentation to a living does not produce *rents*, dividends, interest or annual income, the dispositions of the will were not applicable to that species of property, and, consequently, that the testator's sister was entitled, as his heir at law, to present to the living on the existing vacancy.

The Rev. William Marsden, by his will dated the 18th of August 1840, gave his advowson and right of patronage and presentation of and to the Rectory of Everingham in Yorkshire, of which (as he mentioned) he was incumbent, with the rights, privi-[580]-leges, and appurtenances belonging thereto, and all glebe lands, tithes, tenths, oblations, obventions, fruits, offerings, dues, duties, emoluments and advantages whatsoever to the said advowson belonging, and all houses, outhouses, &c., whatsoever to the said advowson belonging, and also his three cottages in Chorley in the county of Lancaster, and his close of land in the parish of Kirkham in the same county, and his three messuages in the town and county of the town of Nottingham, late the property of his uncle, William Marsden, Esquire, and all other his real estate, subject nevertheless to an annuity of £130, and to another annuity of £20, then already charged upon the messuages in Nottingham by his late uncle, and also his leasehold messuage and premises in the borough of Southwark, and all his Canal shares, money, securities for money, goods, chattels, personal estate and effects whatsoever and wheresoever, subject to the payment of his just debts, funeral and testamentary expenses and the annuities and legacies given by his will, unto and to the use of his friends the Rev. John Blew and the Rev. John Grant Lawford, their heirs, executors, &c., upon trust, when and as they, in their discretion, should see proper for the benefit of his estate, to sell and convert into money all such parts of his personal estate and effects as should not consist of money or securities for money, and to call in such parts thereof as should consist of monies or securities for money (except mortgages), and thereupon, with all convenient speed, to place out and invest the monies arising by such sales and to be called in as last mentioned, on Government or real securities, and to stand seised and possessed of his said real estates, and also of his said personal estate and effects, and the securities upon which the same should be invested, in trust to receive the *rents*, [581] dividends and annual income of his said real estates, until the same should be sold as thereafter contained, and also of his said personal estate, and thereout to pay the annuities before mentioned and certain other annuities, and in trust, during such time or times as his dear sister Charlotte, the wife of William John Martin, should not have any child or children by the said William John Martin actually born and living, to pay the whole of the said *rents*, dividends, interest and annual income of his said real estates until the same should be sold as thereafter contained, and also of his said personal estate, subject to the payment thereof of the before-mentioned annuities, to his said sister Charlotte during her life for her separate use ; and, in case his said sister should have a child or children born alive by the said William John Martin as aforesaid, he directed that, from and immediately after the birth of such child or children, his trustees should stand seised and possessed of all his said real estates, if not then previously sold, and also of his said personal estate and effects, and the securities upon which the same might be invested, and the future and accruing *rents*, dividends, interest and annual income thereof, after payment thereof of the aforesaid annuities, in trust for all and every the children and child of his said sister by the said W. J. Martin who should attain the age of 21 years, and their respective heirs, executors, &c., to be divided between them, if more than one, in equal proportions, and if his said sister should not have any children or child who, under the trusts aforesaid, should become entitled to his said real estates if unsold as aforesaid, and to his said personal estate and effects, and the securities upon which the same should be invested, then, in trust, after her decease and such failure of her issue as aforesaid, to divide, convey and assign all his said real and [582] personal estates, and the *rents*, dividends, interest and annual produce thereof, subject to the payment thereof of the aforesaid annuities, unto and between his said two friends, William John Blew and John Grant Lawford, their

heirs, executors, &c., in equal shares, as tenants in common : provided that, in case his said sister should have any child or children by her said husband born and alive, and all of them should afterwards die in her lifetime without having attained the age of 21 years, then and so often as the same might happen, the right of his sister to the income of his said real and personal estates should revive : provided that his trustee or trustees for the time being should have a discretionary power either to retain or at any time or times to sell his Canal shares when and as they and he might think it most desirable and advantageous for his personal estate. The testator then expressed himself as follows :—“ Provided also, and it is my further will and intention, and I hereby direct that, *with all convenient speed after my decease, as to my said advowson of the rectory of the parish and parish church of Everingham aforesaid, and the glebe lands, tithes, tenths, oblations, obventions, fruits, offerings, dues, duties, emoluments and advantages, and the houses, outhouses, &c., and appurtenances whatsoever to the said advowson belonging or in anywise appertaining, and also my said cottages situate at Chorley aforesaid, and also my said close of land situate at Kirkham aforesaid, and also all other my said real estates whatsoever and wheresoever given and devised to them by this my will, and also my said leasehold messuage and premises situate in the borough of Southwark, and that with all convenient speed after the death of the survivor of the aforesaid annuitants, as to my messuages in the town of Nottingham aforesaid, the trustee or trustees for the time being of this my will* [583] *shall sell and absolutely dispose of all and singular my said real estates at the times or periods last mentioned, freed and discharged from all liability in respect of the aforesaid annuities, or any of them, as the case may be, either together or in parcels, by public auction or private contract, with full power to buy in the same or any part thereof at any public auction, and also to rescind or vary the terms of any contract for sale, and afterwards to resell the same, and to convey and assure the same, when sold, unto the purchaser or purchasers thereof, or as he or they shall direct. And my will further is that my said trustees or trustee for the time being shall lay out and invest the clear amount of the monies which shall arise from such sale or sales as aforesaid, upon the same or the like stocks, funds or securities, and shall stand and be possessed of and interested in the last-mentioned monies, stocks, funds and securities, and the interest, dividends and annual income thereof, upon, for, under and subject to such and the same trusts, intents and purposes, powers and provisions, as hereinbefore directed, expressed and declared with regard to the residue of my said personal estate and effects, or such or so many of them as shall be then subsisting or capable of taking effect : provided always, and I hereby further will and declare that my said trustees and trustee for the time being shall and may, if they and he shall think proper, and at their or his discretion, during the minority of any child or children of my said sister, pay or apply the rents, dividends, interest and annual income of the presumptive share or shares of the same child or children, of and in my said real estates, if not then sold as hereinbefore directed, and if sold, then of the money arising therefrom, and also of and in my said personal estate and effects under the trusts aforesaid, for and towards the* [584] *maintenance, education and advancement of such child or children, and that all the surplus rents, dividends, interest and annual income which shall not be applied for that purpose shall be invested in the public funds, or Government or real securities, and allowed to accumulate, in the nature of compound interest, for the benefit of the child or children from whose share or shares the same shall be saved.”* The testator then gave certain specific and pecuniary legacies, and appointed William John Blew and John Grant Lawford executors of his will.

The testator died on the 21st of December 1841, leaving his sister, Charlotte Martin, his heir at law. She had three infant children by her husband, W. J. Martin, living at the testator's death.

In March 1842 the children filed a bill in this cause against their father and mother, Messrs. Blew and Lawford and the annuitants under the will, praying, amongst other things, that the trusts of the will might be performed under the direction of the Court, and that new trustees might be appointed in the place of Blew and Lawford, they having, as the bill alleged, refused to act. Shortly afterwards, and before any of the Defendants had put in their answers, the Plaintiffs presented a petition in the cause, stating that, although nearly three months had elapsed since the testator's

death, neither Blew nor Lawford had proved the will, nor intermeddled with the testator's estate; and that the Petitioners believed that they intended to renounce the probate and to disclaim the trusts of the will; that the testator, at his death, was both patron and incumbent of the Rectory of Everingham, and that the church had been vacant ever since his death, and no steps had been [585] taken for filing it; and the Petitioners were advised that it was doubtful whether the presentation to the rectory did not belong to Charlotte Martin as the testator's heir; and they submitted that they were entitled to the immediate interference of the Court for the preservation of the testator's property, and that all necessary directions ought to be given for the presentation of a fit person to the church, in order that, when it should be full, the advowson might be sold according to the directions of the will. The petition prayed that it might be declared to whom the presentation to the church, on the then existing vacancy, belonged; or that it might be referred to the Master to approve of some fit person to be appointed to the church, and also to appoint a receiver of the testator's real and personal estates.

Mr. Bethell and Mr. Ellison, for the Petitioners, said that their clients were beneficially interested in the advowson of the rectory, and that the right of presentation followed the right to the advowson; and, consequently, the Petitioners were entitled to present on the existing vacancy: that the heir at law could not be entitled to present; for the testator's intention was that the advowson should be sold to the best advantage; and the heir might select a very young life, and thereby greatly prejudice the sale: that, if the trustees were the parties to present, the Court would control them in the exercise of their power, and would take care that they exercised it in a manner most beneficial to the Petitioners. *Sherrard v. Lord Harborough* (Amb. 165), *Hawkins v. Chappel* (1 Atk. 621), *Holt v. The Bishop of Winton* (2 Salk. 260), *Hill v. The Bishop of London* (1 Atk. 618).

[586] THE VICE-CHANCELLOR. In *Hawkins v. Chappel* the whole beneficial interest was devised; the gift was not contingent. In the present case the disposition of the beneficial interest is executory.

Mr. G. Richards and Mr. Hardy, for the trustees. The testator was, as he mentions in his will, the incumbent of the rectory; and he must have known that the living would become vacant at his death, and that the advowson could not be sold until the vacancy was filled up. So that the right of presenting to the living on his death is necessarily an incident to the sale; and, as such, it belongs to the trustees by whom the advowson is to be sold. Besides, the interests of the children are contingent; and, if none of them attain 21, the trustees will take beneficially under the will. Again, the testator, in the provision which he makes for the children of his sister, uses the words *rents, interest and dividends*; but none of those terms are applicable to the next presentation to a living, for it produces no income whatever.

The heir cannot be entitled to present; for, if she were allowed to do so, she might deteriorate the value of the advowson by presenting a clerk who, only shortly before, had taken holy orders. (*Seymour v. Bennet*, 2 Atk. 482.)

Mr. Goulburn, for Mr. and Mrs. Martin, the latter of whom was the testator's heir.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I do not want to hear the counsel for the heir at law. This seems to me to be a very simple question.

[587] The trusts of the will are in the nature of executory devises; because the objects of those trusts are such of the children of the testator's sister who should attain 21: and, in case the sister should have no child who should attain that age, then the trustees themselves are the objects of the trust. Consequently, as the sister had children at the death of the testator, those children are executory devisees of the trust. Then there is a direction that the trustees should sell the advowson: but they have not sold it; and, by the death of the testator, the church has become vacant. Then there is a direction that, during the minorities of the children, the trustees should apply the rents, dividends, interest and annual income of their presumptive shares for their maintenance, education and advancement: and, after that, there is a direction that all the surplus rents, dividends, interest and annual income which should not be so applied should be invested in the funds and accumulated.

Now, though the law does hold a presentation to a living to be a beneficial interest, yet it cannot be the means of producing an income either for the mainten-

ance of children or for the purpose of forming an accumulating fund. Therefore I think that no beneficial interest in the presentation now in question is given to the children ; but it is like any other thing which becomes separated from the rest of the devise ; that is, it has descended to the heir at law.

Declare that the testator's heir at law is entitled to present to the living on the existing vacancy.

[588] DAVENPORT v. COLTMAN. May 4, 6, 7, 1842.

[S. C. 11 L. J. Ch. 262 ; 6 Jur. 381 ; and at law, 9 Mee. & W. 481 ;
11 L. J. Ex. 114.]

Will. Construction. Intestacy. Implication. Case sent to Law. Conversion.

Testator being seised in fee of a house in the town of C., and of estates in the counties of H. and L., gave pecuniary legacies to his two sons (one of whom was his heir), and also to his two daughters, M. and C. He then gave to his wife, for her life, the possession of his house, together with the use of his plate, furniture, &c., and the interest of his stock in the funds, during her life, "save and except the clauses in favour of my daughters, as already mentioned ; at her decease it is my will and pleasure that M. and C. shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others." Held, that M. and C. took an estate in fee in remainder expectant on the death of the testator's widow, in the house in C., and an estate in fee, commencing on the widow's decease, in the estates in H. and L. ; and that the widow did not take a life interest by implication in those estates, but that the heir took them by descent during her life.

Testator, amongst other bequests, gave a freehold house, his furniture and certain other chattels, to his wife for life, and willed that, at her death, his two daughters should divide equally, as *residuary legatees, whatever he might die possessed of, except what was already mentioned in favour of others.* The question was what was the effect of the words in *italics*, with regard to certain real estates of the testator, which were not particularly mentioned in his will. Held, that the Court ought not, in order to determine that question, to inquire into the value and other circumstances of the real estates, nor ought those circumstances to be stated in a case made for the opinion of a Court of law upon the question.

Testator devised his real estates to trustees, in trust to sell, and to pay the proceeds to the person or persons who, at the decease of S. M. and M. W., was or were their heirs or co-heirs at law respectively, in equal moieties. One of the trustees was the testator's heir ; and he and his co-trustees sold part of the estates shortly after the testator's death. The heir then died ; and, after his death, it appeared that the persons who were the heirs of S. M. and M. W. at their respective deaths had died in the testator's lifetime ; and, consequently, the trusts declared in their favour failed. Held, that the testator's real estates were not absolutely converted by his will into personalty, but only for the purpose expressed therein, and, that purpose having failed, that they descended to his heir. Held, also, that the proceeds of that part of the estate which had been sold by the testator's heir and his co-trustees was sold under an erroneous impression that one or more of the intended *cestui que trusts* might be in existence, and, consequently, that those proceeds also must be considered as part of the real estates of the heir.

In pursuance of the decree made at the hearing of this cause, in February 1841, the following case was stated for the opinion of the Judges of the Exchequer.

George Coltman was, at the time of making his will hereinafter mentioned, and thenceforth continued until and at the time of his death, seised in fee-simple of the house in Stanley Place, Chester, in his will mentioned, and also of a certain tenement in the county of Lincoln, and a certain other tenement in the county of Hertford. The said George Coltman being so seised as aforesaid, and being also possessed of

certain sums of money in the £3 per cent. and £4 per cent. Bank annuities, and of an interest in the leasehold houses at Liverpool in the will mentioned, and of the other personal estate therein also mentioned, duly made his last will and testament, bearing date the 26th of March 1828, which was duly executed and attested as by law was then required for the devise of real estates, and which was in the words and figures following, that is to say :—

“The will of George Coltman, doctor of physic, now resident in Chester, made on the 26th day of March, in [589] the year 1828 of the Christian Era. I revoke all former wills. To my son, Thomas Coltman, I bequeath my gold watch, chain and seals, my carriages, harness and horses, and cows, market cart and harness for the same, also whatever is considered as belonging to me at my new residence in Hagnaby Priory. To my daughter, Mary Newbold, I bequeath the sum of £250 per annum ; and, in case of her death and without issue, the same sum to her husband, for his natural life, and afterwards to be equally divided between my son, George Coltman, and daughter, Charlotte Coltman. To my daughter, Charlotte Coltman, I bequeath the sum of £250 per annum ; and in case she should continue unmarried or die without issue, the same shall be taken possession of by her brother, George Coltman. To my son, George Coltman, I bequeath the sum of £3000, which he is not to receive till after the death of his mother, and likewise, at her decease, all the plate which I may die possessed of, but at my decease he is to have, immediately, the whole of my library at his own disposal. That my wife, Mary Coltman, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of the plate, china, linen and household furniture, and all the joint property in houses in Liverpool, and likewise of interest of money, as often as due, arising from the three and four per cents., and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters, as already mentioned. *At her decease it is my will and pleasure that Mary Newbold and Charlotte Coltman shall divide equally between them, as residuary legatees, whatever I may die possessed of, except what is already mentioned in favour of others.* I give and bequeath the small sum of £50 to my much-[590]-esteemed friend, John Eden, Esq., attorney-at-law, of Liverpool. To Betty Moffitt I give and bequeath the sum of £18 per annum for her natural life. This is done as a small token of friendship for her long and important services in my family. That the intention of this my will may be carried into execution, I appoint my wife my executrix, John Eden, Esq., and my son, Thomas Coltman, executors. As for the houses in Liverpool, they may dispose of any one or the whole of them, whenever the same may be thought advisable for the benefit of the parties concerned ; but the house in Chester must not be sold as long as my wife lives.”

The said testator, George Coltman, died on the 3d day of August 1828, without having in any manner revoked or altered his said will, leaving his wife, the said Mary Coltman, and also the four children named in his said will, that is to say, Thomas Coltman, who was his eldest son and heir at law, George Coltman, Mary Newbold (since deceased), and Charlotte Coltman, who has since become the wife of John Davenport the younger, his only next of kin, him surviving.

The questions for the opinion of the Court are :—

First, what estate, if any, did the said Mary Coltman, the wife of the said testator, George Coltman, take in the said tenements in the counties of Lincoln and Hertford under the will of the said testator ;

Secondly, what estate, if any, did the said Mary Newbold and Charlotte Davenport, the daughters of the said testator, or either and which of them, take in the said tenements in the counties of Lincoln and Hertford under the said will ; and

[591] Thirdly, what estate, if any, did the said Mary Newbold and Charlotte Davenport, or either and which of them, take in the said house or tenement in Stanley Place, Chester, under the same will ?

The case was argued in Michaelmas term 1841, and on the 31st of January 1842 the Barons of the Exchequer certified,

First, that Mary Coltman, the wife of the testator, took no estate in the tenements in the counties of Lincoln and Herts.

Secondly, that Mary Newbold and Charlotte Davenport took an estate, as tenants.

in common in fee-simple, in the tenements in Lincolnshire and Herts, under the said will, commencing at the death of the said testator's widow.(1)

Thirdly, that the said Mary Newbold and Charlotte Davenport took an estate as tenants in common in fee-simple in the Stanley Place house in remainder expectant on the life-estate of the widow. (See 9 Mees. & Wels. 481.)

[592] The cause now came on to be heard on the equity reserved.

Mr. Bethell and Mr. Willcock, for the Plaintiff, the testator's daughter, Charlotte Davenport, supported the certificate. They cited *Huxtep v. Brooman* (1 Bro. C. C. 437); *Hopewell v. Ackland* (1 Salk. 239); *Pitman v. Stevens* (15 East, 505); *Hyley v. Hyley* (3 Mod. 228); *Tanner v. Morse* (Ca. temp. Talb. 284); *Monk v. Mawdsley* (ante, vol. i. 286); *Murry v. Wyse* (2 Vern. 564); *Doe v. Tofield* (11 East, 246); *Wilce v. Wilce* (7 Bing. 664); *Noel v. Hoy* (5 Madd. 38); *Barnes v. Patch* (8 Ves. 604); *Thomas v. Phelps* (4 Russ. 348).

Mr. Koe, for Francis George Newbold, the heir at law of testator's daughter, Mary Newbold, also supported the certificate; he cited *Doe v. Lainchbury* (11 East, 290), and *Doe v. Langlands* (14 East, 370).

Mr. G. Richards and Mr. Lee, for Thomas Coltman, the testator's heir at law. The testator's Hertfordshire and Lincolnshire estates were of very considerable value; and it is but reasonable to suppose that the testator, if he had intended to dispose of them, would have mentioned them specifically. He has left nothing to his heir at law except articles of trifling value; and the fair presumption is that he did not leave him anything more, because he knew that the law would provide for him. The words, "whatever I may die possessed of," are not only general and inappropriate to real estate, but shew [593] that the testator was looking at what he might be possessed of at his death: and, however liberally those words may be construed, they could not, as the law stood when this will took effect, have been held to include real estate which the testator acquired after the date of his will. The case principally relied on by the Barons of the Exchequer was *Huxtep v. Brooman*. There the words as to the effect of which the Court had to decide were "all I am worth." Those words shewed that the testator intended to dispose of property which he had at the time when he made his will, and, accordingly, they were held to include real estate: but it by no means follows that the Court would have come to the same conclusion if the words had been "all I may be worth at my death," that is, if they had been applicable, as they are in this case, to property subsequently acquired. In *Barnes v. Patch* the words were totally dissimilar to those in the present case; they were "the whole residue of my estate:" and it clearly appears from the judgment that the Master of the Rolls came to the conclusion which he did in that case, because the word "estate" was used. In *Pitman v. Stevens* the testator commenced his will by expressing an intention to dispose of all that he should die possessed of, real and personal: and, in the very next sentence, he appointed Captain Preston his residuary legatee and executor; and, after giving certain legacies, he recommended Captain Preston to be kind to his brother-in-law: so that it was evident that he contemplated, as Lord Ellenborough says in his judgment, that Captain Preston would have all his funds, real and personal, that he should die possessed of and should not have otherwise bequeathed. In *Hyley v. Hyley* the question was what effect ought to be given to the word "estate." But we are now contending, not that real estate will not [594] pass by the word "estate," but that it will not pass by the words "whatever I may die possessed of." In *Murry v. Wyse* the question was not whether real estate would

(1) The opinion of the Barons of the Exchequer seems to have been founded upon the comprehensive effect of the expression "whatever I may die possessed of." But was not the effect of that expression limited by the preceding words, "at her decease?" Did not those words shew that the testator meant that his daughters should divide between them what he had given to his wife for life, and nothing more? If not, why did he postpone the division until the death of his wife? It will appear, from the second part of this report, commencing at page 610, that (whatever might be the legal effect of the expression above referred to) the testator could not *intend* it to have the effect attributed to it; inasmuch as he did not know, when he made his will, that the Lincolnshire and Herts estates were his property.

pass by the words used (for, as to that, there could be no doubt); but what quantity of interest passed: and all that that case decides is that, by the words, "all the rest and residue of my real estate," a fee-simple will pass. The case of *Doe v. Tofield* shews, merely, that words applicable to personal estate will pass real estate, where it clearly appears from words which the testator subsequently uses that he is, in fact, disposing of real estate. That case shews nothing more than this: that if a testator were to give all his personal estate called Blackacre, situate in a certain parish, Blackacre would pass. In *Wilce v. Wilce* the decision was founded on the introductory words in the will: "As touching such worldly property wherewith it hath pleased God to bless me in this world, I give, devise and dispose of the same in the following manner." That case, indeed, is in our favour; for it appears from the judgment of Tindal, C.J., that, unless the testator had by the preamble to his will disclosed his intention to dispose of the whole of his property of every kind, that learned Judge would not have held that real estate passed by the words, "everything else I may die possessed of." In *Doc v. Lainchbury* a testator devised all the residue of his money, stock, property and effects of what nature or kind soever: and it was held that the words "property and effects" passed real as well as personal estate; because it appeared from other parts of his will that the testator had applied those words to real estate. Indeed, he began his will by stating: "As to my money and effects, I dispose thereof as follows:" and then proceeded to dispose of parts of his real estates. That case, therefore, resembles *Doe v. Tofield*, and is totally [595] unlike the one which we are now discussing. In *Doe v. Langlands* the word "property" was used, and Lord Ellenborough, C.J., held that, taking the whole of the will together, that word would pass real estate. The same observation applies to *Thomas v. Phelps* as to *Wilce v. Wilce*, namely, that the preamble to the will shewed an intention, on the part of the testator, to dispose of the whole of his property. Moreover, the testator disposed merely of what he then was possessed of. In *Noel v. Hoy* the word on which the question arose was "property." That word is as applicable to real as it is to personal property; and it has been always held so to be, unless there was something in the prior part of the will to confine it to personal estate.

In the present case there is no introductory clause, as there was in some of the cases which have been cited in support of the certificate, nor is there any expression in any part of the will which shews that the daughters were intended to take real estate. The words "shall divide equally between them" are not applicable, in common parlance at least, to real property, nor are the words "residuary legatees." There is nothing to shew that the testator intended his daughters to take anything but personal estate under the residuary bequest. The clause "except what is already mentioned in favour of others" cannot apply to the Stanley Place house, for, in the first place, it had been already mentioned, and, in the next place, it would have been useless to accept it; for the time when the division was to take place was the decease of the testator's wife, and then the wife's prior interest in the house would have expired. All that the testator meant to include in the exception was what he had before bequeathed to his sons. If then, as we submit, the Stanley Place [596] house was not included in the exception, the ground on which the Barons of the Exchequer arrived at the conclusion that the testator intended his other real estates to pass by his will wholly fails. Supposing, however, that the Stanley Place house is included in the exception, it by no means follows that the Hertfordshire and Lincolnshire estates are also included in it. Is it a matter of no importance that the testator has mentioned one estate, but has taken no notice of the rest? Besides, it must be borne in mind that the party for whom we appear is the heir at law of the testator: and there is no rule of law which, hitherto at least, has been more strictly adhered to than that which prescribes that an heir shall not be disinherited, except either by express words or necessary implication. Where property is claimed by a devisee on the one hand, and by the heir on the other, and the right of the devisee is at all doubtful, the heir must have the benefit of that doubt. The Barons of the Exchequer, however, seem to have considered that the heir's legal right was not at all to be regarded, and that he might be disinherited by a constructive devise.

The following cases were cited by Mr. Richards and Mr. Lee in support of their argument. *Doe v. Yeud* (2 New Rep. 214); *Wilkinson v. Merryland* (Cro. Car. 447);

Shaw v. Bull (12 Mod. 592); *Timewell v. Perkins* (2 Atk. 102); *Bebb v. Penoyre* (11 East, 160); *Henderson v. Farbridge* (1 Russ. 479); *Doe v. Rout* (7 Taunt. 79); *Doe v. Dring* (2 Mau. & Selw. 448); *Hogan v. Jackson* (Cowp. 299); *Upton v. Lord Ferrers* (5 Ves. 801).

[597] Mr. Parker and Mr. Mylne, for Mary Coltman, the testator's widow, contended that that lady took an estate for life, by implication, in the Hertfordshire and Lincolnshire estates. They cited *Blackwell v. Bull* (1 Keen, 176).

Mr. K. Parker and Mr. Lonsdale, for the Defendant William Walker.

Mr. Briggs, for another Defendant.

May 7. THE VICE-CHANCELLOR [Sir L. Shadwell]. I am clearly of opinion that the judgment of the Court of Exchequer is perfectly right.

I am glad that this case has been so fully discussed, as I believe that most of the principles of law, and most of the cases that could be cited on the subject, have been quoted. But the great use of quoting cases when the question is what is the meaning of a particular will is that you may, by the cases, establish some rule of law which may have been doubtful, or shew that certain words have received a given meaning. Beyond that, it does not appear to me that, generally speaking, the citing of a number of cases of construction upon a vast variety of wills made by different persons tends to illustrate the particular question which is before the Court, namely, what was the meaning of the testator whose will is under consideration?

I am quite willing to admit that the rule of law is that the heir takes whatever is not given away. About that there is no doubt. And I am quite willing also to admit [598] that such a word as the word "effects," standing by itself, would be, *primâ facie*, taken to be applicable to personal property only. I will, however, put this case with respect to the word "effects." Suppose a man was seised in fee of divers tenements A., B. and C., and he made his will, and said, "I give all my effects to my wife, except my tenement A." There is no doubt, I should conceive, that though in general the word "effects" would pass only that which was of a personal nature, yet the exception would shew what it was that the testator intended by the use of that word.

It appears, upon the face of the will now before me, that it was made by a medical gentleman, and a total absence of all knowledge of law appears in it from the beginning to the end. But it is not to be held that, merely because a man does not use legal phrases, therefore he is to be taken, at all events, to die intestate.

We will now examine what the testator has himself said. First of all, he states himself to be a doctor of physic; and then he says: "I revoke all my former wills. To my son, Thomas Coltman, I bequeath my gold watch, chain and seals, my carriages, harness, and horses and cows, market cart and harness for the same, also whatever is considered as belonging to me at my new residence in Hagnaby Priory." Now, that expression struck me as the expression of a man who, by the very use of it, shews that he was not likely to understand legal phrases, or very conversant with the precision of language: because it is observable that he does not give what belongs to him, but whatever is considered as belonging to him; although it is uncertain who are the persons whose consideration he alludes to. Then he goes on to say: "To my daughter, Mary Newbold, [599] I bequeath the sum of £250 per annum; and in case of her death and without issue, the same sum to her husband for his natural life, and, afterwards, to be equally divided between my son, George Coltman, and daughter, Charlotte Coltman." An observation arises there upon the use of the words "and without issue." I am not, however, called upon at present to decide what they mean. But it is quite plain that a question will arise upon those words. Then the testator says: "To my daughter, Charlotte Coltman, I bequeath the sum of £250 per annum; and, in case she should continue unmarried or die without issue" (there he has varied the phrase) "the same shall be taken possession of by her brother, George Coltman. To my son, George Coltman, I bequeath the sum of £3000, which he is not to receive till after the death of his mother; and likewise, at her decease, all the plate which I may be possessed of: but, at my decease, he is to have, immediately, the whole of my library at his own disposal. That my wife, Mary Coltman, may be left in as comfortable a situation as possible, I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of the plate, china" &c.

I lay no stress upon the words "that my wife, Mary Coltman, may be left in as comfortable a situation as possible," because the testator does not, by his will, profess to give her everything; and therefore it is merely an expression, generally, of an intention to make his wife comfortable; but, of course, taking care to limit the degree of comfort that shall arise in the enjoyment of his property. He says, "I bequeath to her, for her natural life, the possession of my house in Stanley Place, Chester, together with the use of the plate, china, linen and household furniture, and all the joint property in houses in Liverpool, and likewise of interest of money, as often as due, arising [600] from the three and four per cents.; and to have and to hold the same during her natural life, save and except the clauses in favour of my daughters, as already mentioned;" which appears to me to shew that the testator thought that, if he had not made this exception, he should have given to his wife, for her life, all the interest arising from the three and four per cents., and thereby, during her life, have prevented the daughters from having the two annuities of £250 which, in a preceding part of his will, he had given to them.

It is observable that, in that part of his will which I have already read, he has given, not merely interests in chattels, but a freehold interest in a freehold of inheritance. Then he proceeds: "At her decease, it is my will and pleasure that Mary Newbold and Charlotte Coltman shall divide, equally between themselves as residuary legatees, whatever I may die possessed of, save and except what is already mentioned in favour of others;" and upon that the substantial question on this part of the case arises.

First of all, it was said that the words "possessed of" do not imply and cannot be said to comprehend real property: I think Mr. Lee's expression was "of their own force, the words would not apply to real property." But is that so? In the first place, there are two sorts of language in the law; there is the language of pleading and there is the language of conversation or of writing on the subject of law; which are materially different from each other. But I do apprehend that the expression, "possessed of a fee-simple," is a perfectly correct expression, used by the highest authority. Because if you will look into the 8th section of Littleton you will find that that learned author thus expresses [601] himself in commenting on the position of law: "*possessio fratris de feodo simplici facit sororem esse hæredem.*" He says: "Where a man is seised of lands in fee-simple, and hath issue a son and daughter by one venter, and a son by another venter, and die and the eldest son enter and die, without issue, the daughter shall have the land, and not the younger son; yet the younger son is heir to the father but not to his brother. But, if the elder son doth not enter into the land after the death of his father, but die before any entry made by him, then the younger brother may enter, and shall have the land as heir to his father. But where the elder son, in the case aforesaid, enters after the death of his father and hath possession, there the sister shall have the land; because '*possessio fratris de feodo simplici facit sororem esse hæredem.*'" It is quite plain, therefore, that, not using the language of pleading, but using the language of the most correct of writers, "possession" is the proper word to describe the seisin of the fee-simple. It is remarkable that Lord Coke, in his commentary upon the proposition, "*possessio fratris de feodo simplici facit sororem esse hæredem,*" says: "Hereupon four things are to be observed, every word almost being operative and material: first, that the brother must be in actual possession;" so that he speaks of the actual possession, and the actual possession of the fee-simple; and, in a passage a little before that which I have just now mentioned, he puts the case in which he makes the possession of the lessee for years the possession of the tenant in fee-simple; which shews it is the same possession of the thing of which he speaks. He says: "If the father maketh a lease for years, and the lessee entereth and dieth, and the eldest son dieth during the term before entry or receipt of rent, the younger son of the half-blood shall not inherit, but the sister; because the [602] possession of the lessee for years is the possession of the eldest son." Therefore it is perfectly plain that, whether it were a possession by himself simply, or by the lessee for years under the lease of the father, there is actually that possession of the fee-simple which shall make the sister the heir. I refer to these passages for the sake only of shewing that, in one of the earliest books, we have the term "possession" used to designate the seisin of a fee-simple.

In the case of *Thomas v. Phelps* the testator, alluding to his son, says, "him and my daughter Elizabeth Phelps I do make, constitute and appoint my joint executor and executrix of this my last will and testament of all that I possess in any way belonging to me, by them freely to be enjoyed or possessed, of whatsoever nature or manner it may be." Sir John Leach says: "The subject of his gift is all that he possessed, in any way belonging to him, by them freely to be enjoyed or possessed, of whatsoever nature or manner it might be. These words are equivalent to a gift of all his property: and a gift of all property will not only pass real estate, but will pass all the interest of the testator in that estate;" and then he makes an observation which I will call to your attention presently. With respect to the mere words, "whatever I may die possessed of," I should say that they would comprehend not merely personal interests, but also estates in fee-simple. But it is still more plain in this particular case, because the very exception that the testator has made marks the thing which was passing in his mind, and of which he was speaking when he used the phrase, "whatever I may die possessed of;" for he says, "whatever I may die possessed of except what is already mentioned in favour of others." Now, what had been already men-[603]-tioned in favour of others? There had been mentioned in favour of others not merely chattels personal and interests of a personal nature, but there had been mentioned the possession of the freehold house during the life of the wife. Then I say the exception, being of a general nature and applying to everything which had been already mentioned in favour of others, has this effect, that by the words "whatever I may die possessed of," he considered he should have passed everything that had been given to others, unless he had made the exception: that is to say, in other words, that, by making the exception, he has marked the extent and operation which, in his own mind, he thought his own phrases would have had on his own property. Therefore, you have not only the general plain meaning of the words, unincumbered by any legal form, "whatever I may die possessed of," but you have the matter reduced to a certainty, by the very nature of the exception which the testator has made. And it was with reference to that, when I looked at the case of *Thomas v. Phelps*, that I was struck with the observation of Sir John Leach. His Honor says: "The exception of the household furniture is of little weight here." It might be of very little weight in the case of *Thomas v. Phelps*; but it is of very great weight in this case; because it appears to me to put it beyond doubt that the testator was speaking with respect to estates of inheritance, as well as with respect to mere interests of a personal nature.

Then the testator says: "I give and bequeath the small sum of £50 to my much-esteemed friend, John Eden, Esq., attorney-at-law in Liverpool. To Betty Moffit I give and bequeath the sum of £18 per annum for her natural life. This is done as a small token of [604] friendship for her long and important services in my family. That the intention of this my will may be carried into execution, I appoint my wife my executrix, and John Eden, Esq., and my son, Thomas Coltman, executors. As for the houses in Liverpool, they may dispose of any one or other of them, whenever the same may be thought advisable for the benefit of the parties concerned; but the house in Chester must not be sold so long as my wife lives." Now I do not enter into the question whether the testator has given a power of sale or not; but it is pretty plain to me that he had something floating in his mind as to a power to be executed by the executors, as I should presume, for the purpose of division. But my observation upon it is that, if he has, in a preceding part of his will, clearly given to the children, at the decease of his wife, all that was not before given to others, the circumstances that there may be a doubt as to what he meant the executors should do, or as to what he supposed the executors had by way of power, cannot have the effect of cutting down what is perfectly plain. If there is a clear devise, that clear devise must operate, unless there be some specific devise equally clear to cut it down. And it is impossible to say, by any construction of these loose words at the end, that they have the effect of destroying that which, according to my apprehension, was given in clear terms to the wife.

I do not think that any difficulty arises from the circumstance that, on the face of the will, there is an intestacy in part. It is only the house in Stanley Place which is given to the wife for life; but, when he has given everything to his daughters at the

decease of his wife, he has left, as a matter of course, to descend to his heir until the death of his wife all those tenements [605] the reversion of which, after the death of his wife, is given to the daughters.

I must say that, from the time when I first read this will to the present moment, I have never had the least doubt upon the construction of it; and therefore I cannot think it right to send the case to another Court of law.

Although the foregoing part of this report relates to the will of George Coltman, the suit was not instituted upon his will, but upon the will of his brother Thomas; and the case was submitted to the Barons of the Exchequer, in order to enable the Court of Chancery to determine as to the rights of the parties to the property of Thomas, which George became entitled to on his death.

Thomas Coltman, by his will, dated the 10th of October 1821, gave all his messuages, lands, &c., situate in Little Hale, in the county of Lincoln, to his brother, George Coltman, and his (George's) sons, Thomas and George, and their heirs, to the use of the person or persons who, at the death of Elizabeth Walker, late of , was the heir or co-heirs of the said Elizabeth Walker, and the heirs and assigns of the same person or persons respectively; and he directed the trustees to publish advertisements, in certain newspapers, for discovering the heir or co-heirs of Elizabeth Walker; and, in the event of no such heir or co-heirs [606] being clearly and satisfactorily discovered before the end of twelve calendar months next after his death, then he directed that the trustees should, at such times and in such manner as to them should seem meet, and without any concurrence or assent of his heir or heirs at law, sell and dispose of the last-mentioned hereditaments and premises, and stand possessed of the monies to arise from the sale thereof, and from the rents and profits thereof in the meantime, upon the trusts thereafter declared concerning the same. The testator then gave certain annuities and charged them on his messuages, lands, &c., situate in Great Hale, in the county of Lincoln; and he devised those messuages, lands, &c., and also his lands, tenements and hereditaments situate in Puttenham, in the county of Hertford, to the trustees, in trust to sell the same at such times and in such manner as to them should seem meet, and to stand possessed of the monies to arise from the several sales thereby authorized and directed to be made, or such of the same sales as should take effect, and also from the rents and profits of the premises in the meantime, upon trust, after retaining the expenses incident to the sale or sales, to pay the surplus of the trust monies to the person or persons who, at the decease of Sarah Marriott and Mary Walker, the nieces of the said Elizabeth Walker, was or were their heirs or co-heirs at law respectively, in equal moieties; and, if there should be co-heirs of each of them, the said Sarah Marriott and Mary Walker, then upon trust to divide the same moieties of the said residuary trust monies between them respectively as tenants in common, and in the same shares, equally or unequally, as they would be entitled to a real estate descending from the said Sarah Marriott and Mary Walker respectively, and vesting in them at their respective deaths by descent as their co-heirs respectively.

[607] The testator died, without issue, on the 11th of October 1826, leaving his brother George his heir at law.

On the 22d of November 1827 George Coltman and his sons, Thomas and George, sold the lands in Great Hale, subject to the existing annuities, for £5690, and received a deposit of £569.

George Coltman made his will, dated the 26th of March 1828, and died on the 3d of August following, as before mentioned. In January 1829 his two sons filed a bill against William Barber and Mary Lawrence, the two surviving annuitants under their uncle's will, stating that they were unable to ascertain who were the heirs of Elizabeth Walker and her two nieces at their respective deaths, and praying that the trusts of Thomas Coltman's will might be performed under the direction of the Court.

In pursuance of the decree in that suit, inquiries were made by the Master for the purpose of ascertaining who were the heirs or co-heirs of Elizabeth Walker and her two nieces at their respective deaths; the result of which was that no heir of Elizabeth Walker could be found, and that the persons who were the heirs of her two nieces at their deaths were ascertained to have died before the testator, Thomas Coltman; and ultimately the trusts of Thomas Coltman's will were declared to have failed.

Under these circumstances two questions arose in *Davenport v. Coltman* (which was in the nature of a supplemental suit to *Coltman v. Barber*).

First, whether Thomas Coltman's estates at Great Hale, Little Hale and Puttenham were converted by [608] his will into personalty out and out, or only for the purpose of executing the trusts of his will; or, in other words, whether George Coltman, who, as heir to his brother, had become entitled to those estates in consequence of the trusts declared of their produce having failed, took them as real or as personal estate.

Second, if those estates were not converted out and out by Thomas Coltman's will, whether the proceeds of such parts of them as were sold in the lifetime of George Coltman were to be considered as part of his real or of his personal estate.

But before those questions were discussed,

Mr. G. Richards and Mr. Lee contended that a new case, containing all the facts and circumstances above detailed, relating to the Lincolnshire and Hertfordshire estates, ought to be made for the opinion of the Judges of the Exchequer, or of some other Court of law. They referred to what Mr. Justice Chambre is reported to have said in *Doe v. Yeud* (2 New Rep. 221), namely, that where the question is whether certain property does or does not pass by a will, the value and other matters relating to it ought to be stated in the case, in order that the Court may judge whether it was likely that the testator had overlooked it or not.

THE VICE-CHANCELLOR [Sir L. Shadwell]. I am of opinion that the matter ought not to be sent back with an altered case: I am not now alluding to my own opinion upon the certificate; but what I mean is, that I do not think that it would be right to send a case, altered in the way proposed, for the purpose of again taking the opinion either of the Court of Ex-[609]-chequer or any other Court of law, upon the effect of the will of George Coltman.

I can easily understand that there are cases in which there is a kind of ambiguity; and then you must, for the purpose of solving what is ambiguous, know all the circumstances of the case; that is, the Court must put itself in the possession of all the knowledge which the testator had. But it is quite new to me to hear that, for the purpose of determining the meaning of unambiguous phrases, or for the purpose of determining whether certain words pass a fee-simple or give a limited interest, it is necessary to know the amount of the property. When Mr. Lee mentioned the case yesterday, I was very much struck with his stating the language which was put into the mouth of, and probably fell from Mr. Justice Chambre; that is to say, so far as it is stated as a general proposition.

I can easily understand, when a question is made about what is the meaning of a set of words which, together, form a residuary bequest, that there may be circumstances appearing on the face of the will which may make it necessary to know something more about the matter than appears on the face of the will. But, if a Court of law or a Court of Equity were to require to be minutely informed of the amount and value and situation and position of every item which composed a testator's property, in order to indulge itself in the not very narrow field of conjecture what it was likely that the testator would have done in respect of all and every his legatees, if at the time he made his will he had had a full and clear comprehension of the nature, value, extent and circumstances of the different items of his property, my opinion is that the consequence [610] would be that the settled rules of construction would be departed from.

In my opinion, the will itself presents no ambiguity. The only question is, has it passed such real estate as the testator, George Coltman, happened to have? That is the point; and though it may be perfectly true that, with respect to something which was apparently real estate, a question may be raised whether it ought to be considered as real estate or not, *that* is a question which arises after the determination of the question whether the real estate would have passed by the will *simpliciter*. If a question is raised whether a certain portion of property be real estate or not, that question must be determined. But no such question arises under George Coltman's will; and my opinion is that I should be making a very bad precedent if I were to direct that the case should be remodelled, in order that those circumstances to which Mr. Richards and Mr. Lee have referred might be added to it.

Mr. Bethell and Mr. Willcock, for the Plaintiff, Mrs. Davenport, said that, by

Thomas Coltman's will, the [611] estates at Great Hale and Puttenham, and the estates at Little Hale in the event of no heir of Elizabeth Walker being discovered within twelve calendar months after the testator's death, were directed to be sold out and out; and that the sale was not to be deferred until after the heirs of Sarah Marriott and Mary Walker had been discovered, but was to take place in all events; and, if they were discovered, the proceeds were to be divided amongst them; and, consequently, those estates were indelibly stamped with the character of personalty, and devolved as such to George Coltman, the father.

Mr. G. Richards and Mr. Lee, for Thomas Coltman the son and heir of George Coltman, said that Thomas Coltman, the testator, had directed his estates to be sold, not absolutely and in all events, but only for the purpose of the proceeds being divided amongst the heirs of Sarah Marriott and Mary Walker living at their deaths; and, as those heirs had died in the lifetime of Thomas Coltman, the testator, the purpose for which the estates were directed to be sold had failed, and, therefore, the estates retained their original quality; and that quality was not altered by the contract which George Coltman, the father, had entered into for the sale of part of the estates; inasmuch as he had entered into that contract under the impression which afterwards proved to be erroneous, that the objects of the trusts declared by his brother's will were in existence, and with a view solely to the performance of those trusts; and consequently that the proceeds of that part of the estates which had been sold, as well as the parts remaining unsold, were to be considered as part of the real estate of George Coltman, the father; and Thomas Coltman, his son and heir, was entitled to the income of them during the life of Mary Coltman, the widow of George Coltman, [612] the father: that the law applicable to the present case was correctly laid down, by Sir John Leach, V.-C., in *Smith v. Claxton* (4 Madd. 484; see 492): "Where a deviser directs his land to be sold and the produce divided between A. and B., the obvious purpose of the testator is that there shall be a sale for the convenience of division; and A. and B. take their several interests as money and not land. But in the case put, let it be supposed that A. and B. both die in the lifetime of the deviser, and the whole interest in the land descends to the heir, the question would then be whether the deviser can be considered as having expressed any purpose of sale applicable to that event, so as to give the interest of the heir the quality of money. The obvious purpose of the deviser being that there should be a sale for the convenience of division between the devisees, that purpose could have no application to a case in which the devisees wholly failed, and the heir would, therefore, take the whole interest as land."

Mr. Koe, for Francis George Newbold, the son and heir of Mary Newbold, also contended that the estates in question descended to George Coltman, the father, as real estate, and passed as such by his will to his two daughters, subject to the right of Thomas Coltman, his son and heir, to receive the rents during the life of Mary Coltman, the widow.

Mr. Parker and Mr. Mylne, for Mary Coltman, the widow, insisted that the whole of the estates was converted out and out into personalty, by the will of Thomas Coltman, or, at all events, that such parts of them as had been sold by George Coltman the father, were thereby so converted, and formed part of his personal [613] estate to which Mary Coltman was entitled for her life.

Mr. K. Parker, Mr. Lonsdale and Mr. Briggs appeared for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. The principal question is whether, in the events that happened, the estates in Little Hale, Great Hale and Puttenham were, upon the death of Thomas Coltman, to be taken as the real estate of George or not.

I am not aware that Sir John Leach's decision in *Smith v. Claxton* has ever been reversed; and, in my opinion, there is the strongest ground for upholding it.

If the estates in question ceased to bear the character of real estates, it can only be because there was a subsisting (that is to say) an enforceable trust for sale. Suppose that, upon the death of Thomas Coltman, this state of things had happened, namely, that the two co-trustees had filed their bill against George, and had said, "Here is a trust for sale, and the estate shall be sold to answer the purposes of the will," would not the Court, first of all, have said, "Let us see if there is any ground for selling the estates; let us inquire, in the first instance, whether any heir of Elizabeth

Walker is in existence, and if not, whether the heirs of the two other ladies, or the heir of either of them is in existence?" and suppose that it had turned out satisfactorily, on the Master's report, that there was no person to whom, by any possibility, a payment could be made of the monies to arise from the sale of the three estates: would the Court have directed them to be sold? It is perfectly evident to me that there was no other object whatever in directing the estates to be sold, except for the purpose of dividing the produce amongst those persons, with respect [614] to whom it was most probable that there would be more than one, although it was possible that there might be only one. Then, if there was no enforceable trust for sale, as in that case there could not be, this case is precisely the same as if the testator had suffered his estates to descend, except only that the law would consider the legal estate to be vested in those persons to whom it is given in express words. The consequence of which would be, that the heir at law of the testator and his two co-devisees would in a Court of Equity, be held to be trustees for the heir at law.

Then, with respect to any dealing with the estates which took place after the death of the testator, I mean that sale which took effect by virtue of the contract entered into in November 1827, I am of opinion that it ought to be considered as not at all interfering with the right of George, or of those who claim under him in his character of heir at law. I have not seen the particular contract; but it is quite plain that there was a sort of family notion that there was a trust to be executed: and the contract was not made with George alone, but with him and his two sons, one of whom was an infant at the time; and the very fact that any other person was joined with George in the contract goes to shew that it was a contract made, not because George was dealing with that which he considered to be his own real estate, but because he apprehended that he was under an obligation to perform a trust.

If the parties wish that matter to be fully inquired into, I will direct it to be inquired into; but if not, I shall declare that all the estates were the real estate of George, and are to be taken as such by the parties who claim under him.

[615] BROWN v. BAMFORD. May 27, 1842.

This case, which was heard on this day, is reported *ante*, vol. xi. p. 127. An appeal from the Vice-Chancellor's decision to the Lord Chancellor has been argued; but his Lordship has not yet delivered his judgment. (1) [See 1 Ph. 620; 41 E. R. 769.]

[615] MORRICE v. LANGHAM.

The decree in this cause (which is reported *ante*, vol. xi. p. 260) was, as the reporter has been informed by one of the counsel engaged in the appeal, affirmed *in substance* by the House of Lords on the 5th of September 1844, the appeal having been dismissed, with costs, so far as the rents of the copyhold estates were concerned; and having been reversed, so far as the rents of the freeholds were concerned, on the ground *only* that it was irregular in giving relief between Co-defendants. [See 11 Cl. & F. 667; 8 E. R. 1255.]

[616] DUNCAN v. CAMPBELL. May 27, June 6, 1842.

[See *In re Barnard*, 1887, 56 L. T. 12.]

Husband and Wife. Construction. Deed. Settlement. Scotch Deed. Foreign Deed.

Mrs. D. being entitled to £3000 in reversion expectant on her aunt's death, the aunt consented, at the request of Mr. and Mrs. D., to relinquish her life interest in £2000, part of the £3000, in consideration of Mr. D. agreeing that the remainder

(1) See *Baggett v. Meux*, reported by Mr. Collyer, vol. i. p. 138; *Moore v. Moore*, 11 Coll. 54.

of the £3000, when payable, should be paid to trustees for his wife's separate use, and that he would immediately settle £2000 out of his own funds, and also the first-mentioned £2000, so as to provide *for the maintenance of himself and his wife*, and the survivor of them. The agreement was carried into effect by a deed which directed the trustees to pay the interest of the two sums of £2000 *to Mr. and Mrs. D. during their joint lives*, and to stand possessed of the principal for the survivor of them. Mr. D. afterwards separated from his wife in consequence of her having committed adultery. Held, that he was entitled to receive the whole of the interest of the trust fund; and was not bound to maintain his wife out of it, notwithstanding she was destitute of the means of support.

A deed in the Scotch form made between parties, some of whom were domiciled in Scotland, and the others in England, construed partly according to the law of Scotland, and partly according to the law of England; that is to say, so far as it concerned the Scotch parties, according to the Scotch law, and so far as it concerned the English parties, according to the English law.

The bill stated that Margaret Campbell, formerly of Culreath in Scotland, spinster, deceased, and her sister, Marion Campbell, of the same place, spinster, deceased, mutually and reciprocally executed two trust deeds or settlements, dated respectively the 31st of March 1828, by one of which, reserving a life interest in themselves and the survivor of them therein, they gave and disposed of all their lands and heritages, heritable bonds, heritable debts, and, in general, their whole heritable means and estate, to certain trustees, upon trust, among other things, to raise and pay to the Defendant Helen Hodges or Duncan (their niece and the wife of the Plaintiff), the sum of £3000 at the first term of Whitsunday or Martinmas that should happen six months after the death of the survivor of them, the said Margaret Campbell and Marion Campbell, with interest [617] thereafter till paid; and provided and declared that it should not be in the power of the survivor of them, the said Margaret and Marion Campbell, to alter or revoke the said trust deed and settlement, or to diminish any of the special legacies therein mentioned; but that such survivor should have the power to grant further new or additional legacies and bequests affecting the residue of their, the said Margaret Campbell and Marion Campbell's, means and estate only; and subject to such power, they thereby disposed of the residue in manner in the said trust deed mentioned; and by the other of which trust deeds they directed that the residue of their personal estate should, after payment thereof of, amongst other things, such legacies as they or the survivor of them should by deed or writing thereafter direct or bequeath, form part of and be divisible along with the proceeds of their real estate. The bill next stated that Margaret Campbell and Marion Campbell executed a codicil or deed of appointment founded on the said trust deed, and dated the 29th of January 1829, whereby they revoked the disposition of the residue of their estates made by the trust deed and settlement, and directed that such residue should devolve on their nearest heirs upon the death of the survivor of them: that Margaret Campbell died on the 30th of January 1829, and thereupon Marion Campbell became entitled to exercise the power over the residuary funds given to her by the aforesaid settlements; and by a deed of settlement, dated the 16th of July 1832, she, in exercise of such power, gave, amongst other things, the sum of £1000 sterling to the said Helen Hodges or Duncan, if there should be sufficient to discharge the same from the said residuary funds: that the deeds before mentioned were executed in Scotland, and registered in the Books of the Council and Session: that the Plaintiff and Helen Duncan, his wife, entered into an arrangement, in concurrence [618] with Marion Campbell, who consented for that purpose to give up her life interest in £2000 part of the sum of £3000 provided for Helen Duncan by the aforesaid deed or settlement, for setting apart a sum of £2000 of the Plaintiff's own money, together with the £2000 part of the £3000 to provide the Plaintiff for his life, with an annual income for the maintenance of the Plaintiff and his wife, Helen Duncan, who were then residing together, and to make a like provision for the survivor of the Plaintiff and his wife; (1) and in pursuance of that arrangement, the

(1) The above statement of the case was copied correctly from the brief.

Plaintiff and his wife and Marion Campbell, on the 16th of October 1833, made and executed an agreement or contract in the Scotch form, which was as follows:—"It is contracted, agreed and ended, by and between Miss Marion Campbell, of Culreath, on the one part, and Mrs. Helen Hodges or Duncan, spouse of John G. Duncan, *residing at Alton, Hampshire*, with the special advice and consent of the said John G. Duncan, her husband, and the said John G. Duncan, for himself and his interest, and as taking burden on him for his said spouse, on the other part, in manner and to the effect following: whereas the said Miss Marion Campbell and the now deceased Margaret Campbell, her sister, by a certain deed of settlement executed by them, provided said Mrs. Helen Hodges or Duncan in a legacy of £3000 sterling, payable at the first term of Whitsunday or Martinmas that should happen six months after the death of the survivor of them, the said Margaret Campbell and Marion Campbell; and said John G. Duncan and Mrs. Helen Hodges or Duncan having now applied to said Miss Marion Campbell for immediate payment of £2000 of said legacy, in order to enable them to make permanent pro-
[619]-visions for the maintenance of themselves and the survivor of them, by sinking said sum of £2000 along with a similar sum of £2000 of his, said John G. Duncan's, own funds, on an annuity or yearly or half-yearly payment on their joint lives and the life of the survivor of them, *or by investing same in the Government or other public security or securities* in the names of trustees for behoof of them, said John G. Duncan and Mrs. Helen Hodges or Duncan, so that the interest or dividends *shall be paid to them during their joint lives*, and the principal sum to be at the disposal of the survivor, he, said John G. Duncan, at same time and in consideration of such immediate payment, being willing to consent and agree that the remaining £1000 of said legacy, when payable, shall be paid over to trustees for behoof of said Mrs. Helen Hodges or Duncan for her own use exclusively; and said Miss Marion Campbell having, in consideration of the circumstances and situations of said spouses and on these conditions, agreed to the proposition of said John G. Duncan and Mrs. Helen Hodges or Duncan, and, in consequence, made payment to them of said sum of £2000 sterling, of which they hereby grant the receipt, renouncing all exceptions in the contrary, and discharge said Miss Marion Campbell and all others the heirs and successors of said deceased Margaret Campbell of the aforesaid legacy to the extent of said sum of £2000 sterling now paid as aforesaid: and further, and in consideration of the immediate advance of said sum of £2000, said Mrs. Helen Hodges or Duncan, with consent of said John G. Duncan, and said John G. Duncan, for himself and his interest, hereby assign, convey and make over to and in favour of John Deans, Esq., of Albany Terrace, Regent's Park, in the county of Middlesex, William Archibald Henry Fowlds, of Shweeland, Ayrshire, and James Morton, [620] writer in Ayr, and the survivor and survivors of them, as trustees for the use and behoof of said Mrs. Helen Hodges or Duncan, herself, her heirs and assignees, the remaining £1000 of said legacy of £3000 sterling, with full power to them to receive and discharge the same when it becomes payable, surrogating and substituting the said trustees and the survivors or survivor of them in trust as aforesaid in the full right and place of the premises; the said John G. Duncan hereby renouncing his *jus mariti*, in so far as regards the said sum of £1000 sterling, now and in all times coming; and further, and in terms of the aforesaid agreement, said John G. Duncan hereby binds and obliges himself, at the sight of said John Deans, immediately to invest said sum of £2000 so paid by said Miss Marion Campbell, alongst with a like sum of £2000 of his own funds, for an annuity or yearly or half-yearly payment, during the joint lives of himself and said Mrs. Helen Hodges or Duncan and the survivor of them, either by sinking same by way of annuity as aforesaid, or by investing said sums *in the Government or other public security or securities* in manner hereinbefore mentioned, or in such other way or manner as may be sanctioned and approved by said John Deans, taking all due care that same shall be safely invested as to secure the punctual payment of said annuity or the interest or dividends arising on said securities: *and the parties consent to the registration hereof in the books of the Council and Session*, therein to remain for preservation, and that letters of horning on six days' charge, and all other necessary execution may pass herein in form as appears; and for that purpose they constitute procurators. In witness whereof these

presents, written on these and the preceding page of stamped, by Thomas Deans, of College Street, in the City of Westminster, [621] Parliamentary solicitor for said James Morton, writer in Ayr, are subscribed by the parties as follows, viz., by the said Mrs. Hodges or Duncan and John G. Duncan at Albany Terrace, Regent's Park, in the county of Middlesex aforesaid, the 16th day of October in the year 1833, before these witnesses, the said Thomas Deans and William Ashworth, of Albany Street, Regent's Park, aforesaid, and by the said Miss Marion Campbell at on the day of and year aforesaid, before these witnesses."(1)

The bill then stated that the last-mentioned deed was duly registered in the books of the Council and Session; and that it was executed by Marion Campbell in Scotland, and by the Plaintiff and his wife in England, where they were then domiciled: that the two sums of £2000 each were paid to John Deans (who afterwards took the name of Campbell) as one of the trustees of the contract or settlement of the 16th of October 1833; and he afterwards invested those sums in the purchase of 32,200 sicca rupees of the East India Company's Bengal Six Per Cent. Remittable Loan: that the 32,200 sicca rupees were afterwards, at the request of the Plaintiff and his wife, transferred by John Deans Campbell into the joint names of himself and of Charles Trimmer of Alton in Hampshire as trustees thereof: and the Plaintiff received the interest thereon up to the 31st of December 1835: that the 32,200 sicca rupees were paid off by the East India Company in January 1836; and the sum paid by the Company was invested and still remained invested in Exchequer bills in the names of the trustees: that Marion Campbell, by a codicil, [622] dated the 23d of June 1834, revoked the legacy of £1000 given to Helen Duncan, and, in lieu thereof, gave her a legacy of £500 for her separate use: that Marion Campbell died on the 12th of July 1834: that, in consequence of the adultery of Helen Duncan, the Plaintiff was under the necessity of living apart from her and instituting a suit in the Consistory Court of the Bishop of London, and, on the 27th of July 1836, he obtained a decree in that suit for a divorce a mensa et thoro; that the £1000, the residue of the £3000, had been or might be received by Helen Duncan, or John Deans Campbell and the other trustees of the contract of the 16th of October 1833, in trust for her separate use; and that the additional legacy of £500 had been received by her and applied to her own separate use; that the Plaintiff had requested John Deans Campbell and Charles Trimmer to pay to him the interest which had accrued on the Exchequer bills, and to invest the principal in the three per cent. consols: but that Campbell had refused, although Trimmer was willing, to comply with his request: that Campbell pretended that the Plaintiff was not entitled to the interest of the £4000; but that Helen Duncan was entitled to receive a moiety of such interest during the joint lives of her and the Plaintiff, and Campbell had paid her £83, 17s. 10d. in part of such interest; but the Plaintiff charged that he was entitled to the whole of the interest of the £4000 during his life: that he purchased the interest of his wife in the £2000, part of the £3000, by releasing in her favour all his right and title in and to the £1000, the residue of the £3000, and that he was not bound to make any further provision for her, inasmuch as she was entitled to the £1000 and £500 for her separate use; but, nevertheless, she alleged that the contract of the 16th [623] of October 1833 ought to be construed according to the law of Scotland, and claimed to be entitled to a moiety of the income of the £4000; but the Plaintiff charged that the contract ought to be construed according to the law of England, and that, according to the true construction of it, the Plaintiff was solely entitled to the income of the £4000 during his life; and that if his wife was, under the contract, entitled to participate in the income of the £4000, it was only during her cohabitation with the Plaintiff, or in case of any separation arising from his illegal conduct; and that, by her misconduct and separation consequent thereupon, she had forfeited such right of participation.

The bill prayed that it might be declared that the contract of the 16th of October 1833 ought to be construed according to the law of England, and that the £4000 ought to be invested either in the three per cents. or in the purchase of an annuity for the lives of the Plaintiff and his wife and the survivor of them; and that, under

(1) The above deed was correctly copied from the brief, blanks being left as in the text.

the circumstances before stated, the Plaintiff was entitled to receive the dividends and interest of the trust fund or the annuity so to be purchased during his life ; and that Campbell and Trimmer might be directed to invest the £4000 accordingly ; and to pay to the Plaintiff the income during his life, and also the arrears of interest on the £4000.

The Defendant, John Deans Campbell, in his answer, said that the contract of the 16th of October 1833 was executed in Scotland ; and he submitted that, regard being had to its contents, even supposing that it had been executed in England, the parties thereto had thereby contracted that their rights and interests created [624] or affected thereby should be regulated by the law of Scotland : that in August 1835 the Plaintiff sent his wife from his house without making any provision for her support ; and that she had a child born in the December following ; and that, as she was without the means of support for herself or her child, the Defendant had paid her the £83, 17s. 10d. and other sums amounting, altogether, to upwards of £544 : that, according to the law of Scotland, Helen Duncan, under the terms of the contract, would be entitled to a moiety of the income of the funds included therein, and that by the same law he, the Defendant, would not, regard being had to the true construction of the contract, be legally discharged in respect to paying such income, unless he paid the same upon a receipt signed by the Plaintiff and his wife jointly : that he had been advised and believed that, according to the law of Scotland, if the contract of the 16th of October 1833 was adjudged and acted upon in a Scotch Court of Justice, Helen Duncan would be held entitled to a moiety of the income of the trust fund.

Helen Duncan in her answer said that she had received the legacy of £500 ; but that the £1000, the residue of the £3000, had not been paid to the trustees of the contract : that the Plaintiff had refused to make any allowance for the support and maintenance of her and her child ; and that, ever since the decree of divorce, she had been and still was wholly destitute of the means of support. In other respects, her answer was to the same effect as the answer of the Defendant Campbell.

The cause now came on to be heard.

[625] Mr. Bethell and Mr. Willcock, for the Plaintiff. We contend that the instrument of the 16th of October 1833, though in the Scotch form, ought to be construed and carried into effect according to the law of England ; and then the Plaintiff, having been discharged by the misconduct of his wife from the obligation of maintaining her, will be entitled to have the whole income of the trust fund paid to him by the trustees. If, however, the Court should decide that this instrument ought to be construed according to the law of Scotland, the Master must be directed to inquire and state what is the law of Scotland upon the subject.

It is true that Miss Marion Campbell was domiciled in Scotland, and that she executed the instrument in that country : but the Plaintiff and his wife and one of the trustees, Mr. Deans Campbell, were resident in England, and executed the instrument there. It is immaterial to inquire from whence the money came ; but it is very material to see where it was to be dealt with ; where it was to produce income and who were to be the recipients of it. It was to be paid to three gentlemen, one of whom was resident in England, and it was to be invested either in the purchase of an annuity, or in the Government or other public securities, or in such other manner as Mr. Campbell, the trustee resident in England, should sanction or approve of ; and the income of the fund when so invested was to be paid to Mr. and Mrs. Duncan, who were domiciled and resident in England. The instrument was Scotch both in form and language ; but it ought not, on that account, to be construed according to the Scotch law any more than, if it had been in the Latin language, it ought to be construed according to the Roman law. There is not only a *lex loci celebrationis contractus*, but also a *lex loci solutionis* [626] *contractus*. If the question is whether the contract was duly executed or properly stamped, that question must be determined by the *lex loci celebrationis* ; but if the question is what effect ought to be given to the contract, then regard must be had to the *lex loci solutionis* ; that is, to the law of the place of performance. Here the parties to the contract refer, throughout, to England as the place of performance. Mr. Duncan was the principal party to the contract. The consideration for it moved from him. The fund, which was the

subject of it, was to be invested in English securities. The principal trustee, Mr. Campbell, who was to sanction the investment, was resident in England; and the parties for whose benefit the contract was entered into and the investment was to be made were, both of them, domiciled and resident in England. It will be said, perhaps, by the counsel for the Defendants, that it is the *lex loci contractus* which must be regarded in this case: but where a contract is executed by some of the parties in one country, and by the other parties in another country, there is no *lex loci contractus*: in such a case the only law that can apply to it is the *lex loci solutionis*. In *Stanley v. Bernes* (3 Hag. Eccl. Rep. 373) the Court of Delegates decided that a will made by a British subject who was domiciled in the Portuguese dominions, though it was English both in form and in language, must be construed, not according to the law of England, but according to the law of the country where the testator was domiciled.⁽¹⁾ The decisions in *Price v. Dewhurst* (*ante*, vol. viii. p. 279) and *Anstruther v. Chalmers* (*ante*, vol. ii. p. 1) proceeded on the same principle. In *Don v. [627] Lippmann* (5 Clark & Finn. 1; see 13) the House of Lords decided that the law of the country in which a contract is to be performed must decide as to the effect which is to be given to it. Their Lordships there followed the maxim (which is equally applicable to the present case): "*Actor sequitur forum rei*." The law upon the point now in discussion is correctly stated by Dr. Story as follows (Conflict of Laws, 233, 1st edit.): "The rules already considered suppose that the performance of the contract is to be in the place where it is made, either expressly or by tacit implication. But, where the contract is either expressly or tacitly to be performed in any other place, there the general rule is, in conformity to the presumed intention of the parties, that the contract, as to its validity, nature, obligation and interpretation, is to be governed by the law of the place of performance. This would seem to be a result of natural justice; and the Roman law has (as we have seen) adopted it as a maxim; *contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit*. And again, in the law, *Aut ubi quis contraxerit. Contractum autem non ubique eo loco intelligitur, quo negotium gestum sit; sed quo solvenda est pecunia?*"

Mr. Willcock. In order to arrive at a proper conclusion as to the effect which ought to be given to the contract in question, we must have regard to the position in which the parties stood with respect to each other at the time when that contract was entered into. At that time the sum of £3000 was irrevocably settled on Mrs. Duncan. Miss Marion Campbell had no interest in the capital of that sum; she had only a life interest in it; and, on her [628] death, Mr. Duncan would be entitled to it in right of his wife. Such being the interests of the parties, Mr. Duncan agreed to release his right to £1000, part of the £3000, in consideration of Miss Marion Campbell relinquishing her life interest in £2000, the remainder of the £3000. Mr. Duncan, therefore, independently of his advancing £2000 out of his own funds, became a purchaser of the £2000; and Miss Marion Campbell had nothing whatever to do with the other parts of the contract. As to them, she was an assenting, but not a contracting party. The instrument recites that the object of the application to her was to enable Mr. and Mrs. Duncan to make provision *for the maintenance of themselves*, by investing the two sums of £2000 in a certain manner and upon certain trusts, for their own exclusive benefit, which they had previously agreed upon between themselves. Miss Marion Campbell, therefore, had nothing to do with the special terms of the contract: those terms were arranged between Mr. and Mrs. Duncan, both of whom were resident in England; and those terms were to be carried into effect under the sanction of Mr. Campbell, who also was resident in England. Therefore it is the law of England which must regulate the performance of the contract as between those parties. Mr. Burge, in his Commentaries on Colonial and Foreign Laws, treats of the cases in which a contract is to be performed in some other place than that in which it was made; and then states the rule, which prevails in such cases, to be as follows: "The place of performance is then, *fictione juris*, the *locus contractus*; and the general rule is that: *Ratione effectus et complementi ipsius*

(1) The question in *Stanley v. Bernes* seems to have related to the *execution* and not the *construction* of the testamentary instrument.

contractus, spectatur ille locus, in quem destinata est solutio; id quod ad modum, mensuram, usuras, &c., negligentiam et moram post contractum initum accedentem referendum est." The learned author then adds: "This rule is [629] adopted by jurists and is recognised in England, Scotland, and the United States." (Vol. iii. p. 771.)

Ball v. Montgomery (4 Bro. C. C. 339; and 2 Ves. jun. 191) is the strongest case that can be found against the present Plaintiff: but it is different from the present case in many important particulars. There the fund which was the subject of the suit was the property of the wife. Here it is the property of the husband; for he purchased it by relinquishing his right to the £1000, part of the £3000, and by settling £2000 of his own monies. There no trust was declared of the dividends of the stock during the coverture; but here a trust is declared of the income of the fund during the coverture. There the husband was forced to buy the interference of the Court, by doing that which the Court considered it incumbent on him to do; but the Plaintiff in this case has already bought the interference of the Court; for he has made a provision for his wife, not only by the settlement, but also by consenting to the £1000 being paid to trustees for her separate use. We submit, therefore, that *Ball v. Montgomery* is not a case which ought to influence your Honor's decision in the present case.

Mr. Hull, for the Defendant Campbell, said that the parties to the contract of October 1833 had expressly stipulated that the income of the £4000 should be applied for the joint maintenance of Mr. and Mrs. Duncan, and, therefore, Mr. Campbell was justified in paying, as he had done, a portion of the income to Mrs. Duncan, who otherwise would have been wholly without the means of supporting herself and her child.

[630] Mr. Austen appeared for the other trustee, Mr. Trimmer.

Mr. G. Richards and Mr. Roupell, for Mrs. Duncan. The contract of October 1833 was made not between Mr. Duncan and his wife, but between Mr. Duncan and Miss Marion Campbell, the aunt of Mrs. Duncan. At that time Mrs. Duncan was under coverture, and, therefore, incapable of entering into any contract. By the instrument of 1833 Miss Campbell gave up her own life interest in part of the £3000, in consideration that the income should be applied for the joint maintenance of Mr. and Mrs. Duncan: consequently her intention will be defeated if the Court grants the prayer of the bill.

Next, we submit that the instrument under consideration must be construed according to the law of Scotland. Miss M. Campbell was the most important party to it; for, without her assent, it could have availed nothing. She was domiciled in Scotland, and executed the instrument in that country. The form as well as the language of it is Scotch; and it was to be registered in the Books of the Council and Session. That stipulation would have been perfectly useless if the parties had not intended that the construction of the document should be regulated by the law of Scotland. What did the parties intend by the expression "*jus mariti*," but the marital right according to the law of Scotland? The £4000 was to be invested, not in Government securities alone, but in Government or other public security or securities, so that public securities in Scotland, as well as in England, were in the contemplation of the parties. It is true that the fund is now [631] invested in English securities; but that circumstance does not authorize the Court to deal with it according to the law of England. In *Anstruther v. Adair* (2 Myl. & Keen, 513) the fund in dispute was stock in the English funds; but, as the contract respecting it, which it was the object of the suit to enforce, was made between parties who were domiciled in Scotland, and in a form known to the law of that country, the Court gave it the same construction and effect as the law of Scotland would have given it.

The cases of *Stanley v. Bernes* and *Don v. Lippmann*, which were cited for the Plaintiff, have no bearing upon the question, whether a contract ought to be construed according to the law of one country or another. In the former of those cases the question was whether a testamentary instrument made by a person who was domiciled in a foreign country, ought not to be executed in conformity to the law of that country in order to be a valid disposition of property in England; so that the decision in that case had reference not to the construction but to the execution of the instrument. So also in *Don v. Lippmann*, the question was not as to the construction

of the instrument, but as to the remedy which was applicable to it. In *Melan v. Fitzjames* (1 Bos. & Pull. 138), Mr. Justice Heath made a very clear distinction between the construction which ought to be put by the Courts of this country upon an instrument executed abroad, and the mode in which it ought to be enforced. That learned Judge said: "We all agree that in construing contracts we must be governed by the laws of the country in which they are made; for all contracts have reference to such laws. But, when we come [632] to remedies, it is another thing. They must be pursued by the means which the law points out where the party resides. The laws of the country where the contract was made can only have reference to the nature of the contract, and not to the mode of enforcing it." The same distinction was made and acted upon in *De la Vega v. Vianna* (1 Barn. & Adol. 284). The decisions in *Potter v. Brown* (5 East, 124); *Smith v. Mingay* (1 Mau. & Sel. 87); *Robinson v. Bland* (2 Burr. 1077); and *Lashley v. Hog* (Robertson on Personal Succession, 414), shew that the validity of a contract and the effect which ought to be given to it are points to be decided upon according to the law of the country in which the contract was made.

Supposing, however, that the instrument in question in this case is to be construed according to the law of England, we submit that, according to that law, Mrs. Duncan ought to have a portion of the income of the £4000 applied for the maintenance of herself and her child. In *Page v. Way* (3 Beav. 20) the language of the instrument was very similar to the language of the contract in this case. There trustees of real estates were directed to pay and apply the rents for the maintenance and support of a husband, his wife and children. The husband became bankrupt, and his assignees claimed the whole income of the property: but the Master of the Rolls said that there could be no doubt of the intention of the settlement, that the wife should be supported out of the property; and he referred it to the Master to approve of a proper allowance for the maintenance of her and her children. So, in *Rippon v. Norton* (2 Beav. 63), where property was vested in trustees in trust to apply [633] the profits, during the life of the settlor's son, for the board, lodging and subsistence of himself and his family; and the son took the benefit of the Insolvent Debtors Act; the same learned Judge held that the children were entitled to three-fourths of the profits of the property.

Lastly, we submit that, where a married lady is entitled to a provision under a contract, she is not to be deprived of it because she is living in adultery. *Sidney v. Sidney* (3 P. W. 269) and *Blaunt v. Winter* (*Ibid.* 276, note (r)) fully support that proposition; for, in both those cases, the Court, at the suit of the wife, decreed the husband specifically to perform executory contracts, notwithstanding the wife was living in adultery.

At all events, if the Court will not order a portion of the income of the £4000 to be applied for the maintenance of Mrs. Duncan and her child, it will not act at all. *Carr v. Eastbrooke* was very similar to the present case; for the husband had made no provision for his wife, and she had committed adultery; and this Court refused to assist either party. So in *Ball v. Montgomery* the Court, under similar circumstances, refused to give relief to the husband, who was the Plaintiff in the cause.

THE VICE-CHANCELLOR. In *Ball v. Montgomery* the property to which the suit related was not affected by the settlement on the marriage of the husband and wife; it was left as the chose in action of the wife. In *Carr v. Eastbrooke*, also, the property to which the petitions related was the chose in action of the wife.

[634] Mr. Roupell. Under the contract of October 1833 the interest of the £4000 was to be paid, not to Mr. Duncan alone, but to him and Mrs. Duncan, for their joint maintenance during their lives; and, therefore, according to *Page v. Way* and *Rippon v. Norton*, the Court will not permit Mr. Duncan to receive the whole income of the fund, but will give effect to the declared intention of the parties by directing a portion of the income to be paid to Mrs. Duncan; and that, too, notwithstanding she has committed adultery; for this Court considers that the circumstance that the wife has been guilty of that crime does not exempt the husband from his obligation to maintain his wife: and on that ground it refused, in *Ball v. Montgomery* and *Carr v. Eastbrooke*, to assist the husband in asserting his legal right to his wife's property.

The parties plainly intended that the contract, so far at least as it related to the sum contributed by Mrs. Duncan's relations, should take effect and be regulated according to the law of Scotland; for, not only is the instrument Scotch both in form and language, but, on the face of it, the parties refer to the process of registration in the Books of Council and Session, in order to make it binding on Miss M. Campbell. As then the parties referred to the law of Scotland for perfecting the instrument, and as Miss Campbell, the principal party to it, was domiciled in Scotland and executed the instrument there, this Court is bound to give effect to it according to that law; so far at least as the £2000 contributed by her and her sister (which is the only part of the settled fund which is now in question) is concerned.

The case of *Anstruther v. Adair* shews that, if an instrument is in the Scotch form, and the principal party [635] to it is domiciled in Scotland, this Court will follow the law of that country in deciding as to the rights of the parties under it, notwithstanding the fund comprised in it is in England. In *The Attorney-General v. Mill* (3 Russ. 328) a testator, who was resident in England, directed land to be purchased with his residuary estate, and the rents to be distributed amongst indigent persons residing in Scotland: and the Court held that the bequest was void under the Statute of Mortmain. That case, therefore, proves that, when the Court has to decide whether the law of England or the law of Scotland is applicable to an instrument, the country in which the property is to be ultimately distributed is of no importance.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It is quite possible for an instrument to be of such a nature as that, with respect to one part of it, it is to be dealt with according to one species of law, and with respect to another part of it, according to a different species of law; and the instrument with respect to which the question in this suit has arisen, appears to me to be of that nature. There is very good reason why it should be considered, to a certain extent, as a Scotch instrument; for I collect that the real estate of the two Miss Campbells, together with their personal estate, was made the joint fund out of which the £3000 was to be paid; and, therefore, it was proper that the instrument should be in the Scotch form, and that it should be registered in Scotland in order to shew that the real estate had been discharged by the £3000 being paid or satisfied. But in other respects, and as between Mr. and Mrs. Duncan and Mr. J. Deans Campbell (all of whom were resident in England), there is no reason [636] why the instrument should be considered as a Scotch one. Miss M. Campbell, in her lifetime, did all that it was incumbent on her to do; and, therefore, no person is made a party to this suit as representing her. As then the question in the cause arises between Mr. and Mrs. Duncan, both of whom are domiciled in England, my opinion is that the instrument ought to be construed as an English one.

The question then is, what is the true effect of the deed of the 16th of October 1833? Now, it seems to me that, in respect of the £2000 which came from Mrs. Duncan's aunts, Mr. Duncan was a purchaser for valuable consideration: for, by the deed of the 31st of March 1828, the £3000 was to be paid to Mrs. Duncan at a certain time after the death of the survivor of her two aunts. Then Mr. Duncan proposed to Miss Marion Campbell (who had survived her sister) that, if she would pay down £2000, part of the £3000, he would consent to the £1000, the remainder of that sum, being paid to trustees for the separate use of his wife, and would settle, not only the £2000 which was so to be paid down, but also £2000 out of his own funds, in the manner therein mentioned. So that Mr. Duncan was a purchaser, not only by relinquishing his right to a chose in action of his wife's, but by advancing money out of his own pocket. The deed recites that Mr. and Mrs. Duncan had applied to Miss M. Campbell for immediate payment of £2000, in order to enable them to make permanent provisions for the maintenance of themselves and the survivor of them, by sinking that sum, along with a similar sum of Mr. Duncan's own funds, on an annuity or yearly or half-yearly payment on their joint lives and the life of the survivor of them, or by investing the same in the Government or other public [637] securities in the names of trustees, so that the interest or dividends should be paid to them during their joint lives, and the principal sum be at the disposal of the survivor, he, Mr. Duncan, in consideration of such immediate payment, being willing that the remaining £1000 of the legacy, when payable, should be paid to trustees, for Mrs. Duncan's own

use exclusively. The deed then recites that Miss M. Campbell had agreed to the proposal so made to her by Mr. and Mrs. Duncan, and, in consequence, had made payment to them of the £2000. Then, in consideration of that payment, Mr. and Mrs. Duncan assign the £1000 to Mr. J. Deans Campbell and his co-trustees, for the use of Mrs. Duncan; and Mr. Duncan renounces his *jus mariti* with regard to that sum; and then binds himself, at the sight of Mr. J. D. Campbell, immediately to invest the £2000 paid by Miss Campbell, along with a like sum of his own funds, for an annuity or yearly or half-yearly payment during the joint lives of himself and his wife and the survivor of them, either by sinking the same sums by way of annuity as before mentioned, or by investing them in the Government or other public security or securities, in manner before mentioned, or in such other way or manner as might be sanctioned by Mr. J. D. Campbell, taking care that the same should be safely invested so as to secure the punctual payment of the annuity or the interest or dividends arising on the said securities. This last part of the deed imposed an obligation on Mr. Duncan; and he has fulfilled it. Then the only question is what is the trust that results from the expressions used in the deed. Now, in *Page v. Way* the trustees were directed to pay and apply the rents and profits of the trust property, unto or for the maintenance and support of F. Jones, *his wife and family*; and in *Rippon v. Norton* the trust was to apply [638] the profits of the property for the board, lodging and subsistence of J. Rippon the younger *and his family*. But in this case there are no such expressions: the annuity or the income of the securities in which the £4000 might be invested were to be paid to Mr. and Mrs. Duncan only, during their joint lives; and under those words, Mr. Duncan would be entitled to receive the whole. And, if that be so, would it not be strange to say that he shall be deprived of the benefit which he is entitled to under the deed, because his wife has so misconducted herself that he is justified in living separate from her? *Sidney v. Sidney* is not an authority for that proposition, but for the converse of it; for it decided that the wife was entitled to compel her husband to perform the articles entered into on their marriage, notwithstanding she had been guilty of adultery.

I shall, therefore, declare that Mr. Duncan is entitled to the interest of the trust fund during the joint lives of himself and his wife; and as Mr. J. D. Campbell has taken upon himself to decide as to the rights of the parties under the deed, and has paid part of the interest to Mrs. Duncan, the order which I shall make with respect to the costs of the suit is that the Plaintiff do pay Mr. Trimmer his costs, and that Mr. Campbell do pay the Plaintiff his costs, and also the amount of the costs paid by the Plaintiff to Trimmer.

[639] CROFT v. ADAM. June 4, 1842.

[S. C. 11 L. J. Ch. 386; 6 Jur. 522.]

Deed. Construction. Trust. Power.

A widow, by the settlement on her second marriage, settled £2300 which had belonged to her first husband, in trust for her separate use for life; and declared that, subject thereto, the fund should, as and whenever she should think fit or be advised, be settled upon trust for the benefit of her daughter and only child, by her first husband, and of her daughter's intended husband and her child and children, in such manner and for such rights and interests as should be agreed upon, either previous to or after her daughter's marriage, with her consent, and that she (the mother) should have full power to settle the fund or any part of it, in trust for the immediate benefit of her daughter and her child and children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after her own death, as she should think fit; but if the daughter should not be married in the mother's lifetime and should survive her, then the fund should be assigned to the daughter at 21 or on marriage, but if the daughter should die in her mother's lifetime without having been married, then the fund should be held in trust for the children of the mother's second marriage. Held, that a trust, and not a power,

was created in favour of the daughter, her husband and children; but that the mother, if she thought fit, might modify the interests of the *cestuis que trust*, on the daughter marrying with her consent.

By the settlement on the marriage of Jane Thompson, widow, with Sir Everard Home, dated the 2d November 1792, Jane Thompson assigned the sum of £2300, to which she was entitled under the will of her late husband, to trustees, in trust, subject to her appointment by any note or writing under her hand, for her separate use during her life. The settlement then declared that, subject to the separate right and interest of Jane Thompson, during her life, in and to the interest of the £2300, the same should, *as and whenever the said Jane Thompson should think fit or be advised, be settled upon trust for the benefit of Amelia Thompson, her daughter and only child by her late husband, and of her intended husband and her child or children, in such manner and for such rights and interests as should be agreed upon, either previous to or after the marriage of the said Amelia Thompson with the consent and approbation of the said Jane Thompson, her mother; and that the said Jane [640] Thompson should, by virtue of this settlement, be at free liberty and have full power and authority to settle the £2300, or any part thereof, in trust for the immediate benefit of her said daughter, and her child or children, in manner aforesaid, to take effect either upon such marriage, or upon or immediately after the decease of the said Jane Thompson, as she should think fit, notwithstanding her coverture, and whether married or sole; but if Amelia Thompson should not be married in her mother's lifetime, and should her survive, then that the £2300 should be upon trust for the benefit of Amelia Thompson, and should be a vested interest, and assigned or transferred to her upon her attaining the age of 21 years, or on her marriage before that age, as the event should happen: but if Amelia Thompson should die in her mother's lifetime without having been married, then that the £2300 should be upon the same trusts as were therein-after declared concerning the sum of £1000. The trusts declared of the £1000 (which also was the property of Mrs. Thompson) were for the benefit of herself and her intended husband and the children of their marriage.*

In 1811 Miss Thompson married Sir Frederick Adam; and, by their marriage settlement, £20,000 consols, the lady's property, and all other property that might come to or devolve upon her during the coverture, were settled in trust for her and her husband and their children: but Lady Home never made any settlement of the £2300.

Lady Adam died in June 1812, leaving a daughter, named Amelia, the only issue of her marriage: and Sir F. Adam took out administration to her. In February 1833 Miss Adam married Major Boileau. She died a few months afterwards, without issue; and her husband took out administration to her. Lady Home survived Sir Everard, and died in May 1841.

The bill was filed by the trustees of the settlement of 1792, against Sir Frederick Adam, Major Boileau and Lady Home's executors, stating that the Defendants severally claimed the £2300; and praying that the trusts of that settlement, so far as they regarded the £2300, might be carried into execution under the direction of the Court.

The cause now came on to be heard as a short cause.

Mr. G. Richards and Mr. G. L. Russell appeared for the Plaintiffs.

Mr. Stuart and Mr. J. Baily, for Major Boileau, and Mr. Romilly, for Sir Frederick Adam, said that the clause contained in the settlement of 1792 in favour of Miss Thompson, her husband and children, created, not a mere power, but an executory trust, subject to Lady Home's life interest: that the second branch of the clause, commencing with the words, "and that the said Jane Thompson shall, by virtue of this settlement, be at free liberty," enabled the mother to extend her bounty to her daughter in her lifetime; *Brown v. Higgs* (8 Ves. 561), and *Brown v. Pocock* (*ante*, vol. vi. p. 257); that, if it were necessary to have recourse to implication in this case, a trust for Lady Adam might be implied from the circumstance that the £2300 was not given over, except in the event of her dying unmarried in her mother's lifetime, which had not happened.

[642] Mr. Bethell and Mr. Elmsley, for Lady Home's executors, said that the cases in which words apparently importing a power had been held to create a trust were cases in which the donor and the donee were distinct persons; but, in the present

case, Lady Home was the absolute owner of the £2300, and also both the donor and the donee of the power : that the clause under discussion could not be divided into two parts, as had been contended for the other Defendants, but must be taken altogether ; and that the language of the clause throughout, and more especially the words, " as and whenever the said Jane Thompson shall think fit or be advised," and the words, " in such manner and for such rights and interests as shall be agreed upon," shewed that Lady Home (who was under no obligation whatever to settle the fund on her daughter, her husband or children) meant to reserve to herself a *power* to appoint the fund in favour of those individuals, at whatever time and in whatever manner she might think fit : that, in order to create a trust, there must be a definite subject, a definite object and a definite time at which the interest of the *cestui que trust* is to vest ; but, in the present case, the time, the object, and the subject were left in uncertainty : that the settlement was a contract between Lady Home and her then intended husband, and that she plainly intended, by the clause in question to stipulate that she should have the entire control over the fund in case her daughter married during her lifetime. They referred to the following passage in the judgment in *Brown v. Higgs* (8 Ves. 574) : " The principle of that case (*Harding v. Glyn*), and of *Richardson v. Chapman*, which went to the House of Lords, and all these cases, is that, if the power is a power which it is the duty of [643] the party to execute, made his duty by the requisition of the will, put upon him, as such, by the testator, who has given him an interest extensive enough to enable him to discharge it, he is a trustee for the exercise of the power, and not as having a discretion whether he will exercise it or not ; and the Court adopts the principle as to trusts, and will not permit his negligence, accident, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it."

Mr. Neate appeared for another Defendant.

THE VICE-CHANCELLOR [Sir L. Shadwell]. That part of the settlement upon which the question in this case has arisen is very inaccurately expressed ; and, in order to determine what effect ought to be given to it, we must take the whole of it together.

It provides for three events : first, the marriage of the daughter in the lifetime and with the consent of her mother ; secondly, the daughter's surviving her mother without having married in her mother's lifetime ; and, thirdly, the daughter's dying in the lifetime of her mother without having been married. But there is no provision for a fourth event, namely, the daughter's marrying in her mother's lifetime without the consent of her mother ; and that is a very important point.

Now it seems to me that, by the first branch of the clause relating to the first contingency, which ends with the words " with the consent and approbation of the said Jane Thompson," an interest was created in the daughter, her husband and children, if the mother consented to the marriage : but it was an interest which the mother was to have the power of modifying. Then [644] the second branch of the same clause provides that the mother should have liberty to settle the £2300 for the immediate benefit of her daughter and her child and children. Now those words have a distinct meaning ; for though Mrs. Thompson, under the trust previously declared for her separate use, had a power to dispose of her life interest by note or writing under her hand, yet these words enabled her to divest herself of her life interest in favour of her daughter by a mere verbal approbation of a settlement : and, moreover, this second branch of the clause enabled her so to modify the interest previously created, as to disappoint the husband of her daughter. As the right of the parties to take was made to depend upon the mother's previously consenting to the marriage, there is no inconsistency in saying that, though she consented, yet the trust should be liable to such modification as she might think fit to make.

The expression " as and whenever " was relied on by the counsel for the executors, but there is no magic in words ; they amount to nothing more than " as she shall think fit or be advised."

There being then, as I apprehend, a trust created in this case in favour of Miss Thompson, her husband and children, with a power vested in her mother to modify it, but which power was never exercised at all, the only remaining question is, who is entitled to take under that trust. Now, in *Harding v. Glyn* (1 Atk. 469), a testator

gave certain chattels to his wife, and desired her, at or before her death, to give them to such of his own relations as she should think most deserving and approve of. The [645] wife disposed of some of the chattels by her will, but made no disposition whatever of the rest of them; and the Master of the Rolls held that the chattels as to which the wife had not exercised her power of disposition ought to go to the next of kin of the testator at her death. Therefore, in the present case, as Lady Home did not exercise any authority whatever with respect to the trusts declared of the £2300 by the settlement of 1792, my opinion is that Sir Frederick Adam is entitled to that sum for his life, with remainder to Major Boileau absolutely as the husband and personal representative of his late wife.

[645] BRIDGE v. YATES.(1) Feb. 14, 18, 1842.

[See *Heasman v. Pearse*, 1871, L. R. 11 Eq. 535; L. R. 7 Ch. 275; *Attorney-General v. Fletcher*, 1871, L. R. 13 Eq. 128; *In re Hudson*, 1882, 20 Ch. D. 411; *In re Quirk*, 1889, 37 W. R. 796.]

Joint-Tenancy. Tenancy in Common. Will. Construction.

Testator gave one-fourth of his residuary estate to trustees, in trust for his wife for life, and, after her decease, in trust for and to be equally divided amongst all his children who should be then living, and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living. Two children, and two grandchildren the issue of a deceased child of the testator, were living at the death of the widow. Held, that the two grandchildren took, *as between themselves*, as joint-tenants, and not as tenants in common.

Samuel Bridge, by his will dated the 3d of February 1818, gave his real and personal estates to trustees in trust to sell and to stand possessed of the proceeds in trust for and to be equally divided between his wife, Alice Bridge, and all and every his children who should be living at his decease, share and share alike, and for the issue of such of his said children as should be then dead, *equally amongst them, if more than one, share* [646] *and share alike*, such last-mentioned issue taking, amongst them, the part or share only which his, her or their deceased parent or parents would have been entitled unto if living: and, as to the share of his wife, he directed his trustees to pay the dividends and interest thereof to her during her life for her separate use; and, after her decease, to stand possessed of her share in trust for and to be equally divided amongst all and every his children who should be then living, *and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living*; and, as to the share or shares of such of his said children being a son or sons, that his trustees should transfer the same to him or them when he or they should respectively attain the age of 21 years; and, as to the share or shares of such of his said children as should be a daughter or daughters, that his trustees should, upon her or their attaining the age of 21 years or being married, which should first happen, pay the dividends and interest thereof unto such daughter or daughters respectively for her or their respective life or lives for her or their separate use; and, after the several and respective deceases of his said daughters, then as to such her or their several and respective share or shares, in trust for such person or persons, &c., as she or they should, by her or their respective last will or testament in writing, appoint; and, in default thereof, then in trust as to the several and respective shares of his said daughters for her or their respective issue or issues, child or children, share and share alike, at their several attainments to the age of 21 years; and if any of his said children, being a son or sons, should die under the age of 21 years, or, being a

(1) The reporter was not able to procure the brief in this case in sufficient time to enable him to report it according to its date.

daughter or daughters, under that age and unmarried, then the share of him, her or them so dying, [647] should be paid to the survivor or survivors of them, his said children, equally, share and share alike, and to the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have taken if living at such time as his, her or their original share or shares would become payable under the trusts aforesaid.

The testator left his wife and three children living at his death. One of those children, a daughter, died in 1823. She had two children, one of whom died in the lifetime of the testator's widow. The widow died in 1838.

One of the questions in the cause was whether, on the widow's death, the daughter's surviving child took a third or only a moiety of a third of the share of the testator's estate, which was bequeathed in trust for the widow for her life; or, in other words, whether the daughter's two children were joint-tenants or tenants in common of that third.

Mr. Lewin, for the personal representative of the daughter's deceased child, said that, in construing a will, the rule was to favour a tenancy in common rather than a joint-tenancy: that the testator, in other parts of his will, had created tenancies in common, not only as amongst his children, but also as amongst their issue; and, therefore, it was reasonable to infer that the testator intended to create a tenancy in common by the clause in question; *Woodgate v. Unwin* (ante, vol. iv. p. 129).

Mr. Rasch, for the daughter's surviving child, cited *Stratton v. Best* (2 Bro. C. C. 233).

[648] Mr. Spence and Mr. Geldart appeared for the other parties.

THE VICE-CHANCELLOR [Sir L. Shadwell]. It seems to me that, under the trust first declared in favour of the testator's children living at his death and the issue of such of them as should be then dead, both the children and the issue of a deceased child would take, as between themselves respectively, as tenants in common: for the words, "equally amongst them, if more than one, share and share alike," apply both to the children and to issue of a deceased child. Then the testator directs the trustees, after his wife's death, to stand possessed of her share of his estate, in trust for *and to be equally divided* amongst all and every his children who should be then living and the issue of such of them as should be then dead, such issue taking only the part or share which his, her or their deceased parent or parents would have been entitled to if living; the issue, therefore, would have taken their deceased parent's share, as tenants in common with the surviving children. But the testator speaks of no division amongst the issue themselves; and, therefore, my opinion is that they take their parent's share as joint-tenants with each other.

Lord Coke, in his Commentary on Littleton (188 a.), says: "If lands be demised for life, the remainder to the right heirs of J. S. and of J. N.; J. S. hath issue and dieth, and, after J. N. hath issue and dieth, the issues are not joint-tenants; because the one moiety vested at one time, and the other moiety vested at another time," &c. But I apprehend that the learned author means that the issue of J. S. do not take as joint-tenants with the issue of J. N.; and not that the issue of either [649] J. S. or J. N. do not take as joint-tenants as between themselves.

Besides, it seems to me that the point now under consideration has been decided by the case of *Oates v. Jackson* (2 Strange, 1172); and, therefore, I shall declare that the surviving child of the testator's deceased daughter is entitled to a third part of that share of the testator's estate which his widow was entitled to for her life.

[649] COOKE v. TURNER. May 23, 1844.

Costs. Fees to Counsel.

The Plaintiff's solicitor employed a Queen's Counsel and a junior to oppose a motion for further time to answer. The Court held that he was justified in so doing; and ordered the Taxing Master, who had disallowed the fees of the junior counsel, to review his taxation.

Two of the Defendants, after they had made an application to the Master which

was unsuccessful, moved the Court for further time to answer the bill. Affidavits were made both in support of and in opposition to the motion ; and it was supported by Mr. Bethell and Mr. Willcock, and opposed by Mr. Stuart and Mr. Freeling.

The Vice-Chancellor allowed the Defendants six weeks' further time to answer, and ordered them to pay the costs of the motion. The Taxing Master, when the Plaintiffs' costs of the motion were taken before him, considered that the application was not of sufficient importance to justify the employing of two counsel to oppose it ; and, therefore, disallowed the fees paid to Mr. Freeling and his clerk with the brief and for settling an affidavit, and also the solicitor's charges for attendances on Mr. Freeling. The sums disallowed amounted to £5, 8s. The Plaintiffs thereupon presented a petition, praying that the Petitioners might be allowed the several sums before mentioned, and that it might be referred back to the Taxing Master to review his taxation.

[650] Mr. Stuart appeared in support of the petition.

Mr. Bethell opposed it.

THE VICE-CHANCELLOR [Sir L. Shadwell]. With respect to the fees paid to the junior counsel, my opinion is that there has been a miscarriage : and, though the sums are small, yet the principle is very important.

I remember perfectly well, many years ago, observing Sir Anthony Hart refuse to take a brief merely because there was no junior counsel with him.

[Mr. Bethell. That is the rule in causes now : no one of us takes a brief in any cause without a junior.]

And I remember that Lord Eldon said in the House of Lords (when there was some objection made to the fact of two counsel appearing) that it was of extreme importance to the public at large that there should be a successive body of gentlemen brought up, who should understand their profession by knowing it from the beginning : and, in my opinion, it would be most injurious, not merely to the gentlemen who compose the Bar at the particular time, but to the public at large, if the supply of able men were to be cut off by preventing the younger branches from learning their profession. The consequence of which would be that it would be a matter of chance whether, when the gentlemen who are within the Bar drop off, their places would be supplied by persons of sufficient learning and ability. I shall, therefore, refer it back to the Master to review his taxation ; and the costs of the petition must be costs in the cause.

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